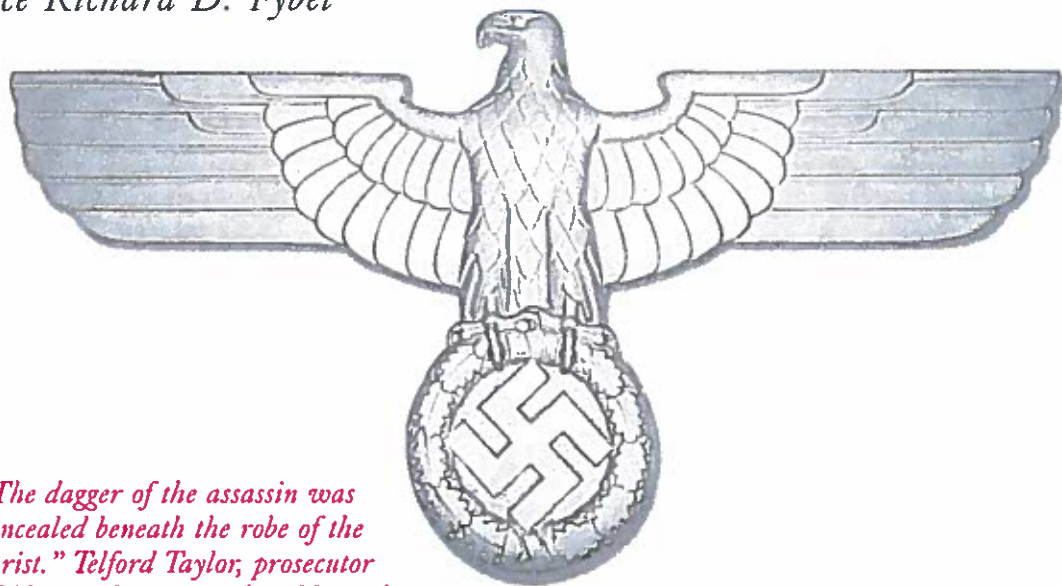


Assassins In Judicial Robes

by Associate Justice Richard D. Fybel*



"The dagger of the assassin was concealed beneath the robe of the jurist." Telford Taylor, prosecutor of Nazi judges on trial in Nuremberg post-World War II.¹

Gavel to Gavel asked me to write about the movie *Judgment at Nuremberg*, but not to write a movie review. I have previously researched and written about the German judiciary and judges from 1933 to 1945,² some of whom are depicted in the movie, so I accepted this kind offer.

The movie *Judgment at Nuremberg* dramatized the post-World War II trial of German judges charged with war crimes and crimes against

humanity. This article will discuss (1) postwar trials in Nuremberg before tribunals of American state court judges, especially the trial of judges, ministers and prosecutors dramatized in the movie, (2) the German court's 1942 opinion that was the basis of the story in *Judgment at Nuremberg*, and (3) the conduct of the presiding judge in *Judgment at Nuremberg*. Along the way, I will provide commentary.

The Justice Case

After the trial in Nuremberg of 22 principal defendants, there were more trials of Nazis

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conducted in Germany. Twelve of these trials were prosecuted by the U.S. in Nuremberg. Defendants included doctors who performed experiments on concentration camp inmates, the perpetrators of slave labor, administrators of the camps, members of the SS Elite Guard who conducted genocide, the "SS Einsatzgruppen" (23 military officers in charge of killing squads who murdered two million civilians), industrialists, and military leaders tried for deaths of prisoners of war (POWs) and civilian hostages.

In *United States v. Josef Altstoetter, et al.* – known as the "Justice Case" – 16 defendants – judges, ministers and prosecutors – were charged with the "commission of war crimes and crimes against humanity through abuse of the judicial process and the administration of justice."³ Why were these cases tried before U.S. judges? According to a former Nuremberg prosecutor:

"To expect the Germans to bring these Germans to justice was out of the question. ... [A]fter World War II, organized society of Germany was in a state of collapse. There was no authoritative judicial system except remnants of the violently partisan judiciary set up by Hitler. And German law had been perverted to be a mere expression of the Nazi will."⁴

The tribunal in the Justice Case issued a lengthy and detailed opinion. The principal defendant, Chief Judge Oswald Rothaug, claimed he decided cases based on the evidence. Yet, the opinion emphasizes that before trial, the judge made public and private comments committing himself to find the defendants guilty and, during trial, he regularly conferred with the S.D. (the security service of the SS) about the case. Throughout the trial, Rothaug was the antithesis of an impartial judge. The tribunal concluded Rothaug was "a sadistic and evil man."⁵ The judgment found Rothaug to be a "knowing and willing instrument in ... persecution and extermination" of Jews.⁶

The Katzenberger Case and Opinion

The principal case dramatized in *Judgment at Nuremberg* portrayed the relationship between a 70-ish Jewish community leader and landlord and a teenage Aryan girl who lived in his apartment building. In the underlying trial, both testified they were only friends. The evidence of physical

contact was they kissed each other and she sat on his lap. The man was convicted and executed for "racial pollution."

The case referred to in the movie was based on the *Katzenberger* case, a real case decided in 1942 by The Special Court for the District of the Court of Appeals in Nuremberg at the District Court Nuremberg-Fürth. The defendants were Lehmann ("Leo") Katzenberger, a 68-year-old German Jew who was a married merchant and leader of the Nuremberg Jewish community, and Irene Seilor, a 32-year-old Aryan married owner of a photography shop. Katzenberger and Seilor were charged with racial pollution and perjury. Found guilty, Katzenberger was executed and Seilor was sentenced to two years of hard labor and loss of her civil rights during that time.

The German court's written opinion in *Katzenberger* is chilling. The opinion was signed by Chief Judge Rothaug and two other judges and has the trappings of a legitimate court opinion. The opinion identifies the parties and the charges and then lists and discusses "Findings" with each section headed by a Roman numeral. For example, the first "finding," in part, is that Katzenberger is "fully Jewish and a German national" according to the Nuremberg Laws. Next, Seilor "is a German citizen of German blood." The opinion describes the charge: "continual extramarital sexual intercourse" with each other.

The opinion then summarizes the defense. Seilor testified she was friends with Katzenberger since 1932. He advised her on personal and financial problems and she regarded him as "a fatherly friend." She admitted she kissed Katzenberger "now and then and allowed him to kiss her." She frequently sat on his lap. She said there were no sexual motives. Katzenberger testified his relationship with Seilor was of "a purely friendly nature." His visits with her stopped in 1940 because of pressure on Seilor by the Nazi party.

Next, the *Katzenberger* opinion summarizes the testimony of defendants and other witnesses. The court rejects the "excuses" of the defendants, concluding their descriptions of their relationship "defy common sense." The opinion characterizes the defendants' relations with each other as "of a purely sexual nature" with "continuous sexual intercourse."

continued on next page

Relying on a 1936 opinion of the German Supreme Court, the *Katzenberger* opinion explained that even if no sexual intercourse had occurred, the Nuremberg Laws were still violated because the defendants' acts satisfied "sexual urges." The German Supreme Court had previously interpreted a prohibition against "extramarital relations between Jews and subjects of the state of German or related blood." (Article 2 of the 1935 Nuremberg Laws.⁸) The German Supreme Court had held that extramarital relations included any act that satisfied the sex urge regardless of whether any bodily contact occurred.⁹ This interpretation was required, the court stated, "because the provisions of the law [entitled "The Law for the Protection of German Blood and German Honor"] serve not only to protect German blood but also to protect German honor."¹⁰

The next section of the *Katzenberger* opinion explains these policies and laws and applies them to the facts it found. Sound familiar? In its most infamous passages, the *Katzenberger* opinion stated:

"The political form of life of the German people under National Socialism is based on the community. One fundamental factor of the life of the national community is the racial problem. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

"Katzenberger practiced pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial problems and he knew that his conduct was

a slap in the face to the patriotic feelings of the German people. Neither the National Socialist Revolution of 1933, nor the passing of the Law for the Protection of German Blood and German Honor in 1935, neither the action against the Jews in 1938 [Kristallnacht], nor the outbreak of war in 1939, made him abandon his activities.

"As the only feasible answer to the frivolous conduct of the defendant, the court therefore deems it necessary to pronounce the death sentence as the heaviest punishment provided by Article 4 of the Decree against Public Enemies. ..."

The judges in *Katzenberger* and other similar cases involving Jews and Poles claimed they were just applying the law. Yet, as graphically illustrated by the German Supreme Court's opinion interpreting the Nuremberg Laws, this assertion is not true. In that case, the judges interpreted the law in an aggressive manner and broadly defined "extramarital relations" beyond any rational definition. There, the German Supreme Court justified its decision based on Nazi race doctrine and became fully coordinated into the Nazi system.

The question arises, what should German judges have done? Individually, a judge could have refused to take a new Nazi oath required in 1933 (to Hitler personally rather than to the German Constitution) and declined to serve as a judge. Even after taking the oath, a judge could have resigned. Based on my research,¹¹ the number of Nazi judges in these categories might be as high as two. Judges could have protested as part of a group of judges or others. Yet, according to Rabbi Leo Baeck, the leader of Berlin's Jewish community: "The universities were silent, the courts were silent..."¹² Indeed, as

continued on page 41

¹ William F. Meinecke, Jr., and Alexandra Zapruder, *Law, Justice, and the Holocaust* (Washington, D.C.: United States Holocaust Memorial Museum, 2009), p. 51.
² Richard D. Fybel, "The Absence of Judicial Ethics and Impartiality: The German Legal System, 1933-1945," in *National Security, Civil Liberties, and the War on Terror*, ed. M. Katherine B. Darmer and Richard D. Fybel (Amherst, NY: Prometheus Books, 2011), pp. 25-37; Fybel, Richard D., "When Mass Murder and Theft of All Human Rights Were "Legal": The Nazi Judiciary and Judges" (2012) volume 25, No. 2, *California Litigation* (The Journal of the Litigation Section, State Bar of California), pp. 15-21.
³ Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946* (Dallas, TX: Southern Methodist University Press), pp. 551.

⁴ *Ibid.*, p. xxxi.
⁵ Meinecke and Zapruder, *Law, Justice, and the Holocaust*, p. 56.
⁶ *Ibid.*, p. 55.
⁷ *Ibid.*, p. 43.
⁸ *Ibid.*, p. 29.
⁹ *Ibid.*, pp. 33-34.
¹⁰ *Ibid.*, p. 34.
¹¹ Richard D. Fybel, "The Absence of Judicial Ethics and Impartiality: The German Legal System, 1933-1945," pp. 25, 31-35.
¹² Eva Fogelman, *Conscience & Courage: Rescuers of Jews during the Holocaust* (New York: Anchor Books, 1994), p. 24.

historian and Pulitzer Prize winner Saul Friedländer has observed, "Not one social group, not one religious community, not one scholarly institution or professional association in Germany and throughout Europe declared its solidarity with the Jews..."¹³

Obviously, the Nazis ruled by terror and violence and it is speculation to think any individual or group protest might have been effective. For as recognized by historians, an independent judiciary and the rule of law are incompatible with a totalitarian state.¹⁴ Yet, one historian observed, far from protesting, the German judiciary became a full partner in Nazi terror with "zeal."¹⁵

Judgment at Nuremberg: The Movie

Spencer Tracy starred in the movie as the presiding judge of a tribunal trying German judges. Tracy played a state court judge from Maine, "Judge Daniel Haywood." His performance gave judges a good reputation. He was calm, dignified, patient and in full control of the courtroom. His analysis of the case focused on the individual responsibility of the judges on trial and the human dignity of victims.

Even when faced with attempted ex parte communications from lawyers, politicians, military officers, and locals, he was alert to the ethical issues raised. It was a movie, after all, so the judge befriended a beautiful German widow who tested the judge's ability to limit his considerations to the evidence in the courtroom.

In the movie, the principal defendant is a judge called "Janning." The character of Janning is

based on Rothaug and was portrayed by Burt Lancaster as learned, reflective and willing to accept responsibility for his decisions. Rothaug displayed none of these qualities as evidenced by the *Katzenberger* case.

Judge Haywood (Tracy) delivers the best – and last – line of the movie. After Janning explains to Judge Haywood that he did not think "it would come to this," namely, that enforcing Nazi laws would enable the commission of mass crimes against humanity, Judge Haywood responds:

"Herr Janning, it came to that the first time you sentenced a man to death you knew to be innocent." ■

¹³ Saul Friedländer, *The Years of Extermination: Nazi Germany and the Jews, 1939-1945* (New York: Harper Perennial, 2008), p. xxi.

¹⁴ Diemut Majer, *"Non Germans" under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland, 1939-1945*, trans. Peter Thomas Hill, Edward Vance, and Brian Levin (Baltimore, MD: Johns Hopkins University Press, 2003), p. 351.

¹⁵ *Ibid.*, p. 361.