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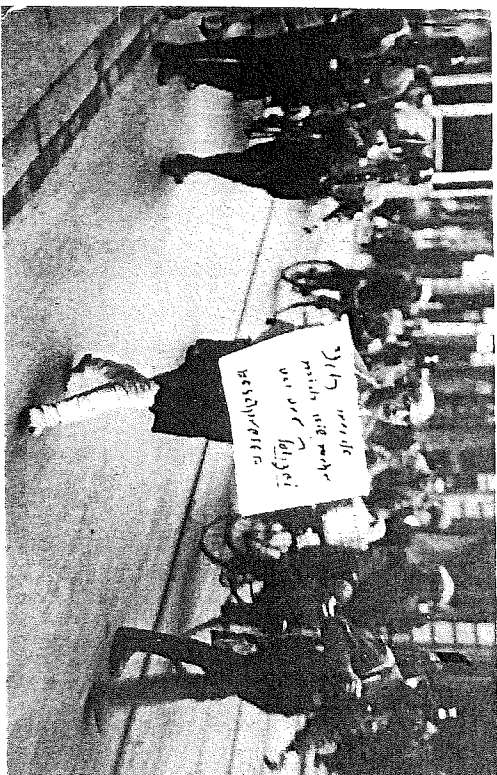
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Michael Siegel, a Jewish lawyer, is paraded through Munich by SA-men on 10 March 1933. Siegel had lodged a protest over the treatment of one of his clients who had been taken into custody. The sign reads, "I will never again complain to the police."

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.<sup>1</sup> 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.<sup>2</sup>

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 Alsberg—the most celebrated criminal defense lawyer of the time. Berliners knew of Max Alsberg. 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."<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup>

### **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 many against communist violence, the decree indefinitely suspended the 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.<sup>8</sup>

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."<sup>9</sup>

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."<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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."<sup>13</sup>

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.<sup>14</sup>

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

a metal sheath, which he pressed, releasing a spiral with a lead bullet fastened to its end. With this instrument, he struck me twice on the head, which poured forth blood and began to swell. ... There were judges, prosecutors and lawyers, many in their official robes, who were driven onto the street by small hordes of SA men. Everywhere the intruders flung open courtroom doors and bellowed, "[J]ews out!"<sup>15</sup>

Was the attack on Breslau's courthouses an isolated event? The answer came in the following weeks, when SA men stormed other German courthouses. On 29 March, in Görlitz, SA men dragged two Jewish judges and two Jewish lawyers out of the courthouse and displayed them before a jeering crowd. On 31 March, in Cologne, SA men forced Jewish judges and lawyers out of the appeals court and onto a refuse cart, and hooted while driving them around the city. A Nazi lawyer later proudly reported: "No protection by officials; no intervention of colleagues for colleagues! That was the hour of separation!"<sup>16</sup>

If courthouse attacks were brush fires, Nazi officials fanned the flames to spread smoke across the legal landscape. They intended a clear message with their boycott of Jewish businesses, doctors and lawyers planned for April 1. On 31 March, in anticipation of the boycott, Hanns Kerrl—the Reich Commissioner for the Prussian Administration of Justice and soon-to-be Prussian Justice Minister—issued one of his first decrees. He warned that Jewish judges and lawyers were endangering the authority of the justice system because their presumptuous bearing had enraged the German people. If officials failed to remove the causes of the popular rage, the people were bound to take matters into their own hands. Accordingly, he demanded that Jewish judges immediately apply for, and be granted, leaves of absence. He also demanded that bar associations (*Anwaltskammern* or *örtliche Anwaltsvereine*) limit the number of Jewish lawyers permitted to appear in court to the proportion of Jews in the population as a whole. Otherwise, judges and prosecutors should bar them from entering courthouses.<sup>17</sup>

If arbitrary arrests of individuals and intimidating attacks on courthouses were lawless, what was the legal nature of the Kerrl Decree? Kerrl himself probably did not much care whether his decree constituted law or not, for he stood out as the first Prussian Justice Minister who lacked legal training. For him, the crux of the matter was wielding power—speaking with the authority of his office and inviting compliance through the threat of mob violence. The Appeals Court in Königsberg captured the point. The court wrote that the Kerrl Decree might "not follow the

constitutionally prescribed form for formulating law," but since it originated with the "actual holder of state power," and since the SAs' presence in the courts secured its enforcement, it was a "thoroughly binding law."<sup>18</sup> Like much Nazi law, the decree was intimidation through other means. And like much Nazi law, the decree diverted attention from the legitimacy of its origins—it had none!<sup>19</sup>—to the effectuation of its ends. The decree marked a mid-point between the prerogative state and the normative state.

The Nazi regime also relied on the normative state, the legal system. The prerogative state accomplished many of the regime's goals, but it had limitations. Its terror tactics helped dislodge the liberal order in the short-run, but they jeopardized the Nazi promise of social order in the long-run. Many Nazi power-brokers realized that using the legal system could secure the new government's legitimacy and advance its goals more systematically, consistently, and thoroughly. Of course, they needed to transform the legal system, replacing liberal law with Nazi law. In this process, the government took a major step with two laws of 7 April 1933, which attacked the two professions animating the liberal state, namely the judges and lawyers. The Law on the Restoration of the Professional Civil Service applied to judges, and the Law on the Admission to the Bar applied to lawyers.

With these two laws, the Nazis aimed to stamp the judicial system with the twin principles of racial superiority and Nazi political control. The Nazis intended to be pragmatic about putting these principles into effect, taking measures that were radical but not absolute. Both laws for the first time distinguished Jews from so-called Aryans and discriminated against Jews as a matter of law (anticipating the Nuremberg Laws of 1935). Under these two 1933 laws, Jewish judges had to retire and Jewish lawyers could be disbarred. But even in regard to race, both laws set limits. The disbarments of lawyers had to take place before the deadline of 30 September 1933. However, Jews could continue as judges and lawyers if they fell under one of three exceptions: (1) Jewish judges who had entered the civil service or Jewish lawyers who had been admitted to the bar before 1 August 1914; (2) Jewish judges or lawyers who had fought on the front in World War I; or (3) Jewish judges or lawyers who had a father or son who had fallen in the war.<sup>20</sup>

The two laws—on the Restoration of the Professional Civil Service and on the Admission to the Bar—nailed down not just racial principles, but also political principles. One political dimension was that the laws showed more concern about the authority exerted by judges than

about the legal work performed by lawyers; Jewish judges were regarded as more dangerous than Jewish lawyers. Aside from the three exceptions, the law against Jewish judges was mandatory, while the one against Jewish lawyers permissive, i.e., judges had to retire while lawyers could be, but did not have to be, disbarred. While this legal distinction made no difference in practice, the message was clear that the Nazis gave priority to removing Jews from positions of political authority. The two laws also included standards for eliminating judges and lawyers that were political rather than racial. While harsher for judges than lawyers, both standards moved in the same direction. In the broader law, judges could lose their positions if their prior political activity failed to ensure that they would unreservedly and always support the national state. In the narrower law, lawyers could be disbarred who had been active "in a communist way." The political messages were complementary: lawyers may not be subversive and judges must be loyal.<sup>21</sup>

The Law on the Admission to the Bar tackled a problem that had plagued German lawyers for years and solved it with Nazi perversion. The problem was the overcrowding of the legal profession. The fear of overcrowding—of damage to the profession's elitism, standards and prestige—dated back to the 1870s, but became acute during the Weimar Republic. By then many lawyers were economically strapped—first, from clawing their way out of postwar chaos, then reeling from run-away inflation, and finally being beaten down by the Depression. By 1933, three quarters of lawyers earned approximately the same (or less) as the average blue-collar worker. Yet the numbers of lawyers kept increasing, with the largest expansion ever taking place in the last two years of the Weimar Republic.<sup>22</sup> Some reasoned that the more lawyers there were overall, the less business for any one lawyer in particular. The conclusion seemed inevitable: limit the number of lawyers through a *numerus clausus*. Others, such as Max Friedlaender, a Jewish lawyer and nationally respected expert on legal ethics, warned that the proposal threatened to corrode the foundations of the free legal profession. The profession was free because lawyers were free of state control, but a *numerus clausus* would enable the state to control admission to the bar, restoring power to the state that lawyers had earlier wrested away for themselves. In December 1932, with the Weimar Republic in its death throes, the German Bar Association finally voted to recommend a *numerus clausus*. Ironically, the Nazi regime refused to implement the recommendation. Instead, it shrank the legal profession by cutting back the number of Jewish lawyers with the Law on the Admission to the Bar, i.e., not with a

merit-based limitation on law applicants but with racial anti-Semitism. In so doing, the regime struck both Jews and the freedom of the legal profession, which it now placed into the noose of the Nazi state.<sup>23</sup>

The Law on the Admission to the Bar jolted the legal profession. Within months, the number of Jewish lawyers in Germany dropped by just over 30 percent, from 4,585 to 3,167; in Prussia by almost 40 percent, from 3,370 to 2,066; and in Berlin, by just over 36 percent, from 1,835 to 1,168, reducing the percentage of Jewish lawyers there, by one count, from 54 percent to 40 percent.<sup>24</sup> From one vantage point, most Jewish lawyers evaded disbarment, either as senior attorneys admitted before World War I or as veterans who had fought on the front. The Nazis were astounded—they never imagined so many "cowardly" Jews had been on the battlefield.<sup>25</sup> Still, many Jewish lawyers abruptly lost their livelihoods. And since Jews could no longer enter the profession, the number of Jewish lawyers remaining represented a ceiling, a number that would decrease, even by attrition alone.

The plunge in the number of Jewish lawyers also had implications for the legal profession overall. The total number of lawyers, i.e., of both Jewish and non-Jewish ones, also fell. For example, in Berlin, the elimination of hundreds of Jewish lawyers reduced the overall number of lawyers from 3,433 to 2,880.<sup>26</sup> For the remaining lawyers, less competition was doubtless good for business, at least for the moment,<sup>27</sup> but it was an ominous sign, and a step toward cheapening the status of the legal profession.

### Discrimination and Degradation: Jewish Lawyers Coping with Nazism

Although Hitler became Germany's chancellor on 30 January 1933, the Nazis did not take control of Bavaria, Germany's most independent province, until 9 March. Early the next morning police arrested the Jewish lawyer Max Hirschberg. Throughout the Weimar Republic, he had been Munich's leading Social Democratic, anti-Nazi lawyer. Before being led away, he sneaked a call to Philipp Loewenfeld, his partner of fourteen years, and a politically active labor lawyer. Later that day, Loewenfeld slipped out of Germany into Switzerland. Hirschberg remained in prison for almost half a year, then picked up a moribund legal practice for eight months, and finally quit the country in April 1934. Five years later, in May 1939, Loewenfeld wrote a letter to a former



colleague that included a striking remark: his friendship with Hirschberg had "suffered a rupture when, after his release from custody, he felt bound to make himself an organ of Nazi justice."<sup>28</sup>

The thought of the rupture between these two men—who for years had practiced law together, engaged in political struggles together, and defied dangers together—is painful. But Loewenfeld's accusation against Hirschberg was ill-founded. In 1933, Jewish lawyers in Nazi Germany, including leftists like Hirschberg, tried to maintain their legal credentials, not relinquish them as a matter of principle. To implement the Law on the Admission to the Bar, provincial governments, as in Prussia and Bavaria, suspended all Jewish lawyers and conditioned readmission on a new application in person. Jewish lawyers lined up. Bruno Blau described the scene in Berlin: "We had to wait for hours in front of the [bar association] building in the rain and under the watch of SA rogues, until we were let in one by one." Of 1,835 Jewish lawyers in Berlin, 1,761—all but 74—reapplied.<sup>29</sup>

By April 1933, the first exodus of Jewish lawyers from Nazi Germany had already occurred. In the wake of the Reichstag fire, Fritz Ball wrote: "Whoever was politically active against the Nazis and is still able, flees." Leftists, such as Hans Litten and Max Hirschberg, were arrested; others, such as Philip Loewenfeld, fled. The elegant Rudolf Olden, who had represented the journalist Carl von Ossietzky, made a court appearance, headed south, and skied over the border into Czechoslovakia.<sup>30</sup> Some prominent, but less political lawyers, such as Max Alsberg, realized that the risk of arrest grew by the day and they made for the exit. But most lawyers stayed in the hope of preserving their livelihoods and weathering the storm.

How did the vast majority of Jewish lawyers, those who remained, respond? There were at least three types of responses, representing varying strategies, whether as a matter of principle or exigency. Each one ultimately proved futile.

How did Jewish lawyers respond to discrimination?

When Max Alsberg shot himself to death, he did not rely on skill in packing a pistol acquired as a front-line soldier. Alsberg had not fought in the war. As a criminal defense lawyer, scholar, and methodical German, he studied how to shoot himself from a text on guns.<sup>31</sup> Unlike Alsberg, however, in 1933 most Jewish lawyers at the height of their careers were veterans. They had the best argument against disarmament: their sacrifice in serving their country in war-time. The argument appealed to German patriotism and honor.

The argument for Jewish war veterans came from the gut. Max Hirschberg was arrested by police in Munich in early March, and while, after waiting, he finally answered routine questions, he mentioned that he had served on the front and earned the Iron Cross, First Class. Tired, frustrated and indignant, he then leaned forward and asked the policeman to add the sentence that adorned the standard military notices to next-of-kin that their loved one had died in the war: "Rest assured that the fatherland is grateful."<sup>32</sup>

The argument for Jewish war veterans made strategic sense. It resonated with Germans, even anti-Semites. One veteran who had fought under Hirschberg's command opposed his disarmament and imprisonment, writing: "Am personally a big follower of the national movement, but we have enough 'Christian Jews' who may be imprisoned; a good soldier who did more than his duty should be free, even if he's a Jew."<sup>33</sup> The comment was no exception. The files of Jewish German lawyers in Berlin are replete with letters from former comrades who praised their patriotism and courage, and from former clients who could not fathom why Jews who had risked their lives for Germany should lose their jobs.<sup>34</sup>

The argument for Jewish war veterans made political sense. The obvious audience was Paul von Hindenburg, the eighty-five year-old president who had appointed Hitler chancellor and was one non-Nazi who still wielded some real power. Jewish veterans wrote him. Hindenburg did not disappoint. On 4 April, he wrote Hitler about the plight of disabled veterans, front-line fighters, and families of the fallen: "If they were good enough to fight and shed their blood for Germany, they should be good enough to continue serving the Fatherland in their profession." Hitler assured Hindenburg that the upcoming law would include the appropriate exceptions. Hitler added, of course, that the German people needed to defend themselves against Jewish domination of intellectual professions, such as law, where in Berlin and other cities Jews occupied up to 80 percent of all positions—an obvious exaggeration.<sup>35</sup>

Coming from the gut, resonating with the populace, and appealing to a national leader, the argument for Jewish war veterans had much in its favor. It met with success. The most important exception to the exclusion of Jews from the judiciary and the bar was the one for front-line veterans. The success of the argument made a difference, sparing most Jewish judges from forced retirement, at least in 1933, and most Jewish lawyers from disarmament.

Still, the argument for Jewish war veterans suffered inherent flaws. One flaw is apparent from a liberal perspective. In relying on honor, the



argument abandoned notions of both Jewish emancipation and legal equality. This illiberal tack had consequences; it separated Jewish lawyers from each other. By privileging front-line veterans, it discriminated against the rest. Was a tactical victory worth the sacrifice of principle? One Jewish lawyer, Kurt Jacob Ball-Kaduri, later reported that the exception for Jewish war veterans aroused "mixed feelings" within Jewish circles. Some thought that pushing through this exception represented a great success. Others disagreed. "While not begrudging an individual the maintenance of his existence, splitting Jews into groups of losers and winners seemed inappropriate." The exception created a generational divide, wiping out young Jewish lawyers. Some of them wrote the Prussian Ministry of State in mid-June 1933, complaining that the Law on the Admission to the Bar, which authorized but did not require the exclusion of Jewish lawyers, had become "a general and undifferentiated threat to many upright citizens." The complaint hardly seems to have resonated, either with Nazis or other Jewish lawyers. The exception for Jewish war veterans also created a gender divide, eliminating women Jewish lawyers. The first German women were admitted to the bar only in 1922. Just over a decade later, in 1933, Berlin counted twenty Jewish women lawyers. Soon the number dwindled to one.<sup>36</sup>

Another flaw in the argument for Jewish war veterans is apparent from a conservative perspective. Based on nationalism, the argument easily degenerated. At its most unexceptional, the point was simply that Jewish Germans were as German as anyone else, immersed in their country's culture and committed to fighting in its defense. At its worst, the point was that Jewish Germans could be loyal to the state. That was the view of the right-wing lawyer, Max Naumann, who in 1921 had founded the League of National-German Jews (*Verband national-deutscher Juden*). In 1933, he wanted to convince the Nazis that some Jews could assimilate into the German national community and serve the Nazi state.<sup>37</sup> While representing a tiny minority of Jews, his views pressed the limits of devotion to the state; they exposed the flaw in the impulse toward loyalty. Reconciliation between being Jewish and supporting Nazism was impossible. Jewish lawyers, even the veterans, could never be loyal to the Nazi state, to its leadership principle, and to Adolf Hitler—they could only be dependent. In early April 1933, Berlin's chief appellate court judge and his colleagues on the provincial courts decreed that all Jewish lawyers had to reapply for admission to the bar and at the same time acknowledge the government and its regulations; Jewish lawyers complied.<sup>38</sup> Jewish war veteran lawyers

clung to their sense of honor until bowing to the humiliation of Nazi subjugation.

The exception allowing Jewish war veterans to continue as lawyers garnered support from Jews and Nazis. Both groups accommodated to the exigencies of the moment, but they took positions that united in anticipation of goals that diverged. From the Jewish lawyers' perspective, the immediate strategy served to blunt Nazi blows, but the accommodation sacrificed liberal equality in favor of questionable loyalty. From the perspective of governing Nazis, their concession was a matter of political expediency, appeasing Hindenburg. It was also a matter of economic necessity. The regime could not uproot Jewish lawyers in one fell swoop without troublesome economic disruption.

Although it was an accommodation for both sides, the exception allowing Jewish war veterans as lawyers was bound to be temporary because it was inherently unstable. The Nazis had the upper hand, not only because of their consolidation of power, but also because of the underlying logic in both the Law on the Admission to the Bar and this exception. That logic was to break liberal principles and replace them with hierarchical ones. Thus, the law presented the Nazis with no dilemma in principle. The very characteristics that should have disturbed Jews heartened Nazis: the law replaced liberal equality with Nazi hierarchy—Aryans before Jews, Jewish war veterans before other Jews. If society was hierarchical, if Aryans were superior to Jews, then the Nazi government could discriminate against Jewish lawyers and also among them. Furthermore, the logic of the law put a premium on loyalty. While giving a nod to a soldier's sacrifice, the Nazis were shifting the notion of loyalty from any person's devotion to Germany to a so-called Aryan's devotion to the Nazi state. Max Naumann aside, both Nazis and Jews knew that the Nazi state could not be the object of Jewish fervor.

The underlying logic of the exception for Jewish war veterans turned on loyalty, which ultimately hurt not just Jewish lawyers but German lawyers in general. What Jews could not achieve from the outside, German jurists had to display from the inside: loyalty to the Aryan community, the Nazi state, and its leader Adolf Hitler. Compared with judges, the nature of a lawyer's role struck closer to the heart of liberalism, because lawyers represent individuals or entities and advance their separate interests, whether against each other or against the state. How could lawyers reconcile their loyalty to the Aryan community with their obligation to individual clients? What was the role of the lawyer, caught between loyalty to the Nazi state and client representation? The original

dilemma of the loyalty of Jewish jurists previewed the dilemma of loyalty of all German jurists.

How did Jewish lawyers respond to degradation?

Max Hachenburg was a doyen of the legal profession. An expert in commercial and corporate law, a legal commentator admired by lawyers, and an active member of bar associations, he wrote his autobiography in 1927 when he was sixty-seven years old. There he cautioned fellow Jewish lawyers to avoid anti-Semitism by conducting themselves with professional restraint. In May 1933, as a long-time columnist for the leading publication for German lawyers, *Deutsche Juristen-Zeitung*, he felt that the Law on the Admission to the Bar presented him with a dilemma. Some might construe his silence on the law as cowardice, while others might reject his views as self-interested. But comment he did. On the one hand, he was not surprised at the reaction against the heavy reliance on Jews in public positions that had appeared since 1919. On the other hand, he could not say that Jewish jurists influenced the German legal system "only in an unfavorable or un-German way." In the end, he cautioned that measures "should not go overboard" in "restraining the excessive influence of Jewish jurists." He hoped that authorities would exercise their discretion under the law "to spare men who conducted themselves with utmost honor, rooted only in Germanness, from being driven to despair." He commented that the recent suicide of a young aspiring law student "should give pause." He also noted that the possibility of denying non-Aryans admission to the bar "ripped the first hole in the freedom of the legal profession."<sup>39</sup>

In his article, Hachenburg struck the restrained tone that he had counseled. He spoke with a patriarchal voice, like a contemplative grandfather who listened to both sides of the story and only hesitantly, only reluctantly, and ever so gently tapped his finger on one side of the scale. But his apparent attempt at moderation was less a liberal call for tempered debate than an illiberal suggestion for milder forms of discrimination. His liberal concern for the freedom of the legal profession paled before his illiberal uneasiness with Jewish emancipation. He retreated to defending the Jewish lawyers who were at least honorable. And beyond giving his rendition of the debate about discrimination against Jewish lawyers, he mentioned violence against them only once: one Jew's self-inflicted suicide. Perhaps by 1933, Hachenburg was simply out of touch. If his thinking included an element of liberalism, it was a liberalism that was exhausted, pathetic, and cut loose from a passion for equality.

Most Jewish lawyers did not assert any kind of liberalism, exhausted or otherwise. When a mugger springs out from the dark, victims confront the moment rather than first principles. In describing the Nazi seizure of court houses, one Jewish lawyer, Bruno Blau, later wrote: "In almost all cases, people yielded to the violence."<sup>40</sup> As violence in public waned, Jews and non-Jews alike still yielded, now to Nazi intimidation and economic manipulation. Jewish lawyers were preoccupied with lost clients and shrinking legal practices.

For most Jewish lawyers under the new Nazi rule, the meaning of liberalism shifted from its political possibilities to its sociological circumstances, from individual freedom to social isolation. With little room for public debate, most Jewish lawyers struggled as solitary individuals trying to protect their own economic self-interest. Jewish lawyers were atomized, separated from other German lawyers, and from each other. This atomization resulted, at least in part, because Jewish lawyers had little organized response to the Nazis' accumulation of governmental power. During the Weimar Republic, Jewish lawyers had gained influence in German bar associations. Nazis in power put an end to that. Through intimidation and fiat, they expelled the Jews, took over the associations, and thwarted possible alternatives—all accomplished between March and May 1933, with the finishing touches in place by year's end. Once they were expelled, Jewish lawyers had nowhere to go. They lacked an independent bar association of their own, and attempts to fill the organizational void were at best sputtering.<sup>41</sup>

The struggle of Jewish lawyers to protect their individual economic self-interest proved a losing battle due to Nazi law and lawlessness. The Law on the Admission to the Bar and follow-up ordinances dried up business. Jewish lawyers lost income because the Nazis barred most from entering courthouses, pressured courts to stop assigning them to represent the poor, and leaned on companies to stop retaining them as outside counsel.<sup>42</sup> Christian lawyers abandoned their Jewish partners, whether eagerly, like Alsberg's partner, or reluctantly. In regard to their lawlessness, the Nazis leveraged their early acts of violence into persistent intimidation. They warned that good Germans would never seek a Jew's legal advice. Thus, as a result of Nazi law and lawlessness, clients deserted their Jewish lawyers.

Choked economically and isolated socially, Jewish lawyers felt humiliated. In describing Jewish lawyers waiting for hours in the rain to re-apply for admission to the bar, Bruno Blau wrote: "This process was the height of degradation, as it was intended to be."<sup>43</sup> Upon learning that

his non-Jewish partner insisted on dissolving their partnership, Max Alsbberg fell into despair.<sup>44</sup> How could Philipp Loewenfeld have written about Max Hirschberg, his compatriot and friend, with such contempt? Throughout the Weimar Republic, they had struggled together, but in 1933 they were separated, suffered the deprivation of their professional lives in isolation, and lost their meeting of the minds. Perhaps in losing some self-respect, the two men lost some mutual respect.

The one countervailing tendency, a source of economic, as well as emotional, support, was other Jews. In separating Jews from other Germans, the Nazis aimed to discourage not only Jewish lawyers from representing Germans, but also German lawyers from representing Jews. Jews needed to turn to Jewish lawyers. In light of anti-Semitic discrimination, such as the Nuremberg Laws of 15 September 1935, Jews needed legal help more than ever—in defending themselves in disputes involving property, housing and employment, and in resolving their affairs before emigrating.<sup>45</sup>

The Nazis discriminated against and degraded Jewish lawyers first with a sudden ferocity and then with unrelenting pressure. As the discrimination and degradation dug deeper roots and took firmer hold, sporadic examples of defiance appeared among Jewish lawyers. To understand that defiance, we must first look at Nazi policy against Jewish lawyers in the mid-1930s.

### Defiance: Nazi Lawyers against Jewish Lawyers, and Two Jewish Lawyers against Nazism

The logic already inherent in the two laws on Jewish judges and lawyers in April 1933 advanced on a schedule that accommodated politics and economics, first striking Jewish judges and later Jewish lawyers. When the Nuremberg Laws of 15 September 1935, in the words of the historian Henry Friedlander “stigmatized Jews as citizens of lesser worth,”<sup>46</sup> the notion of a Jewish judge became impossible. The Ministries of Justice and the Interior acted immediately to retire all Jewish judges by year’s end. But conditions were not yet ripe for disbarring the remaining Jewish lawyers; their disbarment would have risked triggering economic disruption and foreign policy troubles in light of the upcoming 1936 Olympics planned for Berlin.<sup>47</sup> In 1936, there were still 2,552 Jewish lawyers out of 18,854 lawyers in Germany, just over 13 percent of the total. In Berlin, more than one thousand lawyers were Jewish, just over one third.<sup>48</sup>

With new forms of legal discrimination against Jewish lawyers lagging behind economic discrimination and anti-Semitic rhetoric, Nazi academics inflamed the matter with a new forum for propaganda. In May 1936 Carl Schmitt, the influential reactionary political theorist and passionate convert to the Nazi cause, announced a conference for early October in Berlin entitled “Jewry in Jurisprudence.” The conference drew over one hundred jurists, teachers and guests, and generated eight pamphlets of the conference’s papers, published between November 1936 and late 1937.<sup>49</sup>

While not there in person, Nazi Germany’s leading jurist, Hans Frank—head of the National Socialist Lawyers’ Association, president of the Academy for German Law, and cabinet minister without portfolio—sent an opening statement for public reading. He denounced Jewish emancipation because it subverted German legal scholarship with the peculiarly Jewish tendency to disintegrate and uproot the legal order with liberal individualism. He called for an end to German-Jewish jurisprudence since “creative, interpretive, or instructive work or commentary by Jews on German law ... is impossible.” He announced four goals: (1) Jews may not appear in the name of German law; (2) German scholarship must be the reserve of German men; (3) new editions of German legal works by Jewish authors must cease; and (4) libraries must segregate the works of Jewish authors since they “do not have the slightest thing to do with” German jurisprudence.<sup>50</sup>

After Frank’s opening, Carl Schmitt tried to rouse the crowd for the victory that National Socialism had made possible: the liberation of the German spirit from Jewish lies. “Do not forget,” Schmitt declared, “what it means that year after year, semester after semester, for almost one hundred years thousands of young Germans, future judges and lawyers, have been schooled by Jewish legal teachers, that standard texts and commentaries in the most important legal disciplines are by Jews, that influential legal journals were dominated by them.”<sup>51</sup>

In one talk, Karl Siegart, a Nazi law professor in Göttingen, explained that he was about to provide the first overview ever of the Jewish impact on the criminal procedure. He mentioned Max Hachenburg and belittled Hans Litten, but the lawyer that he targeted as the epitome of what was wrong with criminal procedure was Max Alsbberg. In the last years before 1933, this “Jewish being” was the “mightiest and most fateful.”<sup>52</sup>

Siegart handled Alsbberg with the morbid curiosity of an anatomy professor displaying an archetypal skull. The evil of Alsbberg’s efforts lay in his promoting abstract individual rights, which lawyers advanced at

the expense of the Aryan community and Nazi judges. Siegart turned his attention to Alsborg's writings. In his essay on offering evidence during proceedings, Alsborg had been concerned only with the rights of the parties rather than "[t]he idea of justice, the protection of the general good." In his lecture on the philosophy of criminal defense, Alsborg had worshiped disembodied law rather than striving for justice, he had promoted individualism rather than comprehending the needs of the community, and he had subverted "the figure of the eternally truth-seeking German judge." In his recommendations for the reform of criminal procedure, Alsborg had written that the parties in the proceedings were supposed to "be able to exercise a continuous control over the measures taken by the presiding judge—the opposite of our leadership principle." For Siegart, Alsborg the lawyer was the foil for "judicial sovereignty" and "judicial power," i.e., for Nazi sovereignty and power.<sup>53</sup>

The focus on Alsborg marked a subtle but important shift. Alsborg may have been the most prominent lawyer in the Weimar Republic, but he had never triggered the Nazis' worst rage. The Nazis had reserved that for leftist political lawyers, the ones hunted down immediately after the Reichstag fire on 27 February 1933. But at the conference in October 1936, Siegart turned his attention from lawyers who had engaged in leftist politics to one who represented liberal lawyering. While Siegart's anti-Semitism was bad for Jewish lawyers, his anti-liberalism was bad for all lawyers.

One lawyer who did not make it to Berlin in October 1936 for the conference "Jewry in Jurisprudence" was Hugo Sinzheimer. A Jew hailing from Frankfurt, Sinzheimer was as important in German labor law as Max Alsborg in criminal law and Max Hachenburg in commercial law. He devoted his career to the peaceful advance of the collective bargaining rights of workers within a capitalist society. After the Reichstag fire in late February 1933, the Nazis arrested him. Once he was released, he fled Germany, and soon accepted an offer to teach at the Universities of Amsterdam and Leyden.<sup>54</sup> Learning of the 1936 Nazi conference, he did not like what he read. Unlike Jewish lawyers still in Germany, he was not intimidated by the threat of violence; unlike exiles like Max Alsborg, he was not suffocated by foreign surroundings. Instead, he put pen to paper and by August 1937 had finished his response: *Jüdische Klassiker der deutschen Rechtswissenschaft (Jewish Classical Writers in German Jurisprudence)*. Sinzheimer had never before written about Jews. But now he challenged the Nazi jurists and defended Jewish equality with a German idea of liberalism.

Sinzheimer explored whether Hans Frank and Carl Schmitt had engaged in polemic or, as they claimed, scholarship. Sinzheimer had always assumed that scholarship turned on the content of ideas, not the ethnic origins of the thinker. In its search for truth, scholarship also turned on factual inquiry. The factual inquiry needed to test Frank's and Schmitt's theses was this: How did Jewish jurists influence German jurisprudence? Sinzheimer asked "whether one can speak of a characteristic intellectual structure of Jewish legal scholars and what its nature is," and "what the significance is of the Jewish dimension in the development of German jurisprudence, whether it was creative or not." To answer these questions, Sinzheimer devoted one chapter each to twelve Jewish jurists, most from the nineteenth century.<sup>55</sup>

Sinzheimer concluded that the historical facts disproved the assertion of a specifically Jewish mentality. He found that Jewish jurists were influential not in infusing Jewish ideas into German legal thinking, but in explicating German legal thinking itself. "It is German spirit that is the foundation of the Jewish influence," he wrote. With its creative contributions, "Jewish work is . . . an inextricable part of German scholarship." Nazi scholars may look the other way and stop citing Jewish German scholarship, but they cannot eliminate it.<sup>56</sup>

Furthermore, Jewish scholars included notions of both community and individual rights, each of which could not exist without the other:

There is no moral form of the community without recognition of the intrinsic value of each person. But there is also no moral form of the individual without recognition of the intrinsic value of the community.

At its foundation, the development of a true community requires human rights—one of the great spiritual creations, developed by thinkers of many nations, and an inextricable part of German intellectual history. But great German thinkers, Jewish and non-Jewish alike, never recognized an unlimited power of the community over the individual, and certainly not in the hands of an absolute individual.<sup>57</sup>

By the end, Sinzheimer had made three points. First, Frank and Schmitt were factually wrong in asserting that Jewish jurists had poisoned German law with some evil doctrine of their own. Second, Jews were equal to other Germans because they were like other Germans, influential not as Jews but as Germans. Third, unlike Nazism's perverse idea of a community that excluded Jews, the notion of community in German law included a commitment to individual rights.

*Jewish Classical Writers in German Jurisprudence* stands out because Sinzheimer attacked the Nazi arguments head-on. At home, no politician dared debate the Nazis in public, and few lawyers dared confront them in court. But from abroad, Sinzheimer struck back, and he struck back as a scholar. Unlike Max Hachenburg, Sinzheimer did not value commentary detached and above the fray. Rather, his scholarship was engaged. He attacked Nazi politics by using real scholarship to strip bare the Nazis' pseudo-scholarship. Sinzheimer struck back as a German. Unlike front-line fighters, he did not insist upon personal honor. Rather, Sinzheimer turned to Germany's cultural heritage, emphasizing not personal love for it, but the objective study of some of its leading jurists. And Sinzheimer struck back as a liberal, as a German liberal. He did not espouse a negative idea of freedom, of the isolated individual pitted against the state, as championed in the Anglo-American world by the post-World War II political philosopher and intellectual historian Isaiah Berlin. Rather, Sinzheimer's idea of freedom included not only the individual's rights, but also the individual's bond within a community—in Germany within a German community. Sinzheimer had devoted his pre-Nazi legal career to the peaceful reconciliation of employers and organized workers. He now argued for the peaceful integration of Jews into a liberal German community.

In the early 1920s, Sinzheimer was the dissertation advisor to Ernst Fraenkel. While Sinzheimer fled Nazi Germany in 1933, Fraenkel remained. He continued to practice law. He worked in what he later called "inner emigration."<sup>58</sup> By this he hardly meant compliance encasing hidden doubts. Rather, he took on political cases, one of the only Jewish lawyers to have done so.<sup>59</sup> He wrote anti-Nazi articles for underground distribution and ultimately his *pièce de résistance*, *The Dual State*. Smuggled out of Germany in 1938 and published in the United States in English translation in early 1941, the book, as the editor of his collected writings has noted, was the only contemporaneous, comprehensive, critical analysis of the Nazi regime written from within Nazi Germany.<sup>60</sup> While eluding arrest in part by random luck, Fraenkel tested the boundaries of anti-Nazi defiance.

In 1935, Fraenkel wrote an article, "The Point of Illegal Work," which countered the despair of Max Alsberg, the timid liberalism of Max Hachenburg, and the demoralized isolation of struggling Jewish lawyers. Smuggled from Berlin to Switzerland to Paris (there published under a pseudonym in the exile journal *Sozialistische Warte*) to Holland (there printed as a pamphlet) and back into Germany for distribution,<sup>61</sup>

the article set forth a theory of resistance to Nazi rule. It asked: in light of propaganda that the Nazis have converted most of the bourgeoisie and proletariat and cowed the rest, and in light of censorship, arrests and sacrifices, does illegal work by socialists serve any purpose? Fraenkel's answer was that illegal work was justifiable, indeed crucial.

Fraenkel believed that Nazism needed popular support to survive. The critical conflict was between the regime shoring up popular support and the resistance creating instability by unsettling such support. The propaganda machine of Joseph Goebbels endangered the resistance with its "whispering campaign," which was luring both the bourgeoisie and the proletariat into complacency by misleading them into believing that even workers were backing the regime. Socialists, Fraenkel argued, must counter-attack. They must show the lack of popular support that Goebbels claimed, and they must thwart the consolidation of such support in order to destabilize the regime.<sup>62</sup> Fraenkel made four points about the most effective form for illegal work.

Fraenkel first argued that illegal work only made sense if it was visible: "Invisible illegal work is ineffective illegal work." To have political significance, the work must be visible to both the Gestapo and the populace. Socialists must keep the petty bourgeoisie from feeling "comfortable [*gemüthlich*] in the German fatherland," and the worker from "finding a place where ... he can feel at home [*heimisch*]." Illegal work must stir anxiety in the ruling classes and a consciousness of being "spiritually homeless" among workers. Then popular unease would infect the Gestapo with "a feeling of insecurity." Knowing that the populace was seething, the Gestapo would fear conspiracies among a wider array of groups and repress them with a hardened state of siege. In short, visible illegal work would drive more groups, and people, into opposition.<sup>63</sup>

Second, Fraenkel argued that "illegal socialist work must also be visible to the individual socialists." After socialism's shameful collapse in Germany in 1933, visible illegal work could rebuild its moral authority and political power. Anyone knew that "who has pressed a flyer into the hand of a comrade, who saw the flash in his eyes as he, who until then had felt forsaken, said with hardly contained excitement, 'Yes, there is still such a thing!'" By renewing the psychological strength of individual Social Democrats, visible illegal work can restore the moral authority needed for "a rebirth, or better put, a new birth," of German socialism's political power.<sup>64</sup>

Third, illegal socialist work must strike at the opponent's vulnerabilities. "At the moment," Fraenkel wrote, "the power apparatus of the state

in Germany is unassailable." But the major weakness in Nazi rule was the leadership's self-deception about popular sentiments. Nazi leaders hindered their own grasp of those sentiments by suppressing free expression, and they could not fill in the blanks with Gestapo spying. Illegal work should target "the line of communication between populace and government." By doing so, illegal work would help destroy the last vestiges of free expression and also disorient the ruling powers and keep them from "feeling the pulse of the populace."<sup>65</sup> Thus, Fraenkel wanted to make a virtue out of necessity. He wanted to accomplish what was possible in the short run, namely, to increase rather than decrease repression; and watch increased repression deceive the Nazis into believing that the regime had popular support, on the one hand, and take them off guard when popular dissatisfaction shook the regime's foundations, on the other. Ultimately, "the proud edifice of the Third Reich is built on a volcano."<sup>66</sup>

Finally, while illegal work should be visible, resisters themselves would remain invisible. The point was neither action for action's sake nor unnecessary risk-taking. With that precaution, resisters needed to engage in their illegal work then, in late 1935. They had to put their freedom and their lives on the line, to be sure, and they had to be ready "to fall into the hands of the bloodhounds of the Third Reich." But the immediate need for visible illegal work was too great to allow a select few to save themselves for some future time when they might actually build a socialist society. He wrote: "Whoever is too good to endanger himself in the time of white terror is not good enough to join us in the moment of socialist rebuilding."<sup>67</sup> On this point, Fraenkel was emphatic. If imprisoned or murdered, the illegal worker inspires other resisters. Fraenkel concluded:

Yes, we have become "criminals." ... If we were not empowered by our illegal activity, I fear that we too would sink into the smog that oppresses Germany. Because we work illegally, we keep ourselves fresh. ...

That is the point of illegal socialist work in the Third Reich: to infuse the workers with strength, the waverers with trust, the sufferers with hope and the rulers with fear. Does illegal work have a point? What would Germany be without illegal work?<sup>68</sup>

In "The Point of Illegal Work," Fraenkel set forth a theory of political action. He argued how a socialist commitment to the rule of law could attack Nazi power. For one thing, socialist resisters should implement

liberal values as best they can. They should smuggle their socialist views into the open and flaunt them in public. For another thing, resisters should push the Nazi state to follow its own repression to its logical conclusion. They should force the Nazi state to reject liberal values in full, such as freedom of expression, and then watch it suffer the consequences of misreading popular opinion. In exposing the Nazi state's anxiety about popular opinion, socialist resisters could drive a wedge between Hitler and the populace, assailing the leadership principle at the heart of the Nazi theory of the state. Increased repression would trigger increased resistance. Finally, Fraenkel rejected a politics of martyrdom. Resisters should dodge exposure but, when exposed, turn any resulting arrests and executions to good use.<sup>69</sup>

In setting forth his socialist commitment to the rule of law, Fraenkel differed from many Jewish lawyers. He refused to cast away principle in the teeth of Nazi terror. Unlike Jewish front-line soldiers, he did not ask the Nazi state to spare some jobs because of prior military service. Unlike Max Hachenburg, he did not suggest cutting a slightly better deal. If struck on the behemoth—as his colleague Franz Neumann later called the Nazi state—Fraenkel still urged fighting for principle, even if furtively striking blows from somewhere behind the eyes.

Fraenkel set forth not just a theory but also a practical philosophy for opposing tyranny. Others recoiled before two barriers that Fraenkel defied, namely mortality and professionalism. First, Fraenkel insisted that resistance requires a willingness to die for the cause. Moral fear could not excuse biding one's time interminably. Socialists must act now, not wait. This insistence broke the paralysis that beleaguered so many Jewish lawyers. On the one hand, it implicitly rejected the stance of those who hoped to wait out the Nazi regime, to muddle through until the scourge passed. On the other hand, it offered solidarity, the affinity among the like-minded arising from political action that might ease the economic and social isolation afflicting so many Jewish lawyers. After World War II, Fraenkel rarely referred back to his life under Nazi rule. But on one occasion, when he did, he stressed the life-line that fellow resisters had provided in small gatherings, long walks and intense talks—contacts that "spared us suffocating spiritually and emotionally from the loneliness of the inner emigration."<sup>70</sup> For Fraenkel in the mid-1930s, death, if the result of resistance, would not be a lonely act of despair, as in Alsberg's suicide, but an unavoidable sacrifice, an inspiration to other resisters.

The second barrier that Fraenkel defied was professionalism. He could think more freely than his professional cohort because lawyering



was his craft, not his identity. Other Jewish lawyers clung to their profession desperately, as the embodiment of who they were. They were consumed by their pride in their learning, their need for their livelihood, and the injustice of their victimization. They let go only when they had to—when they lost their law licenses or finally saw no choice but to emigrate. But Fraenkel held his professional identity at a distance. He could do so because he maintained an identity as a socialist as well as a lawyer, because he was young enough that his identity as a lawyer had not yet consumed his being, and because he had no children to support. His professional identity did not curb his thinking. He was hardly unique in accusing Nazism of turning legal values upside down, but he stood out as a lawyer who argued that the forum for advancing justice had shifted from the courts to illegal work. A man clinging to his professional status as a lawyer would not have labeled himself, as he did, a criminal, and would not have advocated, as he did, the commission of crimes, even political crimes as defined by a tyranny.

In short, Hugo Sinzheimer and Ernst Fraenkel were two Jewish lawyers who stuck to their belief in the rule of law and defied Nazi discrimination, degradation, and oppression.

### Destruction: The Elimination of Jewish Lawyers in 1938

At approximately midnight of 4–5 February 1938, in a latrine in the Jewish barracks at the Dachau concentration camp, Hans Litten hanged himself. He had earlier decided that he could not endure more than five years in the camps. After the SS had murdered a fellow inmate and seemed poised once again to brutally interrogate Litten, he could not go on. His funeral at a crematorium in Munich was a small affair, attended only by his mother and one of her friends. His mother insisted that the organist play a passage from Bach's *St. Matthew's Passion* that she had recently discussed with her son, a passage that she doubtless thought resonated with his isolation and death, the passage after Jesus was taken prisoner before his crucifixion and the Evangelist declared, "Then all his disciples forsook him and fled."<sup>71</sup>

His mother had not forsaken Litten in the five years that she had fought to save his life. When he died, she cast his death in the mold of Christian martyrdom—not of Homeric heroism, not of the unfilled hopes of a promising bourgeois professional, and not of a Jewish scapegoat. By February 1938, Litten saw little future for himself anyway,

certainly not in law or politics. As early as 1934, he had told a fellow inmate, Kurt Hilfer, that he was politically spent and that "even if he should one day recover his liberty he would no longer be a very useful combatant." That same year Ernst Fraenkel had written his article, "The Point of Illegal Work," and declared that the underground must craft the fate of Nazi prisoners into myths and legends. As news of Litten's death leaked out, émigrés wrote obituaries recounting events, painting the character, and formulating the lessons. Litten's mother, after fleeing Nazi Germany, wrote a memoir telling the tale of trying to save her son. When published in 1940, it stirred the Allied war effort more than the anti-Nazi underground.<sup>72</sup>

Litten did not last five years in concentration camps, and Jewish lawyers could not last much longer in Nazi Germany. In 1938, the Nazi regime finally resolved its problem with Jewish lawyers. The number of Jewish lawyers had remained substantial, with only a modest drop in the two years between 1936 and 1938. In early 1936, Germany had 2,552 Jewish lawyers out of a total of 18,854, just over 13 percent. In early 1938, Germany had 1,753 Jewish lawyers out of 17,360, approximately 10 percent. In Berlin, the proportion of Jewish lawyers had declined from 34 percent in early 1936 to 28 percent in early 1938.<sup>73</sup>

The fragile solution from 1933, the Law on the Admission to the Bar, shattered on the Nazi annexation of Austria in March 1938. Vienna, the symbol of Jewish cosmopolitanism and racial mixing, had a higher proportion of Jewish lawyers than Berlin had ever had: almost 80 percent and, even after disbarring Jews pursuant to the Law on the Admission to the Bar, more than 65 percent still remained. With the rush of events, Jewish lawyers in Germany had a sense of foreboding. In a letter of 30 June 1938, to the Reich Ministry of Justice, Julius Fliess, an unofficial spokesman for Jewish lawyers, pressed his best argument. It was the same argument as five years earlier, on behalf of Jewish war veteran lawyers: the legal situation created by the 1933 Law on the Admission to the Bar should continue because most remaining Jewish lawyers were veterans who had served the fatherland. The argument had lost its punch. It made less strategic sense, with Hindenburg long since dead; it had less popular appeal, in light of Germany's remilitarization without Jewish participation; and it even stirred less Jewish indignation, after five years of economic burdens and demoralization.<sup>74</sup>

The process of eliminating Jewish lawyers combined Nazi law and lawlessness. On 27 September 1938, Hitler signed a decree that disbarred all Jewish lawyers as of 30 November 1938.<sup>75</sup> In between those



two dates, the Nazi regime staged its infamous pogrom of 9–10 November, the so-called *Kristallnacht* or “Night of Broken Glass,” when Nazis burned synagogues, ransacked Jewish businesses and homes, murdered one hundred or so Jews, and rounded up tens of thousands of Jewish men, including lawyers.

For dealing with the legal problems of Jews—emigration, property transfers, lawsuits, criminal prosecutions—the Nazis created a new position, that of Jewish *Konsulent*, or legal advisor. As of 1 December 1938, a tiny, restricted number of Jewish legal advisors—set at 172, or 10 per cent of the remaining Jewish lawyers—could represent the interests of Jews.<sup>76</sup> But Jewish lawyers did not rush to become legal advisors in the fall of 1938 the way they had lined up for readmission to the bar in the spring of 1933. Julius Meyer, a lawyer in Frankfurt, wrote: “Several colleagues have declined ... to apply [for permission to become a legal advisor]; they want to emigrate in any case, and they don’t want to roam the courts as inferior ‘protected Jews’ who are pitied and scorned.” The few who became legal advisors were scattered remnants: some older veterans, too tired to leave Germany; some breadwinners, still grasping for economic survival, even if they hoped to emigrate; some dyed-in-the-wool moralists, chronically afflicted with a Prussian sense of duty; some community-minded souls, committed to helping fellow Jews. Probably indulging a desperate if foolhardy opportunism, one advisor reportedly acted as a Gestapo informer.<sup>77</sup>

In conjuring up the position of Jewish legal advisor, the Nazis separated Jews from other German lawyers. In their rhetoric about legal advisors, the Nazis insulted Jews. In their exercise of power, the Nazis isolated Jews further. But the Nazis failed to transform their theory of lawyering into a theory that made sense. In 1936, Nazi jurists had begun referring to lawyers as guardians of the law and requiring them to swear to upholding Nazism. Erwin Noack, the Vice-President of the Reich Bar Association (*Reichsrechtsanwaltskammer*), set forth the theory of Jewish legal advisors:

The Jewish legal advisor may not under any circumstances be addressed as guardian of the law or even as a lawyer-like actor. He is nothing but a representative of the interests of a Jewish party. Only judges and lawyers can protect justice as officers of the court.<sup>78</sup>

Measured by their actual function rather than Nazi theory, Jewish legal advisors were lawyers, even if they had a limited client base. To the extent that German lawyers stopped performing those functions, i.e.,

representing the interests of their clients, they were the ones who ceased acting like lawyers. One flagrant example was a defense attorney who, in representing a defendant accused of conspiring to assassinate Hitler on 20 July 1944, told the People’s Court that his client’s acts horrified him. Then he demanded the death penalty. Some Nazis understood the implications of their own theory and opined that in the Nazi state, lawyers were no longer necessary. Even Hans Frank, who was devoting his career to developing Nazi law, wrote in his statement prepared for the 1936 conference “Jewry in Jurisprudence” that the “ethical training” of the people would render “criminal procedure more and more superfluous.” However much they tried, however deeply they wished, the Nazis could not develop a theory that made any sense in the real world of disputes and conflicts, a theory where lawyers did not represent the individual interests of their clients.<sup>79</sup>

Hitler never held the law in high esteem, and theoretical subtlety was never the Nazis’ strong suit. Hitler and his henchmen cut down law with power. A decree of 1 July 1943 handed over the prosecution of Jews from the administration of justice to the police,<sup>80</sup> and Jewish legal advisors essentially lost their *raison d’être*. By then, the Nazi state had already deported the vast majority of Jews still present in Germany at the outbreak of war to the east and murdered them. Power unchecked by law showed its prowess at destruction.

By the war’s end, Jewish lawyers such as Max Alsbberg and Hans Litten had long since committed suicide. Hugo Sinzheimer survived in hiding in Holland, only to die from exhaustion in 1945. Max Hachenburg, the quintessential nineteenth-century German lawyer, left Germany in June 1939, lived in England during the war, and finally moved to Berkeley, California, where he died in 1951 at the ripe old age of ninety-one. Both Max Hirschberg and Ernst Fraenkel lived well into the postwar era, Hirschberg in New York, Fraenkel in Berlin. Hirschberg would still write about fairness in criminal justice and Fraenkel about pluralistic democracy, both men working to secure the rule of law in pluralistic democracies.

## Notes

1. For their helpful and insightful comments on an earlier draft of this article, I thank Professor Renate Bridenthal; my wife, Professor Marion Kaplan; and the anonymous reader for the press. All translations are my own unless otherwise indicated.

2. Curt Riess, *Der Mann in der Schwarzen Robe: Das Leben des Strafverteidigers Max Alberg* (Hamburg, 1965), 324–28, 332.
3. Anecdote related to the author by Werner Angress.
4. Gerhard Jungfer, "Max Alberg (1877–1933): Verteidigung als ethische Mission," in Kritische Justiz, ed., *Streithare Juristen* (Baden-Baden, 1988), 141–152; Tillmann Krach, "Max Alberg (1877–1933): Der Kritizismus des Verteidigers als schöpferisches Prinzip der Wahrheitsfindung," in *Deutsche Juristen jüdischer Herkunft*, eds. Helmut Heinrichs, et. al. (Munich, 1993), 655–65; Riess, *Der Mann in der Schwarzen Robe*, 334–35.
5. Kenneth F. Ledford, "Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877–79," *Central European History* 26 (1993): 165–93.
6. Angelika Königseder, *Recht und nationalsozialistische Herrschaft: Berliner Anwälte, 1933–1945. Ein Forschungsprojekt des Berliner Anwaltsvereins* (Bonn, 2001), 114–15; Konrad H. Jarausch, "Jewish Lawyers in Germany, 1848–1938: The Disintegration of a Profession," *Leo Baeck Institute Year Book* 36 (1991): 173–77 (for Berlin and Breslau); Tillmann Krach, *Jüdische Rechtsanwältin in Preussen: Über die Bedeutung der freien Advokatur und ihre Zerstörung durch den Nationalsozialismus* (München, 1991), 414–16 (for the Prussian numbers).
7. Benjamin Carter Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (Oxford, 2008), 125.
8. *Reichsgesetzblatt* (RGBl) 1933, I, 83; Ernst Fraenkel, *Der Doppelstaat*, 2nd ed., ed. Alexander von Brünneck, (Hamburg, 2001), 55–58.
9. Imgeard Litten, *Eine Mutter kämpft gegen Hitler* (Rudolstadt, 1983), 17; Simone Ladwig-Winters, *Anwalt ohne Recht: Das Schicksal jüdischer Rechtsanwältin in Berlin nach 1933* (Berlin, 1998), 28.
10. Litten, *Eine Mutter kämpft gegen Hitler*, 153.
11. Douglas G. Morris, *Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg in Weimar Germany* (Ann Arbor, 2005), 303–04.
12. Litten, *Eine Mutter kämpft gegen Hitler*, 19.
13. Wolfgang Benz, "Von der Entrechtung zur Verfolgung und Vernichtung: Jüdische Juristen unter dem nationalsozialistischen Regime," in Heinrichs, *Deutsche Juristen*, 813–52, here 814; Weber, Reinhard, *Das Schicksal der jüdischen Rechtsanwältin in Bayern nach 1933* (Munich, 2006), 50; "Ich werde mich nie mehr bei der Polizei beschweren—I will never again complain to the Police," [www1.yadashem.org/yv/en/exhibitions/our\\_collections/.../index.asp](http://www1.yadashem.org/yv/en/exhibitions/our_collections/.../index.asp), last accessed Dec. 27, 2011.
14. Benz, "Von der Entrechtung zur Verfolgung," 815.
15. *Ibid.*, 814–15; Krach, *Jüdische Rechtsanwältin*, 172–73.
16. Benz, "Von der Entrechtung zur Verfolgung," 817–18; Krach, *Jüdische Rechtsanwältin*, 180–83 (quotation on 183).
17. Benz, "Von der Entrechtung zur Verfolgung," 820–21; Krach, *Jüdische Rechtsanwältin*, 184–85.
18. Krach, *Jüdische Rechtsanwältin*, 241.
19. Kurt-Jacob Ball-Kaduri, *Das Leben der Juden in Deutschland im Jahre 1933: Ein Zeitbericht* (Frankfurt, 1963), 93; Benz, "Von der Entrechtung zur Verfolgung," 821.
20. RGBl 1933 I, 175 (Law on the Restoration of the Professional Civil Service); RGBl 1933 I, 188 (Law of the Admission to the Bar); see also Krach, *Jüdische Rechtsanwältin*, 422 for reprint of the latter; Benz, "Von der Entrechtung zur Verfolgung," 823–25; Saul Friedländer, *Nazi Germany and the Jews: Volume I: The Years of Persecution* (New York, 1997), 27–28. The Nuremberg Laws of 15 September 1935 were the "Reichsbürgergesetz," and the "Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre," RGBl 1935 I, 1146.
21. Krach, *Jüdische Rechtsanwältin*, 207–08.
22. Kenneth C. H. Willig, "The Bar in the Third Reich," *The American Journal of Legal History* 20 (1976), 1–14, here 4.
23. Eberhard Haas and Eugen Ewig, "Max O. Friedländer (1873–1956): Wegbereiter und Vordenker des Anwaltsrechts," in Kritische Justiz, ed., *Streithare Juristen*, 555–69, 563–65; Krach, *Jüdische Rechtsanwältin*, 60–66; Kenneth F. Ledford, "German Lawyers and the State in the Weimar Republic," *Law and History Review* 13 (1995): 317–49, 342–46.
24. Friedländer, *Nazi Germany and the Jews*, 29 (for Germany); Krach, *Jüdische Rechtsanwältin*, 246, 418 (for Prussia); Ladwig-Winters, *Anwalt ohne Recht*, 8, 43 (for Berlin); Königseder, *Recht und nationalsozialistische Herrschaft*, 16, 114–15 (for percentage reduction in Berlin).
25. Krach, *Jüdische Rechtsanwältin*, 210; Ladwig-Winters, *Anwalt ohne Recht*, 41–42.
26. Königseder, *Recht und nationalsozialistische Herrschaft*, 114.
27. *Ibid.*; Krach, *Jüdische Rechtsanwältin*, 200–02; Ladwig-Winters, *Anwalt ohne Recht*, 42.
28. Morris, *Justice Imperiled*, 300, 303, 320 (with quotation).
29. Horst Göppinger, *Juristen jüdischer Abstammung im "Dritten Reich": Entrechtung und Verfolgung* (Munich, 1990), 87–90; Ladwig-Winters, *Anwalt ohne Recht*, 8, 10, 37–9, 43 (quotation at 38); Morris, *Justice Imperiled*, 320.
30. Ball-Kaduri, *Das Leben der Juden in Deutschland*, 60 (quotation); Krach, *Jüdische Rechtsanwältin*, 166–67; Ladwig-Winters, *Anwalt ohne Recht*, 29, 34.
31. Riess, *Der Mann in der Schwarzen Robe*, 331–32.
32. Morris, *Justice Imperiled*, 300.
33. *Ibid.*, 311–12.
34. Ladwig-Winters, *Anwalt ohne Recht*, 42.
35. Benz, "Von der Entrechtung zur Verfolgung," 824–25; Krach, *Jüdische Rechtsanwältin*, 204 (quotation); 205; Ladwig-Winters, *Anwalt ohne Recht*, 44–45.
36. Ball-Kaduri, *Das Leben der Juden in Deutschland*, 94 (first two quotations); Krach, *Jüdische Rechtsanwältin*, 263–64 (third quotation); Ladwig-Winters, *Anwalt ohne Recht*, 45–47 (on women).
37. Avraham Barkai, "Wehr Dich!": *Der Centralverein deutscher Staatsbürger jüdischen Glaubens, 1893–1938* (Munich, 2002), 138–39, 288–90; Carl J. Rheims, "The Schwarzes Fährlein, Jungenschaft, 1932–1934," *Leo Baeck Institute Year Book* 23 (1978): 173–97, 185–89; Carl J. Rheims, "The Verband nationaldeutscher Juden 1921–1933," *Leo Baeck Institute Year Book* 25 (1980): 243–268, especially 243–47, 246 fn. 24, 252–53, 260, 263, 266, 267 fn. 147; Robert Wistrich, *Who's Who in Nazi Germany* (New York, 1982), 216–17.
38. Ladwig-Winters, *Anwalt ohne Recht*, 38.
39. Max Hachenburg, "Juristische Rundschau," in *Deutsche Juristenzeitung* 38 (1 May 1933), 607–11, 608–610 (quotations); Jarausch, "Jewish Lawyers in Germany," 171; Krach, *Jüdische Rechtsanwältin*, 159, 284–85.

41. Benz, "Von der Entrechtung zur Verfolgung," 834–35; Krach, *Jüdische Rechtsanwältin*, 172, 177–80, 215–36, 264, 307, 307 note 2.
42. Ladwig-Winters, *Anwalt ohne Recht*, 49.
43. *Ibid.*, 38.
44. Riess, *Der Mann in der Schwarzen Robe*, 324.
45. Ladwig-Winters, *Anwalt ohne Recht*, 51; Willig, "The Bar in the Third Reich," 8.
46. Friedlander, Henry, "German Law and German Crimes in the Nazi Era," in *The Holocaust's Ghost: Writings on Art, Politics, Law and Education*, eds F.C. Decosse and Bernard Schwartz, (Edmonton, 2000), 283–89, here 285.
47. Benz, "Von der Entrechtung zur Verfolgung," 838; Göppinger, *Juristen*, 77; Krach, *Jüdische Rechtsanwältin*, 384.
48. Königseder, *Recht und nationalsozialistische Herrschaft*, 114–15.
49. Göppinger, *Juristen*, 154; "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," in *Das Judentum in der Rechtswissenschaft—Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936* (Berlin, 1936–38), Nr. 1, p. 5. While the literature on Carl Schmitt is immense, important interpretations available in English include the following: Joseph W. Bendersky, *Carl Schmitt, Theorist for the Reich* (Princeton, 1983); Raphael Gross, *Carl Schmitt and the Jews: The 'Jewish Question,' the Holocaust, and German Legal Theory*, transl. Joel Golb (Madison, 2007); Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Postwar European Thought* (New Haven, 2003); George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (New York, 1989).
50. "Die deutsche Rechtswissenschaft," in *Das Judentum in der Rechtswissenschaft* (1936/1937), Nr. 1, at 7, 8 (first quotation), 10 (second quotation).
51. *Ibid.*, 15.
52. Karl Siegers, "Das Judentum im Strafrechtsverfahren," in *Das Judentum in der Rechtswissenschaft*, Nr. 4, 32.
53. *Ibid.*, 34 (first quotation); 35 (second quotation); 33 (third quotation); 36 (fourth quotation).
54. Rainer Erd, "Hugo Sinzheimer (1875–1945): Aufbau zur Befreiung des Menschen," in *Kritische Justiz, Streitbare Juristen*, 282–294, 292.
55. Hugo Sinzheimer, *Jüdische Klasker der deutschen Rechtswissenschaft* (Amsterdam, 1938), 9, 13, 15 (first quotation), 16 (second quotation), 17.
56. *Ibid.*, 293 (first quotation), 295 (second quotation), 301.
57. *Ibid.*, 299 (quotation), 300–01.
58. Ernst Fraenkel, "Vorwort zur deutschen Ausgabe (1974)," in Fraenkel, *Der Doppelstaat*, 41.
59. Krach, *Jüdische Rechtsanwältin*, 351–53.
60. Alexander von Brünneck, "Vorwort zu diesem Band," in Ernst Fraenkel, *Gesammelte Schriften. Band 2—Nationalsozialismus und Widerstand*, eds. Alexander von Brünneck, Hubertus Buchstein, Gerhard Göhler (Baden-Baden, 1999), 22.
61. Ernst Fraenkel, "Der Sinn illegaler Arbeit" (1935), in Fraenkel, *Gesammelte Schriften. Band 2*, 491–97, 49.
63. *Ibid.*, 493 (first quotation, emphasis in original); 493 (second quotation); 494 (third quotation); 494 (fourth quotation); 493 (fifth quotation).

64. *Ibid.*, 495 (first quotation, emphasis in original), 495 (second quotation), 495 (second quotation).
65. *Ibid.*, 495 (first quotation), 495–96 (second quotation), 496 (third quotation).
66. *Ibid.*, 493.
67. *Ibid.*, 496 (first quotation), 496–97 (second quotation).
68. *Ibid.*, 497.
69. *Ibid.*, 493–97.
70. Fraenkel, "Vorwort," in Fraenkel, *Der Doppelstaat*, 43 (quotation), 43–45; Ernst Fraenkel, "Erklärungen von Ernst Fraenkel über die Tätigkeit von Gegnern des Regimes 1933 bis 1938" (1948, 1953, 1956), in Fraenkel, *Gesammelte Schriften. Band 2*, 622–27.
71. Knut Bergbauer, Sabine Fröhlich and Stefanie Schüler-Springorum, *Denkmalsfigur: Biographische Annäherung an Hans Litten, 1903–1938* (Göttingen, 2008), 273, 276, 289, 292–96; Hett, *Crossing Hitler*, 220–22, 224, 237, 240–43; Litten, *Eine Mutter kämpft gegen Hitler*, 238–39.
72. Bergbauer, *Denkmalsfigur*, 296–99, 315–18; Fraenkel, "Der Sinn illegaler Arbeit," in Fraenkel, *Gesammelte Schriften. Band 2*, 495, 497; Hett, *Crossing Hitler*, 187, 244–45, 249.
73. Königseder, *Recht und nationalsozialistische Herrschaft*, 114–15, 118.
74. *Ibid.*, 116–117; Krach, *Jüdische Rechtsanwältin*, 388, 390.
76. RGBL 1938 I, 1403, 1439; Göppinger, *Juristen*, 94–97; Königseder, *Recht und nationalsozialistische Herrschaft*, 116–18; Krach, *Jüdische Rechtsanwältin*, 386–95; Ladwig-Winters, *Anwalt ohne Recht*, 55, 58.
77. Benz, "Von der Entrechtung zur Verfolgung," 845 (quotation); Ladwig-Winters, *Anwalt ohne Recht*, 58–60.
78. Benz, "Von der Entrechtung zur Verfolgung," 839 (quotation); Ladwig-Winters, *Anwalt ohne Recht*, 54.
79. "Die deutsche Rechtswissenschaft," in *Das Judentum in der Rechtswissenschaft*, Nr. 1, at 12 (quotation); Krach, *Jüdische Rechtsanwältin*, 398, 400; Ladwig-Winters, *Anwalt ohne Recht*, 55; Müller, 64.
80. RGBL 1943 I, 372; see also Benz, "Von der Entrechtung zur Verfolgung," 848.

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