

•ABORTION AND THE NUREMBERG PROSECUTORS: A DEEPER ANALYSIS

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FROM LATE 1945 TO LATE 1946, twenty-one leading Nazis were tried at Nuremberg by an international tribunal made up of American, British, French, and Soviet judges. From late 1946 to the spring of 1949, 185 lesser-known Nazis were tried before American military tribunals. The American military, in the American zone of occupation, held twelve trials before six different military tribunals, with three American judges on each tribunal. The RuSHAⁱ or Greifelt Case was No. 8 (of 12), Military Tribunal No.1 (of 6). There were fourteen defendants in the RuSHA or Greifelt Case: Heinrich Himmler's deputy Ulrich Greifelt, after whom the case was alternately named, also Otto Hofmann, the second head of RuSHA, Richard Hildebrandt, the third head of RuSHA, and eleven others. There were some two dozen charges made in this trial, and abortion was one of them. On four different occasions I have given a paper on this trial before scholarly bodies, focusing on the subject of abortion.ⁱⁱ

What exactly was the nature of the Nuremberg Military Tribunal's condemnation of abortion at this trial? The Tribunal had stated: "The acts and conduct, as set forth in this Judgment, and as substantially charged in the indictment ["encouraging and compelling abortions"] constitute crimes against humanity... and... war crimes."ⁱⁱⁱ

In my paper I maintained that, according to this judgment, *all* abortions were condemned by the Tribunal as war crimes and crimes against humanity.^{iv} It was my interpretation of the word "encouraging" in the indictment, but I felt uneasy at my interpretation. I decided then to contact the people who were actually involved in the Nuremberg prosecutions.

The prosecutor who drew up the indictment at the RuSHA Case, James McHaney, died in April 1995 after a long, incapacitating illness, and I never had a chance to speak to him. But I was able to get some input from other former Nuremberg prosecutors for their comments on my interpretation. I sent copies of my paper to sixteen surviving Nuremberg prosecutors. With each manuscript I also sent a questionnaire which had

the following three questions:

- 1) Would you give a biography of yourself?
- 2) Would you briefly state your role at the Nuremberg Trials?
- 3) Realizing that you were probably not part of the RuSHA (Greifelt) Case, after having read the enclosed manuscript, do you agree with the prosecutor's arguments and the Tribunal's Judgments in that case concerning abortion?

Of the sixteen individuals to whom I sent manuscripts and forms, ten replied, but two of them stated that they were unfamiliar with RuSHA and thus had no opinion. This left eight who did have opinions, and their replies forced me to give the abortion-Nazism-Nuremberg story a deeper analysis.

WHAT THE FORMER PROSECUTORS SAID ABOUT CONDEMNATION OF ABORTION AT NUREMBERG

Five of the former prosecutors first expressed interest in this paper with comments such as:

- "It presented a great deal of information of which I was previously ignorant."^v
- "...the RuSHA manuscript is scholarly and objective and contributes a great deal toward understanding the problem of abortion under the Nazis."^{vi}
- "I found your research article most interesting."^{vii}
- "Congratulations on your project!"^{viii}
- "Interesting."^{ix}

It is nice to know that the paper was respectable in their eyes because all eight of the former prosecutors disagreed with my conclusion that all abortions were condemned at Nuremberg. They stated that abortions were condemned by the tribunals because they were done for genocidal reasons, because they were forced, or both.

Two of the respondents stated that Nazi abortion was wrong only because it was used for racial reasons in Hitler's genocidal plan:

- "...as part of a war effort or as a policy imposed on a conquered territory, I think abortion is a crime against humanity."^x
- "...the purpose and reason for the abortion was ethnic and racial,

and no one could justify that kind of motivation.”^{xi}

Three others stated that the Nazi abortions were wrong only because they were forced or pressured:

- “I believe that the prosecutor stressed... forced abortions.... I believe a pregnant woman should have more to say about [a] possible abortion than any state, church, or male-dominated society.”^{xii}
- “I always assumed that the findings of the Tribunal on abortion referred to involuntary abortion or pressure.”^{xiii}
- “I do not believe that the Nuremberg Tribunal ever considered abortion to be a crime against humanity unless the female was forced to submit to the operation, or was coerced to do so.”^{xiv}

Two of the eight prosecutors questioned stated that Nazi abortions were wrong for both reasons, racial-genocidal and forced-pressured, but no other:

- “I cannot accept the prosecutor’s [James McHaney, the RuSHA Prosecutor] contention that even truly voluntary abortions were a war crime and crime against humanity.... Only when such abortions advanced the Nazi Genocidal plan.... I might be willing to hold those Nazis guilty because, for them, the woman’s true consent was an incidental rather than a significant element in the execution of the genocidal plan.”^{xv}
- “I am in complete agreement that if abortion of pregnant women in the occupied territories... was coerced by the Nazi Government *as part of its overall policy of genocide*... such acts constituted both war crimes and crimes against humanity.... The ‘encouragement’ of abortion was in fact another form of coercion by the Nazi Government and was not a truly voluntary decision [*sic*] by the affected woman, such ‘encouragement’ can be equated with forced abortions.”^{xvi}

Finally, one of the former prosecutors was ambiguous on the question:

- “...the manuscript cannot avoid the ambiguities in the prosecutor’s case and in the Judgment on the question.... I have always had some difficulty in following all the arguments of the prosecution and the finding of the Court. [Your] manuscript raises the same

questions.”^{xvii}

We all have biases and desires about what we would like to see. I should also note, however, the admitted biases in four of the prosecutors:

- “You may not see any difference but my position is that I have no right to dictate moral behavior to anyone. I am personally against abortion, as are our four daughters. They, like myself, arrived at that position by their own free will.”^{xviii}
- “I do not regard a fetus as a human being before birth but only as a potential human being.... I do not like abortion as a birth control method; at the same time, medically supervised abortions are preferable to back-alley butcheries.... I also recognize that others may strongly disagree with my views.”^{xix}
- “The Nuremberg Trials should have concentrated more on the problems of women and specific wrongs done to women.”^{xx}
- “I personally disagree with those who believe abortion is a crime *per se*. In my view, whether to abort a pregnancy is a personal and not a political or governmental matter. To equate abortion with murder and illegitimize the procedure would, in my view, penalize the poor and encourage the return to back-alley medical butcheries. I am currently an open-minded, skeptical, secular humanist member in good standing of our local Unitarian Church.”^{xxi}

To recapitulate, the eight respondents, some with their own biases (as we all have), thus state that the RuSHA Trial condemned the Nazi use of abortion for one of two reasons or both:

- 1) Only because the abortions were done for racial-genocidal reasons.
- 2) Only because the abortions were forced or pressured.

A DEEPER ANALYSIS OF THE RUSHA CASE

In answering these two points made by the respondents, I will look at some old evidence in a new way and present some new evidence. I will then draw a conclusion.

Point One: Nazi abortions were wrong only because they were done for racial-genocidal reasons. Four of the eight respondents stated this.^{xxii}

When I first approached this subject not too long ago, this was also my own initial conclusion about what the Military Tribunals condemned in the RuSHA Case. On reflection, however, I began to look at the trial in a new way by focusing hard on the indictment, something I had not done before. Under “Crimes Against Humanity” is the statement which, upon quick reading, seems to uphold the conclusion that the Tribunal condemned abortion because of racial-genocidal reasons:

The object of the program [RuSHA] was to strengthen the German nation and the so-called “Aryan” race at the expense of such other nations and groups... by the extermination of “undesirable” social elements. This program was carried out in part by... (b) encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labor and of weakening Eastern nations.^{xxiii}

Mentioned also, however, were:

- (a) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of “racial value.”
- (c) Taking away, for the purposes of extermination or Germanization, infants from Eastern workers in Germany.^{xxiv}

Kidnapping children and forcefully taking infants from their parents are always wrong! They do not become wrong only when done for racial-genocidal reasons. The indictment of encouraging and compelling abortions, therefore, must be understood in this light. It is quite possible that the prosecutor thought abortion *per se* was wrong, just like kidnapping and the ferreting away of newborns are wrong.

Point Two: Nazi abortions were wrong only because they were pressured and forced. Five of the eight respondents stated this.^{xxv} The Tribunals found “encouraging and compelling” abortions, as charged in the indictment, to be crimes against humanity as well as war crimes.^{xxvi} Almost everyone today is against compelling (forcing) abortion. The problem in the indictment and subsequent judgment by the Tribunal, however, concerns the word “encouraging” (*Förderung* in German). Did it mean pressure? If it did, this is close to force. Did it have a broader

meaning? Did it mean, in other words, promoting abortions as something positive or progressive? If so, then abortion *per se* was condemned.

The dictionary defines “encouraging” as “to stimulate, ...in a bad sense, to abet, hound on.”^{xxvii} Thus the dictionary, on the one hand, seems to indicate that “encouraging” can mean *pressure*, so that the Tribunal’s judgment on the indictment of “encouraging and compelling” can read as “pressuring and forcing,” which is the conclusion of five of the Nuremberg prosecutors. The dictionary also defines “encouraging” as “to allow or promote the continuance or development of.”^{xxviii} Thus the dictionary, on the other hand, seems to indicate that “encouraging” can mean *condoning*, so that the Tribunal’s judgment on the indictment of “encouraging and compelling” could read as “condoning and forcing.” The German word used in the indictment was *Förderung*,^{xxix} which can mean the furthering or hastening (pressuring) or promoting or supporting (condoning).^{xxx} Hence, semantics gives us a mixed message.

At this point we should look at the old evidence again, but now with a more penetrating eye. James McHaney, the RuSHA prosecutor at Nuremberg, the one who drew up the indictment “encouraging and compelling,” possibly revealed the intention of the indictment in his closing statement when he said:

Assuming that the abortions performed upon approval of [RuSHA] were made upon request, it is obvious that under the Nazi system of terror the pregnant women had no other choice but to request abortion.

Even under the assumption that her request was *genuinely voluntary*, it constitutes a crime under Section 218, German Penal Code. *At the same time it constitutes a war crime and a crime against humanity* [emphasis mine].^{xxxi}

I believe that a fair appraisal of what McHaney said here in the first paragraph is that the Nazis were guilty of pressuring and forcing abortions and of doing so for racial-genocidal reasons, the two points made by the former Nuremberg prosecutors. In the second paragraph, however, he is saying that the practice itself is also wrong, whether it is voluntary or forced, and for whatever the reason. Hence, I think that the word “encouraging” in the indictment, drawn up by Prosecutor McHaney, and the subsequent Judgment of the Tribunal, has a *double meaning*. It means

force and pressure, and it also means condoning and promoting.

There is also some new evidence which I have not previously presented, namely, a letter sent to me by Telford Taylor, who was in charge of all twelve American Military Tribunals from 1946 to 1949 and who is the author of the 1992 best-seller, *The Anatomy of the Nuremberg Trials*.^{xxxii} He said: “Dear Professor Hunt: I read your paper with pleasure, and general agreement.... I would be interested to see the ultimate result.”^{xxxiii} While not a ringing endorsement, it is still some indication that he thought my conclusions to be correct.

Our story is not over, however. One prosecutor told me: “I know Jim McHaney quite well. I doubt that he would oppose voluntary abortion and deem it a crime were he still alive.”^{xxxiv} McHaney’s son expressed similar sentiments to me, describing his father as a moderate, with no particular church affiliation.^{xxxv} McHaney’s obituary and accounts of his life describe a man who was an ecologist (chief counsel to the Arkansas Department of Pollution Control and Ecology for over twenty years)^{xxxvi} and who drafted legislation allowing mixed alcoholic drinks to be served in Arkansas, hardly the activities of a staunch conservative.^{xxxvii}

Despite all of this, however, McHaney said what he said, and it is part of the Nuremberg record. In addition, if one takes a hard look at the trial testimony again, there are indications that more than women’s liberties and privacy were being violated:

SS General Richard Hildebrandt: “Up to now nobody had the idea to see the interruption of [any] pregnancy as *crime against humanity*” [emphasis mine].^{xxxviii}

We also have indications that Prosecutor McHaney, in the trial testimony, considered the unborn as human beings subject to the protection of the law:

McHaney: “But protection of the law was denied to *unborn children* [emphasis mine] of the Russian and Polish women in Nazi Germany. Abortions were encouraged and even forced on these women.”^{xxxix}

Finally, again referring to the summation, McHaney made clear allusions to lives being taken when there is an abortion: “The performance of

abortions on Eastern [female] workers is also a crime against humanity.... It constitutes an 'act of extermination' ...and an 'inhumane act'."^{xi} James McHaney, the prosecutor who drew up the indictment and who conducted the trial, was condemning a form of killing as well as condemning the coercion of women.

CONCLUSION

The Nazis performed abortions through RuSHA for two reasons:

- 1) *To keep women available as slave labor.* These abortions were forced and pressured and, most certainly, they compromised women's liberty and deeply violated their privacy.
- 2) *To slow down Eastern (Slavic) reproduction.* Here we see that the Nazis saw abortion as an act of killing. They would, so to speak, nip a life in the bud.

Nuremberg, I believe, condemned both the violations of liberty and the violations of life as far as abortion was concerned. Like the kidnapping of children and the seizing of newborns, also prosecuted at this trial, abortions were seen as wrong at any time, not just when done for racial-genocidal reasons.

In 1948, the very year the Nazis were convicted in the RuSHA Case and abortionists were being convicted in the United States,^{xii} the World Medical Association formulated the Declaration of Geneva, or Geneva Code. This was in deliberate reaction to the Nazi experience and was intended to modernize the Hippocratic Oath. It stated: "I [the physician] solemnly pledge to consecrate my life to the service of humanity.... I will maintain the utmost respect for life from the time of *its conception*" [emphasis mine].^{xiii} Ironically, a quote from the letter of one of the former Nuremberg prosecutors to me can best summarize this paper: "I believe you are correct in pointing out the immense change in American public opinion regarding voluntary abortion during the last half century."^{xiiii}

Appendix: the Nuremberg Prosecutors

Those who held abortions wrong because done for racial-genocidal reasons:

- Fenstermacher, Theodore. Chief prosecutor in the “Hostage” or “South-east” Case against two Field Marshals and ten high-ranking generals.
- Johnson, Esther Jane. Assistant in the prosecution of the SS Trial and assistant to James McHaney, who later prosecuted the RuSHA Case.

Those who held abortions wrong because pressured and forced:

- Harris, Whitney. Presented the case against Ernst Kaltenbrunner, Gestapo Head, at the first (international) trial.
- Rockler, Walter J. Prosecuted German bankers in the last (12th) trial, “The Economic Ministries.”
- Sprecher, Drexel A. Director of the I.G.Farben Trial Team and editor-in-chief of *Trials of War Criminals before the Nuremberg Military Tribunals* (15 volumes of the 12 trials held by the Americans in their zone of occupation).

Those who held abortions wrong for both reasons:

- Caming, H. W. William. Prosecutor of members of the German Foreign Office and other governmental ministers of the Nazi Regime.
- Meltzer, Bernard D. The Edward H. Levi Distinguished Professor Emeritus of Law, University of Chicago. Presented the case against Walter Funk, Reich Economics Minister, at the first (international) trial.

Ambivalent position:

King, Robert D. Prosecuted the “Justice Case” against sixteen judges and lawyers of the Nazi Regime.

NOTES

i. RuSHA is a German acronym for *Rasse und Siedlungshauptamt* (Race and Resettlement Office).

ii. “Victims Without Names: Abortion and the Nuremberg Trials,” Fifth Annual Conference on the Holocaust, Hebrew University, Jerusalem, Israel (Dec. 29-31, 1996); “Nuremberg Revisited: Abortion as a Human Rights Issue,” The Fourteenth Annual Conference on the Holocaust (Auschwitz and Modernity), Millersville University, Millersville, Pa. (April 9-10, 1995); The New England Historical Association, Brown University, Providence, R.I. (Oct. 23, 1993); University Faculty for Life, Yale University, New Haven, Ct. (June 6, 1993). The first listed above was a longer version with different title than the other three.

iii. *Trials of War Criminals before the Nuremberg Military Tribunals, October 1946-April 1949*, Vols. IV-V, “The RuSHA Case” (Washington, D.C.: U.S. Gov’t. Printing Office, 1949), V, 153, 160-61, 166. See also IV, 610, 613. Cited hereafter as TWC.

iv. “Nuremberg Revisited: Abortion as a Human Rights Issue,” *Life and Learning III: Proceedings of the Third University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: University Faculty for Life, 1993) pp. 258-59.

v. Letter from Theodore Fenstermacher to the author, August 2, 1996. Fenstermacher was chief prosecutor in the “Hostage” or “Southeast” Case against two Field Marshals and ten high-ranking generals.

vi. Returned form from Robert D. King to the author, October 16, 1996. King prosecuted the “Justice Case” against sixteen judges and lawyers in the Nazi regime.

vii. Returned form from Esther Jane Johnson to the author, August 26, 1996. Johnson assisted in the prosecution of the SS Trial. She assisted James McHaney, who later prosecuted the RuSHA Case.

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- viii. Returned letter from Professor Whitney Harris to the author, July 1996. Harris presented the case against Kaltenbrunner, Gestapo head, in the first (international) trial.
- ix. Letter to the author from Bernard D. Meltzer, Edward H. Levi Distinguished Service Professor Emeritus of the University of Chicago, July 25, 1996. Meltzer presented the case against Walter Funk, Reich Economics Minister, at the first (international) trial.
- x. Returned form from Esther Jane Johnson to the author, August 26, 1996.
- xi. Letter from Theodore Fenstermacher to the author, August 2, 1996.
- xii. Returned form from Walter J. Rockler to the author, August 1996. Rockler prosecuted German bankers in the last (12th) trial, "The Economic Ministries."
- xiii. Letter from Drexel A. Sprecher to the author, August 25, 1996. Sprecher's record is outstanding, having directed the I. G. Farben Trial Team and having been the editor-in-chief of *Trials of War Criminals before the Nuremberg Military Tribunals* (15 volumes of the 12 trials held by the Americans in their zone of occupation), and many other posts.
- xiv. Returned letter from Whitney Harris to the author, July 1996.
- xv. Letter from Bernard D. Meltzer, July 25, 1996.
- xvi. Letter from H. W. William Caming to the author, October 15, 1996. Caming prosecuted members of the German Foreign Office and other governmental ministers of the Nazi Regime.
- xvii. Returned form from Robert D. King to the author, October 16, 1996.
- xviii. Letter from Robert D. King to the author, October 23, 1995. King returned a letter in October 1995 and a form in October 1996.
- xix. Returned form from Walter J. Rockler to the author, August 1996.
- xx. Statement of Drexel A. Sprecher to the author, October 16, 1995. I spoke to Mr. Sprecher at a conference called "Fifty Years after Nuremberg: Human Rights and the Law," held at the University of Connecticut, Storrs Campus. I am recalling his remarks from memory.
- xxi. Letter from Theodore Fenstermacher to the author, August 2, 1996.

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- xxii. Caming, Fenstermacher, Johnson, and Meltzer.
- xxiii. TWC, IV, 609-10.
- xxiv. *Ibid.*
- xxv. Caming, Harris, Meltzer, Rockler, and Sprecher.
- xxvi. TWC, V, 153, 160-61. See also IV, 610.
- xxvii. *Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon, 1989) V, 216.
- xxviii. *Ibid.*
- xxix. Records of the United States Nuremberg War Crimes Trials, *United States of America v. Greifelt et al.* (Case VIII), October 10, 1947-March 10, 1948; the National Archives, Washington, D.C., Record Group 238, Microfilm Publication (M) 8945, Roll @ 17, p. 5. Cited hereafter as NWCT. The above is the German version; references on NWCT below will be the English version.
- xxx. *Cassell's German-English English-German Dictionary*, revised (New York: MacMillan, 1978) p. 226.
- xxxi. NWCT, M.894, R.31, pp. 13-14. See also pp. 37-42.
- xxxii. Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992).
- xxxiii. Letter from Telford Taylor to the author, June 21, 1993. I wrote to him for a deeper clarification of all this on November 7, 1996, but there was no reply, for he had had a brain tumor by this time.
- xxxiv. Letter from Theodore Fenstermacher to the author, August 2, 1996.
- xxxv. Telephone conversation with son, James McHaney, Jr., June 6, 1996.
- xxxvi. See *The Arkansas Democrat*, April 15, 1995, p. B6 and March 26, 1983, p. A9.
- xxxvii. *Ibid.*, December 4, 1968, p. F1.
- xxxviii. TWC, IV, 1090.
- xxxix. *Ibid.*, p. 1077.

xl. NWCT, M.894, R.31., pp. 13-14. See also pp. 37-42.

xli. *The New York Times*, November 15, 1947, p. 19; July 15, 1948, p. 24; July 16, 1948, p. 40.

xlii. Quoted in William Brennan, *The Abortion Holocaust: Today's Final Solution* (St. Louis: Landmark Press, 1983), pp. 137-38, 142.

xliii. Letter from Theodore Fenstermacher to the author, August 2, 1996.