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## The War Crimes Trial: A Second Look

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first obtaining the consent of the State or States whose rights have been violated by such measures.<sup>76</sup>

Note that under this article jurisdiction would not be limited by the right or for the benefit of the accused, but only on behalf of the injured state. Argentina accepted Israel's apology and did not assert her sovereign rights. Thus Eichmann could not benefit from the violation of Argentina's sovereignty. The case, therefore, really stands on the narrower ground of a violation of municipal law. The fact that nations of the United Nations Assembly requested Argentina to accept Israel's apology in order that Eichmann might be "brought to appropriate justice" leads to the conclusion that the Israeli-Anglo-American view that kidnapping does not impair jurisdiction is a principle of international law.

#### CONCLUSION

The *Eichmann* decision is a precedent. The absence of conventional, customary, or judicial law directly in point prevented the Israeli court from establishing conclusively that it declared approved rules of law. This is the inherent dilemma of the system in which a case develops the law. However, the United Nations resolutions affirming the Nuremberg and Eichmann trials and the unanimous adoption of the Genocide Convention give great weight to the position of the Israeli court. On the basis of these resolutions and in the absence of any concerted disapproval, the principles of the *Eichmann* case should be regarded as international law.

*Elizabeth Heazlett*

### THE WAR CRIMES TRIAL: A SECOND LOOK

#### INTRODUCTION

The determination of the victorious Allies to assess individual responsibility for the nightmare of the Second World War through the innovation of the trial of the leaders of the vanquished powers has excited a seemingly endless flow of inconclusive legal analysis. Although more than a decade has elapsed since the termination of the Nuremberg adjudications, the recent conviction and execution of Adolf Eichmann by Israel demonstrate that the newly important field of international criminal law has been little

76. D.C.J.C. art. 16, at 623.

77. Professor Dickenson, who was reporter to the Harvard Research. See D.C.J.C. 435.

developed by the continuing studies. Questions concerning the legality of war crimes trials today seem moot; the prior proceedings are a *fait accompli* which will stand as precedent sufficient to support their reintroduction if the occasion arises. Discussion of the social and political advisability of continuation of the Nuremberg policy would now seem more fruitful than repetitious probing of technical legal issues.

The first part of this note is an attempt to balance the benefits to the international community to be expected from a perpetuation of the institution of the war crimes trial against the disadvantages inherent in the continuation, in judicial form, of such questionable justice. Problems encountered will be analyzed within a framework of modern Anglo-American ethical theory, dependent upon such assumptions as the sanctity of human life and the central role of the individual in society. The more extensive concluding portion of the paper, asserting the necessity of avoiding blind application of a locally developed code of moral behavior, explores the possibility of theoretical justification of the attempted universalization of our system of values evident both in the war crimes trials themselves and in most political and jurisprudential criticism of them.

#### A. WAR CRIMES TRIALS: EFFICACY AND FAIRNESS

##### 1. *War, Technology, and Nationalism*

War has always brought suffering to common combatants<sup>1</sup> and to civilians caught in the path of fighting.<sup>2</sup> Members of the aristocracy frequently, and at times apparently even traditionally, met death in battle.<sup>3</sup> Nevertheless, the presumed manliness of physical aggression, the glory of victory, the grandeur of military display, and the appeals of patriotism combined to make most suffering tolerable. War has been lauded in the most extravagant terms as the highest activity of mankind:

But when the State renounces all extension of power, and recoils from every war which is necessary for its expansion; when it is content to exist, and no longer wishes to grow; when "at peace on sluggard's couch it lies," then its citizens become stunted. The effort of each individual is cramped, and the broad aspect of things is lost. . . .

All petty and personal interests force their way to the front dur-

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1. See POPE, *DECISION AT TRAFALGAR* (1959).

2. See KONINGSBERGER, *A WALK WITH LOVE AND DEATH* (1961).

3. "It is difficult for us to reconstruct the violent tenor of much of feudal life, but one investigator has provided a statistic which may serve to make the point. Of the sons of English dukes born in 1330-1479, 46 percent died violent deaths. Their life expectancy when violent death was excluded was 31 years; when violent death was included, it was but 24 years." HEILBRONER, *THE MAKING OF ECONOMIC SOCIETY* 33 (1962).

ing a long period of peace. Selfishness and intrigue run riot, and luxury obliterates idealism. Money acquires an excessive and unjustifiable power, and character does not obtain due respect.

"Man is stunted by peaceful days,  
In idle repose his courage decays,  
Law is the weakling's game  
Law makes the world the same,  
But in war man's strength is seen,  
War ennobles all that is mean;  
Even the coward belies his name."

Schiller: *Braut v. Messina*

Frederick the Great recognized the ennobling effect of war. "War," he said, "opens the most fruitful field to all virtues, for at every moment constancy, pity, magnanimity, heroism, and mercy shine forth in it; every moment offers an opportunity to exercise one of these virtues."<sup>4</sup>

Even though until the twentieth century weapons had only limited powers of destruction,<sup>5</sup> war has throughout history proved terrifyingly devastating. Kurt Reinhardt, describing the results of the Thirty Years' War of the seventeenth century, states:

Some figures may illustrate the extent to which the vitality of the German people was taxed and depleted by the successive waves of destruction. The city of Augsburg lost 62,000 of its 80,000 inhabitants. The population of the duchy of Wurtemberg was reduced from 400,000 to 48,000. It is reliably estimated that the density of the population as a whole decreased by nearly two thirds.<sup>6</sup>

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4. BERNHARDI, GERMANY AND THE NEXT WAR (Eng. ed. 1914). Reprinted in THE CLASH OF POLITICAL IDEALS 164-65 (3d ed. 1957).

A Mohammedan who dies in battle was believed destined to spend his time in heaven in amorous dalliance with beautiful houris, but the Germanic hero lived quite a different life in the hereafter. He was carried to Valhalla by beautiful maidens, built like trapeze artists. But sex was secondary in Valhalla, where the heroes spent their days fighting each other. At nightfall their wounds were healed so that they could enjoy their beer in the evening and be ready for more battle the next morning.

WORMSER, THE STORY OF LAW 153 (2d ed. 1962).

5. Following the battle of Waterloo (1815) one of Wellington's generals submitted a memorandum suggesting that British infantry be equipped with long-bows. He stated, quite correctly, that they were superior in range, accuracy, and firing speed to the muskets then in use.

6. REINHARDT, GERMANY: 2000 YEARS 292 (2d ed. 1961).

Its horrors are vividly described in memoirs and letters, in sermons and pamphlets, in chronicles and narratives. These documents speak of an "*excidium*

The present existence of powerful nuclear devices<sup>7</sup> and the prospect of continuing advances in weapons technology<sup>8</sup> not only greatly increase the potential devastation of conflict but also for the first time threaten mankind with extinction. In spite of the obvious consequences,<sup>9</sup> however, some military experts accept the possibility of nuclear war with equanimity.<sup>10</sup>

The prevalence of militant nationalism<sup>11</sup> makes the use of modern instruments of destruction possible if not probable. A relatively new force,<sup>12</sup> its reception into the post-classical theory of politics appears to date from Bodin's isolation of the concept of sovereignty in the latter half of the sixteenth century.<sup>13</sup> Machiavelli, who coined the term "state" (*lo stato*) over a century earlier, was interested in the power of the indi-

*Germaniae*" (the destruction of Germany), of a "*Germania experans*" (a dying Germany). They tell a sordid tale of the lust of bloodshed; of slain and tortured men, women and children; of destroyed cattle and farm land; of devastated and pillaged cities, towns and villages.... We learn of a whole generation growing up and knowing the blessings of peace only from hearsay. We are told about the deserted schools and universities, the decline of morality and religion, about empty workshops, burned churches and desecrated churchyards.

*Id.* at 291-92.

7. "What would happen in an H-bomb war is a matter of controversy. The United States Secretary of Defense, in 1958, summarizing a Pentagon report, estimated that, in a nuclear war between NATO and the Powers of the Warsaw Pact, 160 million Americans would die, 200 million Russians and everybody in Western Europe and Britain." RUSSELL, *HAS MAN A FUTURE?* 29 (1961).

8. "So far the H-bomb is the worst weapon of mass destruction that has been invented, but it is obvious that, if international anarchy and scientific skill both continue, even more dangerous weapons will be invented, probably quite soon. There has been talk of what is called 'The Doomsday Machine.' This would be a machine which could, in a moment, destroy the whole population of the world." *Id.* at 36.

9. See generally ROSHEWALD, *LEVEL 7* (1959).

10. See KAHN, *ON THERMONUCLEAR WAR* (1960).

11. See KOHN, *THE AGE OF NATIONALISM* (1962).

12. Carl Joachim Friedrich, discussing thirteenth-century political entities, states:

I say political order rather than state because I regret the long-established habit of speaking of medieval government as a state when nothing justifies this sort of anachronism. For in medieval thought there were princes, lords, rule and government.... [I]n the concept of the modern state unrestricted legislative power is central. Yet it was precisely such unrestricted legislative power which medieval natural law denied to the prince, and within the narrow limits it set for recognizing any legislative authority, it tied the prince to co-operation of the estates.

FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 43-44 (1958). "There was no 'nationalism,' there were no territorial kingdoms in the true sense, at the beginning of the feudal era. There was a King of the Franks, but no King of France, and a King of the Lombards, but no King of Lombardy. Nor did the feudal system create any nationality for the princes and barons who held land under a superior ruler, for feudalism ignored boundaries." WORMSER, *op. cit. supra* note 4, at 167.

13. BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* (1576).

vidual ruler rather than the institutional framework within which he operated.<sup>14</sup>

In the past, patriotism has frequently consisted of little more than an attitude of comfortable superiority engendered by ethnocentrism. The British gentleman of the nineteenth century, for instance, could enjoy the gratification of harmless hatred of everything French without stirring from his club chair.<sup>15</sup> Since aggressiveness is not a prerequisite of patriotism, willingness to die for one's country does not necessarily imply approval of the sacrifice of lives to increase its power.

Nevertheless the ideology of nationalism may be adopted by the fanatic as the means of mobilizing consent to revolutionary change.<sup>16</sup> Resulting encouragement of concern for country without regard for the welfare of mankind in general creates dangerous international instability in a world shrunk by air transportation and electronic communication. This potentially explosive situation was noted in 1952 by the late Albert Einstein in his foreword to Homer Smith's historic survey of religious mythology:

His historical picture closes with the end of the nineteenth century, and with good reason. By that time it seemed that the influence of these mythic, authoritatively anchored forces which can be denoted as religious, had been reduced to a tolerable level in spite of all the persisting inertia and hypocrisy.

Even then, however, a new branch of mythic thought had already grown strong, one not religious in nature but no less perilous to mankind — exaggerated nationalism. Half a century has shown that this new adversary is so strong that it places in question man's very survival. It is too early for the present-day historian to write about this problem, but it is to be hoped that one will survive who can undertake the task at a later date.<sup>17</sup>

14. EBENSTEIN, *GREAT POLITICAL THINKERS* 322 (2d ed. 1956).

15. See generally SOUTHEY, *LIFE OF NELSON* (1813).

16. Eric Hoffer, writing over a decade ago, stated:

The fact that both the French and the Russian revolutions turned into nationalist movements seems to indicate that in modern times nationalism is the most copious and durable source of man's enthusiasm, and that nationalist fervor must be tapped if the drastic changes projected and initiated by revolutionary enthusiasm are to be consummated....

The phenomenal modernization of Japan would probably not have been possible without the revivalist spirit of Japanese nationalism. It is perhaps also true that the rapid modernization of some European countries (Germany in particular) was facilitated to some extent by the upsurge and thorough diffusion of nationalist fervor. Judged by present indications, the renaissance of Asia will by [*sic*] brought about through the instrumentality of nationalism rather than by other mediums. It was the rise of a genuine nationalist movement which enabled Kemal Atatürk to modernize Turkey almost overnight. HOFFER, *THE TRUE BELIEVER* 14-15 (1951).

17. Einstein, *Foreward* in SMITH, *MAN AND HIS GODS* (1952).

## 2. *The War Crimes Trial as a Preventive Measure*

Having granted that thermonuclear war is a grave danger to mankind and that some reformulation of the structure of the international community is necessary to assure peace, we are confronted with the problem of determining whether war trials such as those under discussion are a step toward essential safeguards. Their usefulness as regulators of conflict, and more especially as deterrents to aggression, must be first considered.

One may well doubt that the fear of punishment will go far to prevent future national leaders from initiating hostilities or acting inhumanely during war. Hitler, after all, hardly expected to be banished to Elba if his efforts at world conquest proved unsuccessful. Elimination of hope for mercy, on the other hand, may upon evident military failure lead to orgies of national self-destruction rather than life-saving compromise. Although some lessening of government efficiency may be expected if lower-level leaders are aware that obedience to orders may subject them to personal liability upon defeat, even here we must assume that the individual would prefer to be shot at as late a date as possible.

The war crimes trial may have some small value as a propaganda device through information dissemination and public condemnation of actions which the judges find morally reprehensible. This influence upon the ethical standards of mankind would, however, seem limited. A cursory comparison of behavior recommended by Christ to assure eternal glory and the history of Europe over the past twenty centuries will demonstrate a compartmentalization of the individual's spiritual nature which permits ostensible adherence to ideals even while compromising with reality.

## 3. *The War Crimes Trial as a Mechanism for Revenge*

The war crimes trial would seem most effective as a ritual of revenge. Hitler's madness devastated an entire continent and brought misery into countless American homes half a world away. The attempt to unify a people through the merciless destruction of a several-million-member cultural minority among them ranks with the most barbaric practices in history. Photographs of life in German prison camps such as Buchenwald simultaneously nauseate and enrage the viewer. Psychologically healthy expression of grief and anger may be obtained through a judicial proceeding such as the Nuremberg trials, which permits extensive public exhibition of the criminals and continued reiteration of their deeds.

Retribution as a theory of punishment has its basis in the Code of Hammurabi and the Mosaic laws of *Exodus*, where it was employed as a limitation on revenge.<sup>18</sup> Seneca wrote that "it is but a just retaliation

18. DAVIS, FOSTER, JEFFERY & DAVIS, *SOCIETY AND THE LAW* 277-78 (1962). "[T]hou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning wound for wound, stripe for stripe." *Exodus* 21:25-26.



for anyone to suffer in his own person the evil that he intended to inflict upon another."<sup>19</sup> Kant stated that "the right of Retaliation (*jus talionis*)... is the only Principle which in regulating a Public Court... can definitely assign both the quality and quantity of a just penalty. All other standards are wavering and uncertain;... they contain no principle conformable to the sentence of pure and strict Justice."<sup>20</sup> Nevertheless, the modern reader cannot help but feel revulsion upon reading Blackstone's argument that the corpse of a murderer hanging in chains on the gibbet was "a comfortable sight to the relations and friends of the deceased."<sup>21</sup> There is a growing realization, receiving only limited recognition in the law, that asocial actions indicate character maladjustments which should be corrected rather than condemned.

#### 4. Justice and the War Crimes Trials

The practical effectiveness of war crimes trials may be seriously questioned. Against whatever small degree of utility such proceedings may possess must be balanced their probably intrinsically unjust nature.

The defendants in the Nuremberg trials were not permitted to relieve themselves of individual responsibility by demonstrating that punishment of nationals of the prosecuting states guilty of equally heinous acts was not to be considered. This ruling would seem correct: "As far as the *tu quoque* argument is concerned, it need only be mentioned that it is no defence for an individual to claim that a crime for which he is being tried has also been committed by others."<sup>22</sup> One should nevertheless remember that the atrocities perpetrated by the Russians during the decade preceding the Second World War rivaled in barbarity those of the Third Reich.<sup>23</sup> Moreover, in the last moments of conflict America, albeit with probable justification, unleashed the terror of the atomic bomb on Japanese populations primarily composed of innocent women and children.

That reprehensible acts were committed in pursuance of superior orders did not absolve the defendants, since the courts maintained that

19. See GROTIUS, *THE RIGHTS OF WAR AND PEACE* 37 (Campbell trans. 1901).

20. KANT, *PHILOSOPHY OF LAW* 195-96 (1881).

21. See KOESTLER & ROLPH, *HANGED BY THE NECK* 52 (1961).

22. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 120 (1960).

23. See p. 150 *infra*. The extent of these practices of course raises the possibility that Anglo-American ethical standards had not achieved such universal recognition as customary law that their violation could constitute a crime. If "there is sufficient evidence to conclude that the act is practiced with impunity by a large number of other persons, [a court would] be justified to assume that it was not a crime, since international custom and general practice condoned it." WOETZEL, *op. cit. supra* note 22, at 120.

those on trial were aware that their deeds violated the unwritten laws of humanity.<sup>24</sup> Earlier cases on which this ruling is based would seem in general to hold the accused responsible only for a knowledge of "the law of the land" and local custom.<sup>25</sup> Most of the acts committed on German soil which the Tribunal found objectionable were legal under the degenerate form of national law then prevailing. In addition, the Nazi government had ostensibly made German law applicable to its citizens throughout the conquered territory.

Justice requires court examination of behavioral alternatives available to the accused before condemnation of the choice of one course of action as criminal. In Anglo-American law the defense of compulsion or duress exonerates an individual from guilt of any crime except murder or attempted murder.<sup>26</sup> While the sacrifice of one life motivated by a desire to save others is technically not excusable, such an act has in at least two cases been punished by a mere six-month incarceration.<sup>27</sup> The law under which the defendants in the war crimes trials were found guilty would have offered them and their families no protection from the German authorities if they had refused to act reprehensibly. Although the accused themselves were frequently responsible for reaching a position where their freedom of choice was restricted, the fact that quite probably their adherence to standards of conduct accepted by Allied judges would in most cases have meant immediate imprisonment or death should nevertheless have been given more weight in the judgments.

### B. MORAL RELATIVISM

The defendants in the war crimes trials were condemned for violating largely unwritten international criminal laws based primarily on Anglo-American ethical concepts stressing the sanctity of the individual. It is not the purpose of this concluding section of the paper either to attack or to defend these underlying moral principles. Rather, the material presented is intended to demonstrate the relative nature of our standards of right and wrong and to emphasize the need for understanding and tolerance in our attempts to enforce them universally.

24. *Id.* at 118-19.

25. In a discussion of a case reported in the *Cape Times* it is stated: "The Court... held that even if [the superior officer's] order was unlawful, [the defendant] was bound to obey it if it was not 'obviously and decidedly in opposition to the law of the land or to the well-known established customs of the army.'" Comment, 17 L.Q. REV. 87-88 (1901). For case materials see PERKINS, CRIMINAL LAW 869-78 (1957).

26. PERKINS, *op. cit. supra* note 25, at 842-51.

27. *Regina v. Dudley*, 15 Cox Crim. Cas. 624 (1884); *United States v. Holmes*, 26 Fed. Cas. 360 (No. 15,383) (C.D. Pa. 1842); PERKINS, *op. cit. supra* note 25, at 849-51.

### 1. *Absolute Natural Law*

Max Weber in his *Law in Economy and Society* states:

Natural law is the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment, but, on the contrary, provide the very legitimation for the limiting forces of positive law. Natural law has thus been the collective term for those norms which owe their legitimacy not to their origin from a legitimate law giver, but to their immanent and teleological qualities.<sup>28</sup>

This concept of the existence of patterns of behavior morally right in some absolute sense appears to have had its origins in Greek philosophical thought.<sup>29</sup> Platonic idealism, postulating a higher reality of pure forms which human senses are but dimly able to comprehend, incorporated natural law through considering justice an eternally valid rule for measuring human actions.<sup>30</sup> Through stoic intellectual extensions "natural law became fused with the general law of the universe [and] rightly interpreted constituted nothing more or less than right reason diffused throughout the universe."<sup>31</sup> The theory in this form was adopted by Cicero and other Roman jurists as the basis of the *jus gentium*, the universally applicable general law.

Scholastic philosophy built upon this conceptual foundation an absolute ethical system:

The rise of Christianity and the development of Catholic doctrine brought about a profound change in the older conception of natural law. While profiting from the doctrines of the stoics and the Roman jurists, the church fathers, particularly St. Augustine, divorced natural law from its intimate connection with the physical universe and grafted it on to the corpus mysterium and on to the spiritual unity, founded upon grace and encompassing earth and sky.<sup>32</sup>

28. WEBER, *LAW IN ECONOMY AND SOCIETY* 287-88 (Rheinstein ed. 1954).

29. Theories of natural law may be traced back as far as the period of the sophist enlightenment in Greece of the fifth century B.C. Proceeding from their basic premise that man is the measure of all things, the sophists challenged the prevailing faith in the divine origin of law and set out to show that established law is the artificial creation of human will and human convention. To this artificial and conventional order they opposed natural law, a law rooted in the very nature of man.

*Natural Law*, 11 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 285 (rev. ed. 1937).

30. *Id.* at 286.

31. *Ibid.*

32. *Ibid.*

The supreme position of the Christian faith in medieval Europe<sup>33</sup> permitted widespread belief in the certainty of moral judgments. Carl Becker has succinctly summarized the mythological *Weltanschauung* accepted by Church adherents:

It was an unquestioned fact that the world and man in it had been created<sup>34</sup> in six days by God the Father, an omniscient and benevolent intelligence, for an ultimate if inscrutable purpose. Although created perfect, man had through disobedience fallen from grace into sin and error, thereby incurring the penalty of eternal damnation. Yet happily a way of atonement and salvation had been provided through the propitiatory sacrifice of God's only begotten son. Helpless in themselves to avert this just wrath of God, men were yet to be permitted through his mercy, and by humility and obedience to this will, to obtain pardon for sin and error. Life on earth was but a means to this desired end, a temporary probation for the testing of God's children. In God's appointed time, the Earthly City would come to an end, the earth itself would be swallowed up in flames. On that last day good and evil would be finally separated. For the recalcitrant there was reserved a place of everlasting punishment; but the faithful would be gathered with God in the Heavenly City, there in perfection and felicity to dwell forever.<sup>35</sup>

The flat earth was the center of the universe, about which the heavenly bodies revolved. Excluding angels, devils, and other supernatural personages, life existed only on earth. Mankind had been placed by God in a position above other forms of life and only "a little lower than the angels." The vastness of the world and the variety of its peoples were not known. The groups outside the Christian community of which the European was aware were considered probably condemned to eternal suffering because of their differing ideologies. Religious error contaminated the secular thoughts of these peoples and prohibited the attachment of any importance to what little was known of their intellectual efforts.

The relative homogeneity of the Western European community, the restricted nature of its view of the universe, and its certainty in its detailed knowledge of God combined to permit a belief in absolute moral

33. "It is well known that the medieval world pattern, deriving from Greek logic and the Christian story, was fashioned by the Church which for centuries imposed its authority upon the isolated and anarchic society of western Europe." BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 5-6 (1932).

34. Archbishop Usher and Dr. Lightfoot were able to determine the time of these momentous events. The creation of man took place at nine o'clock in the morning of October 23, 4004 B.C. RUSSELL, *RELIGION AND SCIENCE* 52 (1935).

35. BECKER, *op. cit. supra* note 33, at 6.

concepts which could be discovered by intellectual effort on the part of the individual.<sup>36</sup> St. Thomas stated:

Since all things subject to Divine providence are ruled and measured by the eternal law...it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law.<sup>37</sup>

## 2. *The Failure of Nature-Based Idealism*

The concept of man which had provided a necessary basis for these natural law theories has, of course, been rendered untenable by the scientific progress of the last several centuries. Beginning in the sixteenth century, scholars ceased to accept the fiats of Aristotle and other early writers as absolute authority and relied instead on inductive reasoning based on experiment and observation.

Copernicus and Kepler set forth theories maintaining that the earth, not the stationary center of the universe as the Church had supposed, was in reality a mere satellite of the sun.<sup>38</sup> Continuing scientific advances

36. This pattern appears typical of priest-dominated cultures. See WEBER, *op. cit. supra* note 28, at 224-59.

The distinctive characteristic of a theocratic administration of justice consists entirely in the primacy of concrete ethical considerations; its indifference or aversion to formalism is limited only in so far as rules of sacred law are explicitly formulated. But in so far as the norms of the latter apply, the theocratic type of law results in the exact opposite, viz., a law which, in order to be adaptable to changing circumstances, develops an extremely formalistic casuistry.

*Id.* at 230.

37. BECKER, *op. cit. supra* note 33, at 3.

38. Luther said that "People give ear to an upstart astrologer who strove to show the earth revolves, not the heavens or the firmament, the sun and the moon. Whoever wishes to appear clever must devise some new system, which of all systems of course is the very best. This fool wishes to reverse the entire science of astronomy; but sacred Scripture tells us that Joshua commanded the sun to stand still, and not the earth." Melancton was equally emphatic; so was Calvin, who, after quoting the text: "The world also is established, that it cannot be moved" (Ps. xciii, 1) triumphantly concluded, "Who will venture to place the authority of Copernicus above that of the Holy Spirit?" Even Wesley, so late as the eighteenth century, while not daring to be so emphatic, nevertheless stated that the new doctrines in astronomy "tend toward infidelity."

RUSSELL, *op. cit. supra* note 34, at 23.

demonstrated that our planet is little more than a speck of dust in a universe at least hundreds of millions of light-years across.<sup>39</sup>

The realization of this fact has made belief in an anthropocentric diety virtually impossible. Bertrand Russell has stated:

The importance of Man is an essential part of the teaching of both the Old and New Testaments; indeed God's purposes in creating the universe appear to be mainly concerned with human beings. The doctrines of the Incarnation and Atonement could not appear probable if Man were not the most important of created beings. . . . While it was thought that the sun and moon, the planets and the fixed stars revolved once a day about the earth, it was easy to suppose that they existed for our benefit, and that we were of special interest to the Creator. But when Copernicus and his successors persuaded the world that it is we who rotate, while the stars take no notice of our earth; when it appeared further that our earth is small compared to several of the planets, and that they are small compared to the sun; when calculation and the telescope revealed the vastness of the solar system, of our galaxy and finally of the universe of innumerable galaxies—it became increasingly difficult to believe that such a remote and parochial retreat could have the importance to be expected of the home of Man, if Man had the cosmic significance assigned to him in traditional theology. Mere considerations of scale suggested that perhaps we were not the purpose of the universe; lingering self-esteem whispered that, if we were not the purpose of the universe, it probably had no purpose at all.<sup>40</sup>

Darwin in his *Origin of Species*, published in 1857, rejected the Biblical doctrine of instantaneous creation in favor of an evolutionary process of mutation and natural selection.<sup>41</sup> The necessary acceptance of his theory

39. "Our sun, far from being the center of the universe, is not even the center of our galaxy, but rides on the periphery 30,000 light years from the galactic nucleus." BARNETT, *THE UNIVERSE AND DR. EINSTEIN* Plate 2 (2d ed. 1950).

40. RUSSELL, *op. cit. supra* note 34, at 23-24.

41. The developing sciences of geology and zoology had already undermined the authority of *Genesis*. It would have been physically impossible, for instance, to fit a pair of each of the millions of known species of animal life into a vessel the size of Noah's ark. Regional differentiation of flora and fauna was also puzzling. Fossils of extinct forms of life raised difficult questions, since the religious assumed that God would not perform an evil or useless act. Edmund Gosse had suggested in his *Omphalos* that false evidences of evolutionary creation were placed on earth by God to try man's faith. The beliefs that rabbits were made with white tails so that man could more easily shoot them or that watermelons were ribbed so that they could be conveniently divided among the members of a family had begun to appear absurd. "St.

reduced *Genesis* to allegory, raised the possibility of the existence of life on hundreds of millions of planets scattered throughout the universe, and cast man in the role of an ape with a hypertrophied brain who had proved temporarily dominant in the continuing struggle for survival. It began to appear probable that any natural law among mankind could be little more than a continuation of vestigial animal drives.

Anthropological studies have more recently made us aware that other societal structures require laws which we would regard as unnatural. Freud and his followers in the field of psychiatry have demonstrated that the highly developed human intellect is primarily directed toward the satisfaction of unbelievably irrational impulses.

Man remains a remarkable phenomenon, a portion of matter able to explore the nature of its existence. But the thesis that idealistic behavioral absolutes have a basis in the inherent character of mankind must be abandoned.<sup>42</sup>

### 3. *Relative Natural Law*

The later scholastic philosophers tentatively suggested that absolute ethical standards would be possible even in the absence of a Catholic God. Attacks by emerging science upon the foundations of Church ideology gave impetus to attempts to divorce natural law from religion:

There may be detected in Aquinas the first effort in Christian Philosophy to effect, at least partially, a secularization of natural law. This effort became more pronounced and systematic in the work of Aquinas' successors, Biel, Alamin, and particularly Vasquez. Taking as their starting point the inability of the divine will to modify the rational natural law, or *lex aeterna*, and the idea of *lumen naturale* residing in each human being, they reached the revolutionary conclusion that natural law would exist, God or no God — a thesis which in the seventeenth century was widely popularized and applied in a more sustained and vigorous manner by Hugo Grotius.<sup>43</sup>

Friedrich states:

Grotius expounded the theory of a purely secular natural law based upon Stoic doctrine and freed from all ecclesiastical authority.... The decisive achievement of Grotius was to separate

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Augustine confessed himself ignorant as to God's reason for creating flies. Luther, more boldly, decided that they had been created by the Devil, to distract him when writing good books." *Id.* at 65.

42. See generally KRUTCH, *THE MODERN TEMPER* (1929).

43. *Natural Law*, 11 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 287 (rev. ed. 1937).

natural law from its Christian and theological basis as it had been understood in the Middle Ages....What Grotius really did was to return to the common and rational basis of all law....<sup>44</sup>

This position appears untenable. Grotius states:

Natural right is the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature. The actions, upon which such a dictate is given, are either binding or unlawful in themselves, and therefore necessarily understood to be commanded or forbidden by God.... Now the Law of Nature is so unalterable that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things to which it does not extend.<sup>45</sup>

Reasoning within this framework, Grotius is able with some success to assert the *validity* of a system of natural law independent of the existence or characteristics of God. His difficulty arises when he attempts to designate the *content* of this law, for his "natural" rules of behavior are substantiated primarily through Biblical reference. Thus although there may be universally true standards of right and wrong irrespective of the truth of Christianity, these principles of morality are known to mankind only through divine revelation.

Absolutism in ethics was unable to survive the destruction of the medieval *Weltanschauung*.<sup>46</sup> Failure of traditional theories of natural justice, however, does not limit the science of jurisprudence to a critically neutral compilation of empirical data concerning positive law. The importance of ethical evaluation in legal scholarship has not diminished:

44. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 65 (1958).

45. GROTIUS, *op. cit. supra* note 19, at 21-22.

46. While it would hardly seem possible to eradicate completely from legal practice all the latent influence of unacknowledged axioms of natural law, for a variety of reasons, the axioms of natural law have been deeply discredited. The conflict between the axioms of substantive and formal natural law is insoluble. Evolutionist theories have been at work in various forms. All meta-juristic axioms in general have been subject to ever continuing disintegration and relativization. In consequence of both juridical rationalism and modern intellectual skepticism in general, the axioms of natural law have lost all capacity to provide the fundamental bases of a legal system. Compared with firm beliefs in the positive religiously revealed character of a legal norm or in the inviolable sacredness of an age-old tradition, even the most convincing norms arrived at by abstraction seem to be too subtle to serve as the basis of a legal system. Consequently, legal positivism has, at least for the time being, advanced irresistibly.

WEBER, *op. cit. supra* note 28, at 297-98.



Historically, philosophers have spoken of "natural" or "in-alienable" rights as the precipitating factor behind the assertion of interests and of "natural law" as the embodiment of these controlling principles that should govern the dispensing of justice. Today, the moral or ethical principles that are involved in the assertion of interests or that influence judicial decision commonly are referred to as "values" or a sense of justice or injustice—a feeling of right and wrong. No matter what terminology we adopt, a realistic appraisal of the judicial process cannot overlook the important role played by the moral element in both litigation and decision-making.<sup>47</sup>

Today, however, concepts involving temporally and spatially static definitions of good and evil have been replaced by a relativistically constructed morality. Authorities admit: "There is no eternal law. The law that is suitable for one period is not so for another; we can only strive to provide every culture with its corresponding system of law."<sup>48</sup>

#### 4. *Anglo-American Ethnocentrism*

In the war crimes trials the convicted were found guilty of non-conformity with standards of justice accepted even today by only a minority of mankind. Concern for the dignity of the individual and the placing of high value on life would seem possible only in a materially wealthy, technologically advanced democratic state.

Needless cruelty was formerly the rule in warfare. The Bible records:

And they warred against the Midianites, as the Lord commanded Moses; and they slew all the males.... And the children of Israel took all the women of the Midian captives, and their little ones, and took the spoil of all their cattle, and all their flocks, and all their goods. And they burnt all their cities wherein they dwelt, and all their goodly castles, with fire.... And Moses was wroth with the officers of the host.... And Moses said unto them, Have ye saved all the women alive?... Now therefore kill

47. DAVIS, FOSTER, JEFFERY & DAVIS, *op. cit. supra* note 18, at 138.

48. ALLEN, *LAW IN THE MAKING* 25 (6th ed. 1958). Modern juridical "postulates are set within a context of cultural relativism, are statements of what is most important in our time and place, and are subject to change. They are not regarded as 'absolute' and are to be weighed and balanced, compromised and adjusted; but, by and large, they express policy factors that are dominant in contemporary judicial thinking." DAVIS, FOSTER, JEFFERY & DAVIS, *op. cit. supra* note 18, at 141. For an excellent study of the relationship between natural law and positive law with regard to war crimes trials see Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961). See also Schwarzenberger, *The Eichmann Judgment: An Essay in Censorial Jurisprudence*, 15 CURRENT LEGAL PROBLEMS 248 (1962).

every male among the little ones, and kill every woman that hath known man by lying with him.<sup>49</sup>

Absence of means of mechanized production has required extensive reliance on slavery by the great civilizations of the past.<sup>50</sup> One must remember that in the United States only a century ago this institution was strongly supported and even considered by some to be divinely sanctioned.

Throughout history established institutions have frequently sacrificed the sanctity of the individual on altars of reputedly higher forms of justice. The most obvious example of the destructive capacity of misguided fanaticism may of course be found in the Church persecutions for witchcraft during the late Middle Ages. Catholic theology reconciled belief in the benevolence of God with the obvious presence of evil on earth through the construction of an elaborate mythology of evil supernatural beings.<sup>51</sup> The Bible commands: "Thou shalt not suffer a witch to live."<sup>52</sup> This directive was taken quite literally. Methods of determining the guilt of those accused of witchcraft showed the extent to which the administrators of the City of God had departed from the precepts of the Sermon on the Mount.<sup>53</sup> Those found guilty were generally dispatched by burning them at the stake:

49. *Numbers* 31:7-17.

50. [S]lavery on a massive scale was a fundamental pillar of nearly every ancient economic society. In Greece, for instance, the deceptively modern air of the Piraeus masks the fact that much of the purchasing power of the Greek merchant was provided by the labor of 20,000 slaves who labored, under sickening conditions, in the silver mines of Laurentium. At the height of "democratic" Athens, it is estimated that at least one-third of its population were slaves. In Italy of 30 B.C., some 1,500,000 slaves—on the latifundia, in the galleys, the mines, the "factories," the shops—provided a major impetus in keeping the economic machinery in motion. Seneca even tells us that a proposal that they wear special dress was voted down lest recognizing their own number, they might know their own strength.

HEILBRONER, *THE MAKING OF ECONOMIC SOCIETY* 24 (1962).

51. In 1484 Pope Innocent VIII "issued the Bull *Summis desirantes affectibus*, in which he expressed his anxiety about intercourse with the devil: 'Not without immense grief have I recently learned that in certain parts of Germany, particularly in the regions of Mainz, Trier, Salsburg and Bremer, very many persons of both sexes, forgetful of their own weal and straying from the path of the Catholic Church, have sinfully consorted with devils in male and female form.'" LEWINSOHN, *A HISTORY OF SEXUAL CUSTOMS* 125-26 (Eng. ed. 1958).

52. *Exodus* 22:18.

53. Torture to procure confession was the normal procedure. SMITH, *op. cit. supra* note 17, at 286-87. "The magistrate had to put thirty-five questions to the suspect. The first question alone was enough to send the witch to the stake, irrespective of the others. It ran: 'Believest thou in witches?' If the accused answered 'yes' she was versed in witchcraft; if she answered 'no' she was guilty of heresy." LEWINSOHN, *op. cit. supra* note 51, at 126. "Proof of their guilt was mainly established in this wise:

Nicholas Reny boasted in his book on demonology that within fifteen years he had sent eight hundred persons to death for witchcraft in Lorraine, and added 'justice has been so ably administered at my hands that in one year sixteen witches have taken their own lives rather than come before me.' A bishop in Wurzburg claimed 1900 in a five year period; another in Como, 100 in one year; another in Nancy, 800 in 16 years; another in Bamberg, 600 in 10 years, while at Geneva, the home of Calvin, 500 were executed in three months and the Parliament of Toulouse distinguished itself by burning 400 in a single day. A total of 7,000 were said to have been burned at Treves. Bouquet boasted of having burned 600 lycathropes, and it has been asserted that the Lutheran, Benedict Corpzov (1595-1666), who claimed that he had read the Bible 53 times, passed sentence on 20,000 Satanists. The slaughter was less in England, but one recent estimate puts the figure at some 30,000 people hanged or burned between 1542 and 1736. How many people were tried or otherwise persecuted for witchcraft in Europe during the whole Christian Era is unknown; estimates run as high as several million, and a much larger figure would be required to encompass all those who were indirectly brought into misery by the struggle to defend God and man against the devil.<sup>54</sup>

Nineteen were executed as a result of the Salem witch trials of 1692. During them, "a dog was put to death at Andover for bewitching several people, which balanced the accounts between Eastern and Western Hemispheres; in the year 1474, a diabolical rooster, for the heinous and unnatural crime of laying an egg, had been solemnly tried, condemned, and publicly burned at the stake by the church authorities at Basle."<sup>55</sup>

Members of the Anglo-American community frequently forget the barbarity of the British penal code until the early nineteenth century:

It was unique in the world inasmuch as it listed between 220 and 230 offenses to be punished by death. They included the stealing of turnips, associating with gypsies, damaging a fishpond, writing threatening letters, impersonating out-pensioners at Greenwich Hospital, being found armed or disguised in a forest,

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their feet and hands being bound together they were thrown into the water. If they sank and were drowned they were innocent; but if they remained floating on the surface they were pronounced guilty, and were burnt." HEINE, *RELIGION AND PHILOSOPHY IN GERMANY* 30 (Snodgrass trans. 1882). "A woman was thus drowned...near Danzig, as late as 1836." LEWINSON, *op. cit. supra* note 51, at 126.

54. SMITH, *op. cit. supra* note 17, at 292-93.

55. *Id.* at 294.

park or rabbit warren, cutting down a tree, poaching, forging, picking pockets, and so on.<sup>56</sup>

Children were frequently put to death, often for mere theft. In 1808 a girl of seven was hanged at Lynn.<sup>57</sup> The penalty of execution for treason was designed not merely to extinguish life but also to torture and disgrace:

The sentence on a traitor was that he must be drawn on a hurdle from the gaol to the place of execution, and when he came there he must be *hanged by the neck, but not till he be dead*, for he must be *cut down alive*, then his bowels must be taken out and burned before his face, then his head must be severed from his body, and his body divided into four quarters, and these must be at the king's disposal.<sup>58</sup>

Disregard of the individual in England during this period was of course not confined to the police, the legislature, and the judiciary. The steam engine had been perfected to the point of utility during the latter half of the eighteenth century. The entrepreneurial activity of the industrial revolution reduced the urban lower classes to a position akin to slavery. Since the workers were not owned by the employers but labored for a wage, there was not even concern for individual welfare on the basis of protection of capital investment.<sup>59</sup>

56. KOESTLER & ROLPH, *op. cit. supra* note 21, at 28. The severity of the law was mitigated by the reluctance of juries to convict and a liberal application of "benefit of clergy," a rule permitting those able to read to escape execution. The passage chosen to test literacy was always the first verse of the Fifty-First Psalm, "so prisoners who were unable to read learned it by heart, and, as they knelt in the dock, held the Bible open at Psalm 51 (found for them by the gaoler), and pretended to be reading." *Id.* at 37.

57. *Id.* at 33.

58. Poland, *Changes in the Criminal Law and Procedure Since 1800*, in *A CENTURY OF LAW REFORM* 43 (1901). Reprinted in COHEN & COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 355 (1951).

59. A committee of Parliament appointed in 1832 to examine working conditions recorded this testimony from a factory overseer:

Q. At what time in the morning, in the brisk time, did these girls go to the mills?

A. In the brisk time, for about six weeks, they have gone at three o'clock in the morning and ended at ten or nearly half past at night.

Q. What intervals were allowed for rest and refreshment during those nineteen hours of labor?

A. Breakfast a quarter of an hour, and dinner half an hour, and drinking a quarter of an hour.

Q. Was any of that time taken up in cleaning the machinery?

A. They generally had to do what they call dry down; sometimes this took the whole time at breakfast or drinking.

Instances of barbaric cruelty are not limited to the distant past. The leaders of modern totalitarian Russia, a state represented on the Nuremberg Tribunal, give little indication of abandoning the terrorist principles of the Stalin era. In the 1930's the government of this nation liquidated or transported to the wastes of Siberia an estimated three million kulak peasants who had resisted compulsory collectivization. As an ally of Germany it participated in the absorption of the defenseless Eastern European nations, and "deported innocent people to the interior of Russia with such brutality that hundreds of thousands of them appear not to have survived."<sup>60</sup> During the same period a large portion of the Communist ruling caste itself was destroyed through senseless purges.<sup>61</sup>

### 5. *German Behavior*

Although we are of course unable to condone the actions of the German people before and during the Second World War, we may perhaps with this background understand them. When placed within the context of German life and thought, the horrors perpetrated seem less unnatural.<sup>62</sup>

The liberal tradition in Germany, evident in the works of Goethe and the disorders of 1848, was eclipsed by nationalistic sentiment during the

Q. Had you not great difficulty in awakening your children to the excessive labor?

A. Yes, in the early time we had to take them up asleep and shake them.

Q. Had any of them any accident in consequence of this labor?

A. Yes, my eldest daughter...the cog caught her forefinger nail and screwed it off below the knuckle.

Q. Has she lost that finger?

A. It is cut off at the second joint.

Q. Were her wages paid during that time?

A. As soon as the accident happened the wages were totally stopped.

TAWNEY, BLAND & BROWN, *ENGLISH ECONOMIC HISTORY, SELECTED DOCUMENTS* 510 (1914).

60. KENNAN, *RUSSIA AND THE WEST UNDER LENIN AND STALIN* 333 (1961).

61. The purges took that fantastic course which defies the power of description and nearly defies the imagination. Heads rolled by the thousands, the tens of thousands, probably even the hundreds of thousands. A process of terror and panic, mutual denunciation and mutual extermination, was set in motion which is probably without parallel in modern history. In a vast conflagration of mock justice, torture, and brutality, at least two thirds of the governing class of Russia literally devoured and destroyed itself. The jailors and judges of one day were the prisoners and victims of the next... For two years [Stalin] let the conflagration proceed... One of the last to be shot was the Grand Inquisitor himself—Yerzhov. He belonged to that final category of those referred to in Russia as "the witnesses," those who had to be killed because they had seen too much and knew too much.

*Id.* at 307-08.

62. See generally LEWIS, *IT CAN'T HAPPEN HERE* (1935).

course of the nineteenth century. Friedrich Ludwig Jahn, "Father" Jahn, founder of the gymnastic movement, wrote in 1799:

Of all the heroes who shine upon the world as eternal stars, through all the regions to the end of the world, you, oh patriot, are my hero: you who are often misunderstood by the men give yourself entirely to the fatherland, feel only its sorrows, think only of its greatness, live and die for the fatherland.<sup>63</sup>

Adam Muller stated in lectures delivered in Berlin in 1810: "The great confederation of European nations will one day be a reality and... will fly the German flag, for everything that is great, everything that is thorough, everything that is enduring in European institutions is German...."<sup>64</sup> These beliefs became entrenched in German thought through emphasis upon the folk culture at the expense of more recent western ideologies. Wagner's operatic themes illustrate this process.

At the same time cultural shallowness illuminated by the urban conformity of nascent industrialization nurtured the concept of the hero, one who could rise above mediocrity to lead mankind to higher levels of achievement. The earliest proponent of this philosophy of "Heroic Vitalism"<sup>65</sup> was the Englishman Thomas Carlyle, who advocated return to a state of Darwinian conflict to assure emergence to eminence of the highest type of man. He maintained that "all force is moral."<sup>66</sup> These ideas were extended by Friedrich Nietzsche.<sup>67</sup> Although this German

63. KOHN, *THE MIND OF GERMANY* 81 (1960).

64. *Id.* at 67.

65. See BENTLEY, *A CENTURY OF HERO WORSHIP* (2d ed. 1957).

66. *Id.* at 68. "An American lady, Margaret Fuller, visiting Carlyle in 1846,... reveals some of the forces which made Carlyle a philosopher of heroism. 'All Carlyle's talk that evening,' she says, 'was a defense of mere force, success the test of right. If people would not behave well, put collars round their necks. Find a hero and let them be slaves.'" *Id.* at 30.

67. Bentley has summarized a portion of Nietzschean philosophy in these words:

Society cannot take root, or reach beyond the family, until the inevitable *bellum omnium contra omnes* has been checked by the invention of the state. But, says Nietzsche, war does not thereupon cease. War gathers in states like rain in the clouds. Men still strive for mastery, and life remains dangerous. Out of the tension comes great art, the tonic *par excellence* which preserves men from pessimism. The embodiment of an abundant vitality, art cures the devitalized.

Out of the bitter struggle for survival and mastery, Nietzsche's theory continues, a few individuals emerge with the full stature of manhood. The struggle is mitigated by no human rights. Conflict is the law of life, from the conflict of the white corpuscle with the typhoid germ to the conflict of embattled nations. The protoplasm itself sends out its pseudopodia in its effort to absorb and overcome. Life is defined as a lasting form of force-establishing processes, in which the various contending forces grow inequally. If we are to *accept* the nature of the world instead of flying in its face, we must, according to Nietzsche, recognize that power confers the first right, and that there is no right that is

philosopher's thoughts,<sup>68</sup> taken out of context and distorted, became a source of National Socialist propaganda, his conclusions were at least ambiguous.<sup>69</sup> Eric Bentley states that Nietzsche "praises cruelty, struggle, and worldliness, all as a prelude to a prayer-meeting with the animals."<sup>70</sup>

The German people had experienced the glories of power as the center of the Holy Roman Empire, an at least partially effective supranational unit from the crowning of Charlemagne by the Pope in 800 until the Church achieved dominance in secular affairs in about the twelfth century.<sup>71</sup> The geography of the Renaissance made Germany a territory of transition between the developing states of Western Europe and the Slavs of the East. A liberal tradition arising in the lands along the Rhine was balanced by Prussia's totalitarian ideology.<sup>72</sup> In the eighteenth century Friedrich the Great led this Eastern principality to a position of great power in German politics which was with difficulty maintained until the Napoleonic Wars.

Under Bismarck Prussia achieved formidable military strength, defeated rival Austria in a three-week-war in 1866, and gained supremacy on the continent after easily conquering France by 1871. On January

not at bottom usurpation. The state is the objectification of the predatory instinct.

*Id.* at 143. See generally JASPERS, *NIETZSCHE & CHRISTIANITY* (Gateway ed. 1961).

68. For example: "I don't find it easy to believe that little people are necessary"; "You say: the good cause sanctifies war. I tell you: the good war sanctifies every cause." *Id.* at 88, 120.

69. "In 1917 alone, one hundred and forty thousand copies of the pocket edition of *Thus Spake Zarathustra* were sold in Germany." *Id.* at 353. "The Boston *Evening Transcript* (April 24, 1940) carried the headline: Hitler War Urge Blamed on Insane Philosopher, Nietzsche Nazi Chief's Favorite Author." *Id.* at 255.

70. *Id.* at 132. For instance, Nietzsche also stated: "Therefore the highest beauty is found in Jewesses." *Id.* at 155. "It is a matter of honor with me to be absolutely clear and unequivocal in relation to anti-Semitism, namely, *opposed* to it as I am in my writing." NIETZSCHE, *THE PORTABLE NIETZSCHE* 457 (Kaufmann ed. 1954). "An anti-Semite certainly is not any more decent because he lies as a matter of principle." *Id.* at 641. "I have been reading the life of *Thomas Carlyle*, this unconscious and involuntary force, this heroic-moralistic interpretation of dyspeptic states." *Id.* at 521. "Culture and the state—one should not deceive oneself about this—are antagonists: '*Kultur-Staat*' is merely a modern idea. One lives off the other, one thrives at the expense of the other. All great ages of culture are ages of political decline: what is great culturally has always been unpolitical, even *anti-political*. . . . At the same moment when Germany comes up as a great power, France gains new importance as a cultural power. . . . It is already known everywhere: in what matters most—and that always remains culture—the Germans are no longer worthy of consideration." *Id.* at 509. "*Deutschland, Deutschland über alles*—I fear that [slogan brought about] . . . the end of German philosophy." *Id.* at 506.

71. BOSSENBOOK, *THE GERMAN MIND* 15-47 (1961). See generally TAYLOR, *THE COURSE OF GERMAN HISTORY* (1946).

72. *Id.* at 2-3.

18 of that year in the Hall of Mirrors in Versailles Prussia's William I was proclaimed Emperor of a union of the German states.

The First World War, the result of a complex political impasse for which neither side was totally to blame, was concluded by German defeat of Russia in the East and subsequent defeat of Germany in the West. Military failure of Germany's totalitarian leaders led to the founding of the Weimar Republic and the granting of responsibilities of democracy to a citizenry uneducated in self-government. The world depression of the 1930's, added to the burden of reparation payments,<sup>73</sup> spelled economic collapse to a nation already demoralized by political impotence.

The rightist reaction to the liberal atmosphere of the post-war period, given added momentum by chaotic domestic conditions, thrust the extremist Hitler into a position of power within the democratic regime in 1933. This National Socialist leader was able to gain control of the state and remold its institutions in patterns established in totalitarian Russia and fascist Italy. The brutality of police-state measures was thought by many to be excused by the need for efficiency in combating intolerable economic conditions.

Although following the First World War attempts were made to outlaw international conflict, war was commonplace throughout the 1930's. Before Germany's aggressions were initiated the Spanish Civil War had been fought, Italy had defeated a virtually defenseless Ethiopia, and Japan had invaded China. Hitler's moves against Eastern Europe have been viewed as an attempt to obtain lands partly inhabited by Germans which the nation thought it had earned by defeating Russia two decades earlier. Germany, losing the gamble that its seizures would be allowed to continue without interference from the western democracies, found itself at war against practically the rest of mankind.<sup>74</sup>

#### CONCLUSION: CAUTION

The actions and policies of the Third Reich appear at least comprehensible when placed in their historical ideological context. Legal enforcement of a code of ethics assigning primary importance to the liberty and dignity of all is a recent and localized phenomenon. We find it successful and rightly wish to encourage its universal adoption. In our support of our postulates, however, we must not discard the possibility that other

73. See KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920). The fantastic size of the burden imposed by the Allies may be gathered from an enumeration of the goods demanded in the weeks immediately following the Armistice. The list includes "500 locomotives, 150,000 freight cars, and immense quantities not only of war material but of farm equipment, including horses (150,000), cattle (880,000), sows (15,000), sheep (897,000), and goats (25,000)... These stipulations... were fulfilled." REINHARDT, *GERMANY: 2000 YEARS* (2d ed. 1960).

74. See TAYLOR, *THE ORIGIN OF THE SECOND WORLD WAR* (1962).