

NUREMBERG AND GROUP PROSECUTION*

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INTRODUCTION

The trial of the Nazi war criminals at Nuremberg for crimes against peace, war crimes and crimes against humanity involved not only the indictment of individual defendants but also the indictment of the major Nazi organizations.¹

An aspect almost completely ignored in the welter of allegations concerning the *ex post facto* basis of the Nuremberg prosecutions² is that concerning the infliction of collective or group sanctions through adjudication of group criminality.

The question touching on the use of such sanctions for the maintenance of public order has become particularly acute in recent years in democratic society faced with the threat of global violence. An ominous resort to group or collective deprivations was highlighted in the Western world during World War II by deportation of West Coast Japanese—Americans to "relocation centers" in the name of security.³ A subsequent resort to the infliction of such deprivations has become apparent in the

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1. The Nazi organizations indicted were *Die Reichsregierung (Reich Cabinet)*; *Das Korps Der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party)*; *Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterpartei* (Commonly known as the "SS") and including the *Sicherheitsdienst* (Commonly known as the "SD"); *Die Geheime Staatspolizei (Secret State Police, commonly known as the "Gestapo")*; *Die Sturmabteilungen Der N.S.D.A.P.* (commonly known as the "SA") and the *General Staff and High Command of the German Armed Forces*. See 1 NAZI CONSPIRACY AND AGGRESSION iii.

2. See Ireland, *Ex Post Facto From Rome to Tokyo*, 21 TEMPLE L. Q. 27 (1947); review of Glueck, *The Nuremberg Trial and Aggressive War*, 14 UNIV. CHI. L. REV. 319 (1947); cf. Frank, *War Crimes, Punishment For Today-Precedent For Tomorrow*, Collier's, Oct. 13, 1945, p. 11.

3. Military orders embracing sweeping restrictions upon all West Coast residents of Japanese ancestry were sustained by the Supreme Court against individuals whose loyalty was unquestioned. In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Supreme Court upheld the constitutionality of curfew orders; in *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld outright exclusion from the West Coast.

See Dembitz, *Racial Discrimination and the Military Judgment*, 45 COL. L. REV. 175 (1945); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

attempt at the control of subversive groups through legislation exemplified by the McCarran Act.⁴

While the issue of the acceptability of these latter day manifestations of group sanctions is not within the scope of this paper, the issue as to whether the use of group sanctions at Nuremberg was acceptable under democratic standards and as to whether it provided impetus or incentive for duplication on these shores embodies the central point of investigation.

A resolution of the issue requires re-examination of our dominant attitudes toward collective or group sanctions and a review of the lesson of Nuremberg.

The debate over the infliction of group sanctions at Nuremberg began in an atmosphere charged with moral indignation brought about by the disclosure of a catalogue of Nazi crime without parallel in human history.

The post war German scene confronted a bewildered world with the inescapable fact of the stupendous scale of the premeditated and carefully executed mass murder, highlighted by the crime of genocide: deliberate physical extermination with the specific intent of achieving the outright extinction of ethnic and religious groups, a crime involving millions of victims,⁵ and a process requiring the overt participation of thousands within Germany, most of whom were organized in specific organizations for that purpose.⁶ The world was presented with the spectacle of the unprecedented scale of direct and indirect participation in the commission of that crime on broad, popular levels.

The initiation of any program of war crimes prosecution confronted the Allies with the almost superhuman task of the detection of the killers and accomplices. It has become indisputable that the vast majority of the less spectacular killers of the Nazi system succeeded in submerging successfully within the broad layers of a sympathetic populace. It has become equally indis-

4. See INTERNAL SECURITY ACT OF 1950, Chapter 1024—Public Law 831, 1 U.S. Code Congressional Service, (81st Congress, 2d Sess.) 984 (1950).

5. For a summary of the toll of genocide, see McDougal and Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950); for a good discussion of Nazi concepts of legality, See Czyzak, *The Ideal Legal Order for an Occupied Nation: Polish Commentary on Mitchell Franklin*, (1951) WASH. U. L. Q. 188.

6. For the role of organizational units in the carnage see the judgment of the International Military Tribunal, 22 *Trial of the Major War Criminals* 498-523 (1946); see also KOGON, *THE THEORY AND PRACTICE OF HELL (THE GERMAN CONCENTRATION CAMPS AND THE SYSTEM BEHIND THEM)* (1950).

putable that this submergence took place well after the final disclosure of the names of wanted war criminals. The process of this reception of war criminals in the German fold was so rapid that less than six years after the German defeat, official German circles could make unequivocal demands for the amnesty of convicted mass murderers subject to prison sentences or execution.⁷ The process has its well-known historical parallel. A strong popular support of, and identification with, individuals charged with atrocities had characterized the German response to Allied demands for vigorous prosecutions after World War I.⁸

The problem confronting the United Nations at the outset of the attempt of war crimes prosecution was this: should the vast majority of physical killers be permitted to escape unscathed without even the infliction of ascertainable moral stigma in vindication of the principle of strictest individual responsibility, or should the concept of collective responsibility be used for purposes of widening the prosecution—in derogation of traditional standards of individual guilt? The problem involved a clear cut balancing of interests. While the effects of a widened prosecution appeared unforeseeable, it was clear that its abandonment would entail continued circulation within Germany of thousands of physical killers with explicit assurances of immunity.

7. See N.Y. Times, February 7, 1951, p.14, col. 1: "Germans Agitate For New Reprieves." Or *id.*, March 10, 1951, p.4, cols. 3, 4: "Gen. Baron Alexander von Falkenhausen . . . and Gen. Eggert Reeder . . . were sentenced today to twelve years' hard labor for war crimes.

A Belgian court-martial found the two Germans guilty of having ordered the execution of 240 Belgian hostages. They also were accused of the arbitrary arrest and deportation of Jews and other Belgians. . . .

West German Chancellor Konrad Adenauer said today he was 'surprised' by the sentence against General Falkenhausen. . . .

Socialist Leader Kurt Schumacher said: 'I have the impression that those who reached this verdict understood neither the political nor human problems involved.'

8. See GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT, 19-36 (1944), and particularly *id.*, 24, 25: "Though in signing the Peace Treaty the Germans had solemnly obligated themselves to deliver up the accused for trial, they soon reneged. In an article published in 1929, for the archives of German-made history, Baron von Lersner, President of the German Peace Delegation, pridefully recalls how the head of the Peace Division of the German Foreign Office came to Paris early in November to help him 'initiate diplomatic steps which would prevent the surrender' of wanted 'war criminals.' These two worthies informed the Allied diplomats that, 'the entire German Volk, without regard to class and party, is of the conviction that it is impossible to deliver up the so-called war criminals. . . .'

In Germany, feelings ran high upon receipt of the list. Von Lersner proudly relates how mass meetings were held in churches and streets, and how everywhere 'thousands upon thousands protested in the sharpest manner against the Auslieferungsauftrag.'

The need to vindicate basic rectitude standards in Germany seemed paramount. Beyond the satisfaction of this need two elements of the world audience outside Germany required antidotes to the examples of mass killings. The first was represented by the world equivalent of the German "noncriminal" elements the suppression of whose lawless impulses made mandatory, in the absence of adequate media of mass therapy, by the example of the infliction of negative sanctions against overt malefactors.⁹ The second consisted of those whose insight into their sadistic tendencies obviated the need for vicarious expiation as well as those whose sadistic tendencies were negligible to begin with. Absence from the cultural response of energetic countermeasures could be assumed to result in coarsening of the best of us in the face of the unstemmed recurrence of the vice which, though

. . . to be hated needs but to be seen.
 But seen too oft, familiar with her face,
 We first endure, then pity, then embrace.

Part of the cultural response of the Western world to the need of the moment was the demand for the indictment of the leading Nazi groups. In the light of unparalleled tension and a degree of European indignation capable of generating a St. Bartholomew's Night Massacre,¹⁰ the contemplated procedure seemed endowed with the maximum possible concern for individual justice compatible with the maintenance of public order.

I

Orientation within an adequate semantic framework must precede further discussion. The word "sanction" is employed within this paper throughout in lieu of the word "punishment."

The operative effect of the negative sanction will be seen to exceed that traditionally recognized as the effect of "punish-

9. It is no longer subject to question that the personality dynamisms which were at least partially responsible for the Nazi rampage are global in scope and effect. The Nazi crimes are thus fully capable of stimulating kindred manifestations abroad. A psychoanalytically oriented perspective need not be confined to the study of interpersonal relations but has relevancy to the international field. See Gess, *The Vanished Glory—A Problem In International Psychology*, 37 THE PSYCHOANALYTIC REVIEW 345 (1950).

10. The extent of existing European indignation need be gauged only by the extent of German pillage and murder. See, e.g., CREEL, WAR CRIMINALS AND PUNISHMENT, 15-28 (1944); for the reflection of this mood on an executive level, see ROOSEVELT, AS HE SAW IT, 188, 189 (1946).

ment," though even the latter term has proved flexible in judicial hands.

Formalistic doctrine tries to differentiate between judicially inflicted deprivations comporting obloquy under formal criminal auspices,¹¹ judicially inflicted deprivations under so-called civil auspices¹² and non-judicially inflicted deprivations authorized under prevailing community standards.¹³ The greatest confusion exists in the differentiation of these categories.

Detached appraisal will reveal all of these categories within the postulated sanction process to be possessed of identical characteristics. Each is characterized by the severity of deprivations. The severity, in turn, is accompanied by a loss in respect status as a concomitant part of the deprivational or punitive process. The immediate objective may then be either loss of respect status or alternately a sufficiently severe loss of another value status to comport a loss of respect. In this context a formal "criminal" conviction for a traffic violation does not embody the form of "sanction" studied in the instant situation while the loss of a civil suit on the basis of fraud charges does.

From the standpoint of ascertaining the existence of a sanction it is not vital that it be preceded by a formal declaration of guilt, though guilt breeding will be an inevitable consequence. It is immaterial whether it is administered under formal or informal auspices.

It is doubtful, for example, if much comfort is derived by inmates of administrative internment centers of totalitarian, quasi-totalitarian or non-totalitarian states by the fact that their internment takes place pursuant to administrative as distinct from formal judicial orders and is justified not as the mandatory punishment of guilt, but as "protective custody," "quarantine" or what have you.¹⁴ In a society accepting such internment the de-

11. The meaning and permissible scope of "criminal" sanctions are discussed in *Wong Wing v. United States*, 163 U.S. 228 (1896); cf. *Bridges v. Wixon*, 326 U.S. 135 (1945).

12. The combined use of judicial obloquy under "civil" and "criminal" auspices is aptly illustrated by *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

13. Dismissals of civil servants pursuant to the federal loyalty program present the best example. See *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), affirmed by an equally divided Supreme Court, 71 Sup. Ct. 669 (1951).

14. The lesson of recent European history is too fresh to need recapitulation. For an example of American experience see ROSTOW, *op. cit. supra* note 3.

privation does not extend solely to physical well-being but to the basic respect status of the individual involved.

It appears equally doubtful if the government employee condemned to slow but inexorable economic extinction for disloyalty is comforted by the knowledge that his dismissal takes place pursuant to Presidential and not judicial order and is justified not as the mandatory punishment of guilt but as a protective or prophylactic measure.¹⁵ The deprivation goes both to well-being and respect.

It is difficult to see that the person burned at the stake as a presumptive as distinct from a true heretic after the sifting of his thought processes by the Holy Inquisition derived great comfort from the differences in designations.¹⁶

The sanction, for purposes of this study, is defined as a value deprivation of sufficient severity to encompass the loss of respect.

II

How far-reaching are sanctions in their repercussions upon individuals and groups? And how far-reaching is our acceptance of any group effect that they may have?

It is vital that the reader disabuse himself of several illusions concerning the rejection of collective sanctions in contemporary culture. The requirement of individual guilt as a prerequisite to the infliction of sanctions has been more honored in the breach than the observance even outside totalitarian societies whose use of collective repression has been notorious in its most drastic phase.

It must first be conceded that no sanction can confine its deprivational effect solely to the individual who constitutes its legitimate target. No method has yet been devised which is capable

15. See Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948); Kaplan, *Loyalty Review of Federal Employees*, 23 N.Y.U.L.Q. REV. 437 (1948); cf. Mr. Justice Black, concurring, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 71 Sup. Ct. 624, 634 (1951), reversing the lower court judgment which dismissed complaints asking for injunctive relief against the Attorney General's *ex parte* designations of complaining organizations as subversive under the loyalty program: ". . . the system adopted effectively punishes many organizations and their members . . . because of their political beliefs and utterances."

16. An individual, guilty solely of the crime of being suspect of being a heretic in the medieval phase of the operation of the Holy Inquisition, was vouchsafed the right of purging himself by procuring the necessary number of compurgators. Failure to so purge himself resulted in his condemnation, albeit as a presumptive heretic. See 1 LEA, A HISTORY OF THE INQUISITION OF THE MIDDLE AGES 455, 456 (1888).

of immunizing all the "innocent" from the scope of the sanctions inflicted upon the "guilty."¹⁷ The question confronting the sanction specialist is not so much one of tolerance but rather one of the degree of conscious tolerance of sanctions having a collective effect.

The scope of the use of group sanctions in most cultures is generally proportionate to the instability and turbulence of the times. Frequent use was made of group sanctions within primitive communities.¹⁸ Even the birthplace of the common law saw the use of group sanctions in a variety of forms: sectional group loyalties were combatted by group sanctions in the interests of centralized government with special ferocity throughout feudal days.¹⁹ Elimination of conditions of strife gave rise in at least some cultures to the elimination of group sanctions in favor of individualized justice.²⁰ Insufficient empirical evidence is available to show conclusively whether the disorder produced by severely conflicting group interests establishes the necessity of group sanctions as a prime step to the establishment of an order which in its elimination of anarchic turbulence might be capable of producing a system of individualized justice. The evidence, however, tends to show that such disorder has invariably produced group sanctions in each culture that has been exposed to it.

Nowhere perhaps is the growth of group sanctions as products of turbulence more pronounced than in the anarchy of international relations.

In the field of international law overwhelming evidence con-

17. It requires little imagination to visualize the severely deprivational character of a sanction directed against the murderer by society in its effect upon the immediate family of the condemned man. It does not require much more imagination to visualize the comparable effect upon the family of convicted burglars, arsonists or petty thieves. It requires little imagination indeed to visualize the impact upon friends and relations of the dismissal of a government employee for the "crime" of "disloyalty." The fact that in all of these cases outsiders are inadvertent victims of the sanction does not detract from the severity of its group effect.

18. See HOGGIN, *LAW & ORDER IN POLYNESIA*, pp. 76 et seq. (1934); cf. MALINOWSKI, *CRIME & CUSTOM IN PRIMITIVE SOCIETY*; Radin, *The Goal of Law* (1951) WASH. UNIV. L.Q. 1, 18-19.

19. Attaint and Forfeiture are elementary examples of such sanctions. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, pp. 185, 382, 479, 480 (1936); for a striking example of the parliamentary form of proscription in the form of the bill of attainder of a later day, See, Appendix to Mr. Justice Black's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 71 Sup. Ct. 624, 635 (1951).

20. See generally, NORTHROP, *THE MEETING OF EAST AND WEST* (1946); MALINOWSKI, *FREEDOM AND CIVILIZATION* (1944).

cerning a Western use of a system of group sanctions was incisively presented by Professor Quincy Wright with the conclusion that the present trend, while countenancing group penalties under "civil," was veering toward a rejection of group penalties under "criminal," auspices.²¹ The distinction appears tenuous and unrealistic. The sole criterion of sanctions is the degree of the severity of deprivations. "Civil" or "criminal" characteristics of the auspices under which sanctions have been meted out appear irrelevant.

A plethora of names has come to designate the methods of the infliction of group sanctions authorized by the Western doctrine under prevailing Western conceptions of international law. War nurtured several extreme examples.

The use of retaliation²² offers classic examples of a practice of group sanctions tolerated by existing mores and unfettered by any judicial restraint. Chief Justice Marshall's pronouncement in 1815 remains declarative of the "law" of today:²³

. . . The Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings toward our citizens, is a political not a legal measure. It is for the consideration of the government, not of the courts. The degree and the kind of retaliation depend entirely upon considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs, in a manner having no affinity to the injuries sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of a nation, and to thwart its views. It is not for us to depart from the beaten track prescribed for us and to tread the devious and intricate path of politics.

Mass detention of aliens and confiscation of "enemy" property by executive and legislative authority illustrate traditional invocations of sanctions upon no other basis than group affiliations.²⁴

It is useless to rationalize such actions as analogous to quarantine and hence in no way comparable to criminal penalties. The

21. See Wright, *International Law & Guilt by Association*, 43 AM. J. INT'L L. 746, 748 (1949).

22. For examples of time-hallowed methods of retaliation, see 7 MOORE, DIGEST OF INTERNATIONAL LAW, 182-183, 187, 865; cf. methods of retaliation described in Arens, *Vicarious Punishment and War Crimes Prosecution*, (1951) WASH. U. L. Q. 62.

23. The *Nereide*, 9 Cranch 388, 421-422 (1815).

24. See *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Miller v. United States*, 11 Wall. 268 (1871). Cf. VI HACKWORTH, DIGEST OF INTERNATIONAL LAW, 186, 187 (1943).

severity of the deprivation inflicted by such sanctions makes the nomenclature for the most part a matter of supreme indifference to the victim. Where rectitude rationalizations were invoked, judicial approval of such sanctions was generally couched in terms of the necessity of satisfying the superior claims of transcending national interests at a time of stress. Speaking for a unanimous Supreme Court on the subject of confiscation of enemy property during the Civil War, Mr. Chief Justice Chase rejected the defense of the owner's loyalty and sustained the right of confiscation in these words:²⁵

It is said that though remaining in rebel territory, Mrs. Alexander had no sympathy with the rebel cause, and that her property, therefore, cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory . . . Being enemies' property, the cotton was liable to capture and confiscation. . . .

The conclusion of a state of war has traditionally seen the use of collective sanctions through the exaction of reparations or indemnities²⁶—in the case of Germany after World War I accompanied by the exaction of an acknowledgement of collective war guilt in the form of the "war guilt clause" of the treaty of Versailles.²⁷

Collective sanctions, however, do not remain confined to wars and to their aftermath. In time of peace vicarious liability could be visited on the collective entities known as states for injuries inflicted by their nationals upon other states or their nationals.²⁸ And vicarious liability can be visited upon the nationals of offending states without regard to any standards of individual

25. Mrs. Alexander's Cotton, 2 Wall. 404, 419-420 (1864).

26. For a well known example of reparations, see *Allied Powers, Agreements Concerning Deliveries In Kind To Be Made By Germany* (London, 1922). For examples of the distribution of indemnities under American conceptions of international law—see 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 763 et seq. (1943).

27. Article 231 of the Treaty of Versailles. For a historical analysis of this problem see Adler, *The War Guilt Question And American Disillusionment*, 23 JOURNAL OF MODERN HISTORY, 1 (March 1951).

28. See FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938). BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, Chapter V (1915). Jessup, *Responsibility of States for Injuries to Individuals*, 46 COL. L. REV. 903 (1946).

Still on the theoretical plane, the argument for State criminal responsibility has been propounded with vigor in such works as Pella, *L'Esprit de Corps et les Problèmes de la Responsabilité Pénale* (1920); *La Guerre—Crime et les Criminels de Guerre* (1946).

"guilt." Doctrinal authority for this long-standing practice is "Retorsion," defined as consisting of the treatment of "the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated."²⁹ A moderate example of such practice is provided by recent history: When the Soviet-controlled Hungarian government clamped travel restrictions upon United States diplomatic personnel in Hungary—similar restrictions were ordered by the State Department against Hungarian diplomatic personnel in this country.³⁰

Use of collective sanctions in our culture, however, extends far beyond the bounds of the anarchy of international relations. Time and time again it is resorted to in the attempt at the maintenance of order amid the chaos of the complexities of modern industrial life: a vicarious "criminal" liability for the acts of others is attached with increasing frequency in the repression of "nuisances" under regulatory legislation,³¹ a wide scope is afforded to vicarious criminal liability for the acts of others in the repression of "criminal" conspiracies,³² sanctions under "civil" as well as "criminal" auspices are directed against the "guilty" corporation³³ or unincorporated association³⁴ and hit

29. HALL, *INTERNATIONAL LAW*, 433 (8th ed., 1924).

30. *N. Y. Times*, January 30, 1951, p. 5, col. 2.

31. See *United States v. Dotterweich*, 320 U.S. 277 (1943); Sayre, *Criminal Responsibility for Acts of Another*, 43 *HARV. L. REV.* 689 (1930).

32. See note 58 *infra*.

33. Civil as well as criminal suits are available weapons for the social control of corporate practices. The metaphysical obstacle of the criminal prosecution of the soulless entity has long been surmounted. See Edgerton, *Corporate Criminal Responsibility*, 36 *YALE L. J.* 827 (1929); see also MANNHEIM, *WAR AND CRIME*, 200 (1941):

"Is not the guilty mind a quality which can be attached exclusively to the individual? And, if so, which are the consequences of this limitation? Does it follow that a collective person can never be made criminally responsible because it cannot act with a guilty mind, or does it rather follow that the latter should not be treated as an essential requirement in cases where the breach of the Criminal Law has been committed by a collective person? At least, should that requirement not be considerably modified in order to meet the special position of the collective person?"

cf. Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404 (1916).

34. See *State v. Kansas City Live Stock Exchange*, 211 *Mo.* 181 (1908); *United Mine Workers v. Coronado Coal Company*, 259 U.S. 381 (1912).

Possibly the most far-reaching extant judicial version of the vicarious liability of the members of an unincorporated association was presented by Gibson, C. J., in *Eichbaum v. Irons*, 6 *W. and S. (Pa.)* 67, 69-70 (1843): "Every member present assents beforehand to whatever the majority may do and becomes a party to acts done, it may be directly against his will. If he would escape responsibility for them, he ought to protest, and throw up his membership on the spot. . . ."

the "innocent" stockholder or member—all without provoking large-scale moral indignation for the violation of a dominant rectitude norm.

It is difficult to believe that this trend, if pursued in moderation, clashes with the basic mores of the culture.

A trenchant expression of the ethical rationale of the developing situation has been provided by Morris Cohen:³⁵

In our ethics the principle of individual responsibility that each man shall be rewarded or punished according to his own deed has been unquestioned. But in practice it is often disregarded, because not applicable. It is impossible to isolate, in a complicated system of interaction between countless individuals, past and present, the part of the result due to any individual deed. The principle of individual responsibility postulates a world in which each individual can be the sole producer of definite results, a world where each individual can be the sole master of his acts and fate. This, I submit in all seriousness, is not the world in which we find ourselves . . . but while the principle of individual responsibility has remarkably little to commend it as a primary principle it is nonetheless useful as a secondary one.

III

If a cultural acceptance of group sanctions be conceded, the quest for doctrinal tools can begin. What, then, were the doctrinal tools that lent themselves to the infliction of collective sanctions under the municipal law of the West and East which could be drawn upon for the Nuremberg prosecution?

The delegates of the four major powers who met in London in the summer of 1945 to map out the ensuing program of war crimes prosecution were each backed by a formidable body of authoritative doctrine and practice in the field of group sanctions invoked under their respective municipal law.

It is a fact that despite the widest cultural disparities between East and West a backlog of doctrinal authority remained as an adequate meeting ground for achievement of the group prosecution contemplated by the Nuremberg proceedings. The meeting ground was provided by a community of thought on "conspiracy."

Nowhere, of course, did either Western doctrine or practice reach the limits of its Soviet counterpart. The extremes reached by the latter are highlighted by several examples. Soviet incor-

35. COHEN, REASON & NATURE 394 (1931). See also *id.* at 392-395.

poration into criminal law of the doctrine of analogy which renders any activity or association subject to punishment in the discretion of the ruling elite, is one.³⁶ Another is presented by phases of authorized Soviet police practice. Subject to no supervision by any courts the "Special Boards" of the Ministry of the Interior, empowered to deal summarily with "sabotage" or "counter-revolution" are free to use any standards within their discretion including their own concepts of collective guilt.³⁷ Moreover, the crudest example of the extremes of vicarious liability under the Soviet law was provided directly by the Criminal Code: the adult members of the family of an individual deserting from military service are explicitly declared subject to deportation to Siberia regardless of any absence of knowledge concerning the commission of the offense.³⁸

While conceptual difficulties obstructed Soviet use of the device of indicting and trying groups or corporations as inanimate entities existing solely in the contemplation of law,³⁹ the widest latitude was afforded to the Soviet officialdom in the prosecution of the live membership for nefarious associations which could have any descriptive label ranging from "banditry" to "counter-revolutionary activity" attached to it by official edict.⁴⁰ The conviction of the leaders of a criminal group, under the Soviet view, was furthermore capable of raising the presumption of the guilt of all of their subordinates so that the widest imposition of vicarious liability was made possible.⁴¹

Justified as necessitated by the demands of state survival, Soviet conspiracy concepts permitted proof of association for criminal purposes to be presented by other than direct evidence and were satisfied by indications of association of a highly tenuous kind.⁴²

36. UGOLOVNY KODEKS RSFSR, Article 16.

37. BERMAN, JUSTICE IN RUSSIA, 84 (1950).

38. *Op cit. supra*, note 36, Article 58.

39. See note 80 *infra*.

40. *Op cit. supra*, note 36, Articles 58 and 59.

41. See note 78 *infra*.

42. PEOPLE'S COMMISSARIAT OF JUSTICE REPORT OF COURT PROCEEDINGS IN THE CASE OF THE ANTI-SOVIET 'BLOC OF RIGHTS & TROTSKYITES,' 694, 695 (1939) reporting Prosecutor Vyshinski's summation: "There is an opinion current among criminologists that in order to establish complicity it is necessary to establish common agreement and an intent on the part of each of the criminals, *i.e.*, of the accomplices, for each of the crimes. This viewpoint is wrong. We cannot accept it and we have never applied or accepted it. It is narrow and scholastic. Life is broader than this view-

It is thought-provoking and conducive to a sense of humility that despite these practices the emerging Soviet doctrine of criminal conspiracy should converge with ease with its Anglo-American counter-part, albeit in the more restrictive pattern prescribed by the Nuremberg Charter.

While French doctrine alone has scorned the pitfalls of "conspiracy" it has none the less authorized prosecution for membership in organizations formed for the purpose of criminal activities.⁴³

As in the case of the Soviet doctrine, a psychological acceptance of its Anglo-American counterpart as a dragnet of formidable scope rested at least to a large extent on the assumption that it was necessary for the prevention of outright social disintegration. Mr. Justice Jackson diagnosed the modern conception of conspiracy as "so vague that it almost defies definition,"⁴⁴ as apparently manipulable with the greatest latitude, and as emerging from a history of political struggle.⁴⁵

The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself.

Notwithstanding the fact that the ethical justification of the concept would appear founded on nothing short of the necessity of societal survival, and hence preclude authorization of dragnet prosecutions for matters which did not threaten the most vital national interests, conspiracy has formed the gist of innumerable criminal charges for acts ranging from espionage to the petty misdemeanor.⁴⁶

Standard definitions succeed in raising more questions than they can answer. Thus conspiracy has been defined as "a combination of two or more persons to do an act which is unlawful in itself or to do a lawful act by the use of means which are unlawful,"⁴⁷ a "partnership in criminal purposes,"⁴⁸ even more

point. Life knows of examples when the results of joint criminal activity are brought about through the independent participation in such activity by individual accomplices, who are united only by a single criminal object common to all of them."

43. DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL* 249, 250 (1947).

44. *Krulewitch v. United States*, 336 U.S. 440, 446 (1949).

45. *Id.* at 448.

46. For a brief view of the scope of "conspiracy," See MILLER, *HANDBOOK OF CRIMINAL LAW*, 108-11 (1934.)

47. *Id.* at 108.

48. *United States v. Kissel*, 218 U.S. 601, 608 (1910).

briefly as a "partnership in crime."⁴⁹ Inevitably it is permissible to prove the crime of conspiracy by a showing of the requisite mental state coupled with what would otherwise be innocuous association.⁵⁰ The requisite mental state, however, need not be shown to have become manifested by simultaneous action or agreement between the conspirators.⁵¹ The association which is established need not be direct and may be tenuous indeed.⁵²

Capping the collective impact of "conspiracy" is the rule that vicarious criminal liability can be attached to each conspirator for the acts of his fellows in furtherance of the criminal design.⁵³ While the standard of proof at no time appears formally reduced below the requirements of the ordinary case, the net effect of the doctrinal design which seems almost indistinguishable from its Soviet counterpart, weighs the scales heavily in favor of the prosecution.⁵⁴

In such a context it is not altogether surprising to find a court sustaining a conspiracy charge upon the theory that conspiratorial association and agreement could be consummated without direct contact among the conspirators but through one person "round whom the rest revolve."⁵⁵ The metaphor which described the process according to the court was "the metaphor of the centre of the circle and its circumference."⁵⁶ Formal agreement was unnecessary to such a crime.⁵⁷ The requirement of proof with regard to the formation or existence of the agreement, moreover, was no more strict where the prosecution attempted to establish the vicarious criminal liability of one co-conspirator, for the acts of another. It was thus possible for the Supreme Court of the United States to uphold the conviction of a defendant for the acts committed by his co-conspirator without the

49. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

50. See Harno, *Intent In Criminal Conspiracy*, 89 U. OF PA. L. REV. 624 (1941). Cf. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1938).

51. *Schenck v. United States*, 253 Fed. 212, 213 (E. D. Pa. 1918); *aff'd* 249 U.S. 47 (1918). Cf. discussion of "generic conspiracies" for purposes of criminal prosecutions under the Sherman Act in DESSION, CRIMINAL LAW, ADMINISTRATION & PUBLIC ORDER 526-527 (1948).

52. See *Allen v. United States*, 4 F.2d 688 (7th Cir. 1925).

53. See MILLER, *op. cit. supra*, note 46 at 114.

54. See Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948).

55. *Rex v. Meyrick and Ribuffi* (1929) 21 Cr. App. R. 94, 102.

56. *Ibid.*

57. *Ibid.* Cf. *Madsen v. United States*, 165 F.2d 507 (10th Cir. 1947).

knowledge or approval of the defendant who in fact was in prison at the time of the crimes, on the theory that they were chargeable to him as acts in furtherance of an agreement to which he had become a party.⁵⁸ Mr. Justice Douglas, speaking for the Court, declared direct knowledge of or participation in the crime unnecessary to sustain a conviction:⁵⁹

The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime.

Agreeing was thus turned into the equivalent of aiding and abetting.⁶⁰

Add to the use of the conspiracy doctrine the device of the corporate prosecution and/or the proscription of the mere formation of, and participation in, specific organizations and a punitive dragnet could be widened almost at will by the prosecutor. Illustrative of the latter, before the Nuremberg trial, was the Smith Act⁶¹ on the federal, and the California Criminal Syndicalism Law,⁶² on the state level. While the Supreme Court has not yet passed upon the former, at the time of the writing of this article, it upheld the constitutionality of the latter.⁶³ The operation of that law has been described with telling effect by Mr. Justice Brandeis:⁶⁴

The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime . . . The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Combine the use of the prohibition against conspiracy with the use of prohibition under such a statute and you prosecute for associating with an intent to associate with individuals evincing

58. *Pinkerton v. United States*, 328 U.S. 640 (1946). See also Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 YALE L. J. 371 (1947).

59. *Pinkerton v. United States*, 328 U.S. 640 (1946).

60. Mr. Justice Jackson's comment upon earlier decision in *Krulwitch v. United States*, 336 U.S. 440, 451 (1949); *Cf. People v. Luciano*, 277 N.Y. 348, 14 N.E. 2d. 433 (1938).

61. 62 STAT. 808 (1948), 18 U.S.C. 2385 (supp. 1950).

62. 3 CAL. GEN. LAWS, Act 8428 (Deering 1944). For discussion of comparable legislation in other jurisdictions see 2 U.S. Code Congressional Service, 81st Congress, 2d Sess. 1950, 3886.

63. *Whitney v. California*, 274 U.S. 357 (1927).

64. *Id.* at 373.

an intent to preach the virtues of illegal association. Concede to the prosecution a reduction in the required standard of proof and the conspiracy prosecution becomes *sui generis*. If a rectitude rationalization be sought at that stage the unprecedented latitude afforded to the prosecution can be justified by the inherent difficulties of procurement of evidence of secret associations and by reference to the enormity of an offense whose repression is dictated by state survival.

It is startling that official attempts at the justification of such latitude under United States and Soviet auspices should reveal an uncanny similarity of attitude. Thus for the United States in the words of Judge Cox speaking for the Second Circuit Court of Appeals in 1909:⁶⁵

Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine. It is enough that they have a common purpose . . . and that they act together for that purpose. It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same . . . purpose, even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others.

Thus for the Soviet Union in the words of Prosecutor Vyshinski speaking in the course of a political mass trial in 1937:⁶⁶

You cannot demand that cases of conspiracy of coup de'état be approached from the standpoint: give us minutes, decisions, membership cards, the numbers of your membership cards; you cannot demand that conspirators have their conspiratorial activities certified by a notary. No sensible man can put the question in this way in cases of State conspiracy.

A survey of the existing doctrinal background of the four prosecuting powers makes it plain that the prosecution was not left to grope for the creation of doctrine to justify the application of group sanctions on the German scene. Existing doctrine possessed every flexibility.

Mr. Justice Jackson, therefore, was hardly stretching the point when he cited the municipal law of the four powers in support of his demand for a judicial declaration of the "collective crim-

65. *Marrash v. United States*, 168 Fed. 225, 229 (2d Cir. 1909).

66. *The Moscow Trial*, 205 (London 1937).

inality" of the indicted groups.⁶⁷ The doctrinal authority for such action seemed exhaustive. Reliance on it does not ipso facto furnish grounds for criticism. The history of the abuse of doctrinal authority should not make for the rejection of doctrinal authority out of hand. It remains to determine whether an abuse took place at Nuremberg.

IV

It seemed strange at first glance that it was the United States representative in the four-power negotiations on the prosecution of Nazi criminals, who pressed insistently for a commitment to seek a judicial declaration of collective criminality at Nuremberg and that it was the Soviet representative who as insistently opposed it.

The United States plan was motivated by the conviction of the necessity of coping with the unprecedented challenge of Nazi crime and the desire to do this with the least infringement of the traditional safeguards. It was motivated too by a concern for the need for a public revelation of the character of the Nazi groups and for the collective effect of their moral stigmatization in the Allied world and Germany.

The contemplated United States prosecution technique envisaged the indictment and trial of specific Nazi organizations upon charges of criminal conspiracy and substantive offenses in a manner analogous to corporate prosecution for crime, their adjudication as criminal conspiratorial groups, and the subsequent trial of any of their members for adherence as well as for their vicarious responsibility for any criminal acts perpetrated in furtherance of their criminal design.⁶⁸ Under this prosecuting plan adequate notice was to be given of the contemplated initial group prosecution and adequate opportunities for the defense of the accused groups afforded to such of their members as could reasonably be expected to do justice to the representation of their interests.⁶⁹ While the challenge to the group indictment under this plan was to be unlimited in the proceeding which was to secure the judicial declaration of their criminality, the achievement of this objective was to foreclose for all time

67. See JACKSON, *THE NURNBERG CASE*, 103 et seq. (1947); cf. 8 *TRIAL OF THE MAJOR WAR CRIMINALS*, 361 (1946).

68. See *INTERNATIONAL CONFERENCE ON MILITARY TRIALS* 7, 32 (1949).

69. *Id.* at 58.

the question of their group guilt as *res adjudicata*.⁷⁰ Subsequent proceedings for the trial of their individual members could restrict themselves solely to considering the proof of individual membership and such personal defenses on the merits or in extenuation as ignorance of the criminal character of the groups, the subjection of the defendants to duress at the time of joining, and the degree of participation in group activities.⁷¹ On all of these matters, however, the burden of proof was to shift to the accused.⁷²

The envisaged United States program was thus to fall into two stages: the initial trial of the groups on the issue of conspiracy and substantive crimes; and the subsequent trial of affiliated individuals on the issue of membership. The dragnet was to be consciously broadened to prevent the escape of at least major offenders. Operation of this contemplated dragnet has been well described by Mr. Justice Jackson as a prosecutor:⁷³

Now let us see what we are trying to reach by this method that we might not reach otherwise. Let us suppose that there is a very active member of the S.S.—active in organizing, active in getting new members—but he never took a part in a single crime. He helped to formulate the general plan; he knew about it; he knew the methods; he knew that their plan was to exterminate minorities, to run concentration camps, to do all these things; but you cannot prove by any witness that he was present when a single offense, standing by itself, was committed. By reason of his membership in this common criminal plan and by reason of his participation in it, we would expect to reach him. Now the difficulty is that there are several hundreds of thousands of members of these organizations. You cannot get witnesses, at least we hadn't thought we could get witnesses, to prove where each was at all times and prove what he did. It is very hard to identify persons who are in uniform and to get accounts of their part in acts of the organized military or parliamentary units. Therefore, we would expect to be able to show what offenses were committed, and then every person who was a part of that general plan, whether he actually held the gun that shot the hostages or whether he sat at a desk somewhere and managed the accounting, would be responsible for the acts of the organization.

70. *Id.* at 59.

71. *Ibid.*

72. *Ibid.*

73. *Id.* at 138, 139.

In effect then the first adjudication of collective criminality was to establish a presumption of guilt on the part of group members for future trials. While such a presumption unquestionably clashed with the traditional democratic presumption of innocence of one charged with crime, such a clash was reduced by the fact that the accused was vouchsafed the opportunity of vicarious personal defense through the defense of the indicted organization at the first trial which was to be held without any prejudicial presumption; and that the subsequent presumption must be regarded as rationally justifiable in the light of the overwhelmingly voluntary nature of major Nazi organizations and the publicity accorded to their work.

Soviet opposition to the prosecution of the Nazi groups in no way stemmed from reluctance to engage in dragnet prosecutions or from concern for the niceties of procedural fairness though occasionally their arguments were couched in those terms. If anything it stemmed from the fear that the dragnet was not sufficiently secure, a fear compounded by emotional and political compulsion to assert for prestige purposes, if for no other reason, characteristically Soviet legal patterns. Thus initial Soviet responses to United States suggestions for adoption of the principle of group criminality were to the effect that in the presence of superior executive declarations of the criminality of such Nazi groups, a quest for further judicial declaration seemed superfluous.⁷⁴ Moreover, the inference, raised by formal group indictment, continued the Russians, suggested that the issue of group guilt or innocence had remained open. Nothing could be further from the truth, asserted Soviet spokesmen: The issue was deemed foreclosed once and for all by the expression of governmental policy.⁷⁵ Soviet spokesmen, moreover, proceeded to question the wisdom of group prosecutions in terms of purely practical obstacles. What would happen, they asked, if upon notice issued that at the trial the court would be asked to pronounce, say, the Gestapo a criminal organization and that anybody who wished to dispute this should come forward, "some hundreds of the members of the Gestapo . . . (were to come) forward to defend the case of the organization."⁷⁶

74. *Id.* at 107.

75. *Ibid.*

76. *Id.* at 235.

The gist of the Soviet suggestion on the accomplishment of the creation of the dragnet without benefit of initial group prosecution was essentially the reverse of the United States proposal. Where the United States representative urged the declaration of the criminality of groups as a preliminary to the declaration of the criminality of individuals, the Soviet representative urged the declaration of the criminality of individuals, as a preliminary to the declaration of the criminality of groups.⁷⁷ Specifically, the Soviet spokesman announced as fundamental to Soviet criminal law that "a decision of the court which establishes the criminal responsibility of the heads or the leaders of any organization of that kind automatically establishes the criminal responsibility of the various subordinate members of the organization."⁷⁸ The practical implication of the theorem is presumably this: Convict the leaders of a group in a demonstration trial and then round up the surviving members for forced labor in the Siberian salt-mines. The clash of views is nowhere better illustrated than in this exchange:⁷⁹

General Nikitchenko. . . . If a member is found whose guilt consists in being a member, then you have declared that the organization itself is criminal. . . .

Mr. Justice Jackson. Well, you see we have a fundamentally different concept and that is what I am afraid of.

Principles of Soviet criminal law were drawn upon for further support of the Soviet position. Almost in one breath it was declared that Soviet doctrine did not recognize the possibility of formal criminal prosecution of inanimate entities existing solely in the contemplation of law,⁸⁰ that on the other hand it provided exhaustive opportunity for the widest dragnet prosecution of their individual flesh and blood membership,⁸¹ and that it none the less based the administration of criminal law "on the fact of

77. *Id.* at 135, 136, 217.

78. *Id.* at 135.

79. *Id.* at 217.

80. *Id.* at 134: "The Soviet Law . . . fully recognizes in exactly the same way as the French, and probably others, the collective responsibility of members of an organization for the crimes committed by the organization. The theory of the Soviet criminal law fully recognizes the trial of gangs or organizations and the responsibility of the members of such organizations in addition to any individual responsibility they may carry for individual acts. Where we do not agree is in the idea that the trial of organizations should form actually the basis of the agreement for the trial of criminals. An organization is not a physical body. . . ."

81. *Id.* at 135.

the individual criminal responsibility of the individual person.”⁸²

It is difficult in the absence of more information concerning the then current transactions on a more important power level than that of the prospective prosecutors’ conference to establish the reasons for the ultimate Soviet acceptance of the United States view with anything like precision. Certain it is that the official Soviet rationalization for this move expressed agreement with the United States view that such a group prosecution was vital to anything like the effective repression of Nazi criminal elements at least in the Western zone, and that more than any other act it would serve to enlighten the outside world as to the structure and operation of the Nazi state. A closing exchange between the representatives of American and Soviet legal thought seems revealing:⁸³

Mr. Justice Jackson. I don’t want to prolong the discussion, but you don’t want to depend on American judges to know all about the Gestapo. You must remember your people are much nearer to this scene than we have been. Information comes through radio, which we sometimes doubt, and newspapers which we sometimes suspect of exaggeration. This experience is not so well known in the United States that you can depend on a judge to assume it. The evidence we have found since I came here the first time has utterly astonished me, and I followed the Nazi regime fairly closely because I had something to do with the effects of the war on us under President Roosevelt’s administration. These organizations are criminal beyond anything that I can dream. I think proof of their acts really means more to understanding by the United States of the problem you have had to deal with, and are going to have to deal with on this Continent, than you think.

Professor Trainin. It is because of that consideration that we have accepted the American view that the verdict must apply to the whole of the organization.

The ground was laid for group prosecution in its contemplated two stages.

V

The first stage of this phase of prosecution could begin.

Indicted with the “twenty-odd broken men” representing the Nazi elite,⁸⁴ for conspiracy to commit, and the substantive com-

82. *Ibid.*

83. *Id.* at 241, 242.

84. See Mr. Justice Jackson’s opening address for the prosecution, 2 TRIAL OF THE MAJOR WAR CRIMINALS 99 (1945).

mission of, Crimes against Peace, War Crimes, and Crimes against Humanity were the Nazi organizations representing the mainstay of Nazi power.⁸⁵ The specificity of the charges contained in the indictment was far in excess of that of the average accusation in Anglo-American jurisdictions.⁸⁶ While the effect of the sought for verdict of "guilty" against these groups was to secure an authoritative and unquestioned moral condemnation of all that they stood for, it was also to "render *prima facie* guilty, as nearly as we can learn, thousands upon thousands of members now in custody of United States forces and of other armies."⁸⁷

The proceedings were instituted under Charter provisions requiring adequate notice to the membership of the organizations indicted and for leave within sound judicial discretion for individual members to come forward and be heard on the subject of group criminality, as well as the right of the indicted groups to be represented by counsel.⁸⁸

The prosecution relied heavily on domestic municipal precedent for group action. Without being required to do so under the Nuremberg Charter, it set itself the following standards of proof. The prosecuted groups had to be shown to be composed of "persons associated in identifiable relationship with a collective general purpose." Membership had to be voluntary: "Was the organization on the whole one which persons were free to join or to stay out of? Membership is not made involuntary by the fact that it was good business or good politics to identify one's self with the movement."⁸⁹ The criminality of action or purpose was to be interpreted in the strict sense of the indictment and had to be sufficiently open and notorious to provide adequate notice thereof to the membership at large, although the prosecution was not to be required "to establish the individual knowledge of every member or to rebut the possibility that some may have joined in ignorance of . . . (the) true character" of the groups.⁹⁰ Lastly, some individual defendant had to be shown to have been

85. See note 1 *supra*.

86. The form of the indictment followed the Continental pattern in including evidentiary matter. See 1 NAZI CONSPIRACY AND AGGRESSION 14-56 (1945); *cf.* JACKSON, THE NURNBERG CASE vi-viii (1947).

87. See Mr. Justice Jackson, *supra* note 84, at 152.

88. See 1 NAZI CONSPIRACY AND AGGRESSION 4, 6 (1946).

89. 8 TRIAL OF THE MAJOR WAR CRIMINALS 367 (1946).

90. *Id.* at 368.

a member of each of the indicted groups "and . . . (had to) be convicted of some act on the basis of which the organization was declared to be criminal."⁹¹ Traditional Anglo-American conspiracy concepts were adequate to fulfill the tasks set itself by the prosecution. It was thus completely unnecessary to show the participation in criminal activities by all individual members. It was enough if a part was engaged in crime.⁹² The primary objective was to prove that the ends pursued by these groups were criminal. The execution of acts in furtherance of those ends by any member were then chargeable upon the membership. Orthodox Anglo-American conspiracy doctrine was invoked:⁹³

The criteria for determining whether these ends were guilty ends are obviously those which would test the legality of any combination or conspiracy. Did it contemplate illegal methods or purpose illegal ends? If so, the liability of each member of one of these Nazi organizations for the acts of every other member is not essentially different from the liability for conspiracy enforced in the courts of the United States against business men who combine in violation of the anti-trust laws, or other defendants accused under narcotic drugs act, sedition acts, or other Federal penal enactments.

The unfolding of the case against the Nazi groups did not in fact differ materially from the unfolding of the average conspiracy case in the federal courts of the United States, with the one marked exception that affidavit evidence was admitted,⁹⁴ not, however, in any serious violation of the principles of general Continental practice.⁹⁵ The opportunity for defense on both the facts and the law was ample. Counsel for the various organizations indicted were not only able to argue and argue with eloquence that the collectivities they represented, such as, e.g., the S.A., had political objectives based upon patriotism and civic virtue and attracted high-minded individuals⁹⁶ but, even in cases where the iniquity of a group, such as the Gestapo, was conceded, that a collective adjudication of guilt flouted natural justice and

91. *Ibid.*

92. *Id.* at 368.

93. *Id.* at 365.

94. The tribunal was not bound by any technical standards of evidence under the charter. See 1 NAZI CONSPIRACY AND AGGRESSION 9 (1945).

95. Not all French courts, for example, require the personal presentation of witnesses to secure the admissibility of their evidence. See DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL* 793 (1947).

96. 22 TRIAL OF THE MAJOR WAR CRIMINALS 169 (1946).

used the methods for which condemnation was sought through the Nuremberg judgment.⁹⁷

Found guilty by verdict of the tribunal were the Leadership Corps of the Nazi Party, the Gestapo and S.D. and the S.S.⁹⁸ Acquitted were the S.A., the Reich Cabinet, and the German General Staff and High Command.⁹⁹ It is safe to conclude that the tribunal was meticulous in its sifting of evidence concerning the activities of indicted groups. Evidence concerning the notoriety of and collective participation in, the myriad of Nazi crime, by the convicted groups, was overwhelming. The benefit of a doubt, however slight, was accorded to the defendant groups. Featured among the acquitted groups, the S.A., for example, was officially described in the verdict of the tribunal as the "strong arm of the Party" responsible in large part for the "Nazi reign of terror over Germany" in its early days, suffering a reduction in influence after June 30, 1934, but lending isolated units for such bagatelles as the Austrian "Anschluss," Czech disintegration, the blowing up of synagogues in the Jewish pogrom of November 1938, and the physical extermination of Jews in Eastern Europe.¹⁰⁰

The verdict concerning all of the convicted groups carried the proviso that it applied only to those individuals who became or remained members with knowledge of their criminal activities or who were personally implicated in their crimes and excluding from its operation those "who were drafted into membership by the State in such a way as to give them no choice in the matter."¹⁰¹

Conclusion of the first stage of the prosecution left the world waiting expectantly for the second. The world had been led to believe that the hundreds of thousands of the membership of the convicted organizations would be brought to account before occupation tribunals operating under the first Nuremberg judgment. This was never done. It is safe to state with the benefit of hindsight that abandonment of the scheme of mass prosecution was not prompted by any sense of rectitude dictating

97. 21 TRIAL OF THE MAJOR WAR CRIMINALS 493-498 (1946).

98. For the tribunal verdicts concerning the accused organizations see 22 TRIAL OF THE MAJOR WAR CRIMINALS 498-523 (1946).

99. *Ibid.*

100. *Id.* at 517-519.

101. See, *e.g.*, the conclusion of the opinion on the SS, *id.* 517.

individualization of justice. If anything, the dominant factor in the abandonment of previously declared policy was a growing indifference to the task of the stigmatization of Nazi criminality and the controlling thought of the need for Allied rapprochement with Germany. West and East engaged in an undignified scramble for the loyalty of a formerly despised enemy who was to become a comrade in arms for a war of either cold or hot variety. The fact that Allied abandonment of membership prosecutions was not even remotely related to a concern for individualization of justice was perhaps best demonstrated by the fact that the Germans themselves were encouraged to try their own nationals for group membership before local German denazification tribunals set up with the official blessing of the Allies.¹⁰² The well-known denazification fiasco was the result.¹⁰³

In the meantime, a selective Western prosecution of overt Nazi criminals was initiated after the first trial.¹⁰⁴ Such prosecution included the charge of membership in criminal organizations but was in no case in the Western zones based upon membership alone.¹⁰⁵ In a few instances, however, conviction of individuals was based solely upon the membership charge. It is unquestionable that the proceedings so far from shocking to any democratic sense of justice were fastidious in probing for individual guilt and involved a clear-cut curtailment of the conspiracy theory. The case of Poppendick in the Medical Trial¹⁰⁶ is illustrative of the meaning of guilt on the ground of membership in the context of post-war United States prosecutions.

Poppendick was a co-defendant in the prosecution of several luminaries of the Nazi medical profession for murderous "exper-

102. See Raymond in *N. Y. Times*, Aug. 14, 1949, p. 3, col. 1 for a brief survey of the history of "denazification."

103. *Ibid.* See also Marcus, in *N. Y. Times*, May 12, 1949, p. 30, col. 6, citing the following figures. Out of almost 13,000,000 people who registered under the denazification law nearly 2,500,000 were amnestied without trial, 9,500,000 were exonerated to all intents and purposes, 33.5% of those tried became the beneficiaries of subsequent amnesties and one tenth of one percent were found to be major offenders. In Bavaria, 83% of the judges, 81% of the public prosecutors and some 11,000 teachers are former Nazis; in Schleswig-Holstein 91% of all judges, prosecutors and court officials are former Nazis. And see Baldwin, *id.*, April 10, 1949, p. 13, col. 1: "There has been no real political or spiritual regeneration."

104. See TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

105. Brigadier General Telford Taylor in letter to writer.

106. Taylor, *op. cit.* *supra* note 104 at 163.

iments" carried out upon concentration camp inmates. Specifically, Poppendick, a medical colonel in the S.S., was charged "with personal responsibility for, and participation in, High-Altitude Freezing, Malaria, Sulfanilamide, Sea-Water Epidemic, Jaundice, Sterilization, Typhus, and Poison experiments."¹⁰⁷ He was charged too "with being a member of an organization declared criminal by the judgment of the International Military Tribunal."¹⁰⁸ The proof of the acts themselves was irrefutable. Proof of Poppendick's direct personal participation was not, according to the tribunal, "beyond reasonable doubt." Proof of his knowledge of, and acquiescence in, the experiments was ample. Proof, in fact, of his tacit collaboration in the Nazi-imposed medical pattern, of which these "experiments" were a part, was abundant. Much of this proof was furnished by Poppendick's personal admissions. Thus, as recounted by the judgment of the case,

Poppendick stated that the Nazi racial policy was twofold in aspect; one policy being positive, the other negative in character. The positive policy included many matters, one being the encouragement of German families to produce more children. The negative policy concerned the sterilization and extermination of non-Aryans.¹⁰⁹

Poppendick, of course, asserted that his overt participation was restricted to the implementation of the "positive" policy. By his own admission, however, he knew that the "positive" policy was but a part of a design rendered criminal by the "negative" counterpart. Specifically, this Nazi worthy was found to have gained knowledge of most of the torture under the guise of medical "experiments," some of it, as in the case of his knowledge of the freezing experiments conducted at Dachau, through personal conferences with the perpetrators who received the benefit of his advice on "scientific" matters.¹¹⁰ It is difficult in the face of this avalanche of evidence to conclude with the court that the evidence did not prove beyond a reasonable doubt "that Poppendick was criminally connected with the experiments." However, even if this rationale be accepted, his mere connection with the elite group would have been sufficient under prevailing common

107. 2 TRIALS OF WAR CRIMINALS 248 (1946).

108. *Ibid.*

109. *Id.* at 250.

110. *Id.* at 249.

law notions of conspiracy¹¹¹ to charge him with criminal responsibility for acts flowing from the criminal design to which he had become a party. In this case his exoneration on the score of personal responsibility did not include exoneration of responsibility for having joined and remained a member of a criminal organization with knowledge of its criminal activities.¹¹² The conspiracy dragnet had been used, but in a seriously curtailed form. No abuse of its powers was observed. It was used sparingly and with great circumspection. Any further restriction of its scope would have resulted in its outright abandonment. The latter would have constituted implicit endorsement of the crime.

CONCLUSION

It has been customary democratic preference to permit the escape of ninety-nine guilty men rather than suffer the injustice of convicting one innocent. In stable democratic societies, this represents a sound balancing of values. A policy tending toward the enhancement of the respect due to individual dignity out-balances the loss to society in the value of the successful prosecution of the guilty. It is arguable that transported into a culture whose conception of individual justice is not in excess of Malinowski's primitive society the meticulous concern for enforcing a rectitude norm through meticulous ascertainment of individual guilt at the expense of the escape of large numbers of guilty parties may turn into a perversion of the rectitude norm itself and hence outright encouragement of crime. While in a democratic society the balance between individual respect and effective prosecution falls naturally in favor of the former, the opposite may well be the result in a culture which is saturated with blood. It was against the background of a culture saturated with blood that the indicated group prosecution was conceived subject to the highest possible degree of procedural safeguards.

111. See *Pinkerton v. United States*, 328 U.S. 640 (1946).

112. See note 109 *supra*. The apparent leniency of the finding which comported a ten year sentence was more than matched by subsequent action. See Terencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. 144, 151 (1948): ". . . in one of the most recent cases 5 high-ranking SS officers who were convicted of membership in a criminal organization with knowledge of its criminal activities, were promptly released."

Abandonment of such prosecution under Allied auspices as authorized by the Nuremberg Charter embodied a body-blow to democratic doctrine and practice within Germany and the outside world. The harmful results of this abandonment are all too apparent. The effectiveness of any machinery for prosecution of Nazi criminality rested inevitably upon the use of group sanctions judiciously administered. Rejection of group sanctions meant the collapse of the only effective machinery for prosecution possible under Allied Western auspices, and concomitantly therewith, the resurgence of Nazism in Germany. The tragedy of an attempted prosecution under German auspices need not be dignified with a formal discussion.

Group or collective sanctions are an accepted part of the response within a common culture pattern when necessitated by the dint of circumstance. Rational contemporary appraisal of such sanctions as the summary deportation of Japanese-Americans is more concerned with an analysis of the claim of "necessity" advanced by its protagonists than the admittedly inequitable hardship inflicted upon the group. It is customary human preference to make individualization of justice wait upon the claims of human survival. The use of group sanctions in Germany rested upon infinitely more "compelling necessity" than the Japanese cases and was subject to infinitely greater procedural restraints.

The invocation of group sanctions under present security auspices in such forms as the McCarran Act deserves examination upon present merits, both in terms of necessity and procedural safeguards. It is safe to conclude, however, that the precedent of the Nuremberg prosecution did not help pave the ground for the use of group or collective sanctions in this country. Factors operating for the invocation of such sanctions in Germany clearly do not operate within this country. This is not a culture saturated with blood and law enforcement is not confronted by thousands of mass murderers roaming upon the countryside. It is interesting to note that the chief opponents of the prosecution of Nazi criminality in Germany are now numbered among the chief proponents of collective sanctions under current security auspices in this country.¹¹³ Thus, regardless of one's personal

113. U.S. Senator McCarthy provides a prime example. For a documented description of the Senator's tactics on a national level see LATTI-

attitude concerning the use of collective or group sanctions under present circumstances it is not difficult to conclude that their abandonment in Germany was a disaster.

MORE, ORDEAL BY SLANDER (1950). For the Senator's reaction to established Nazi crime, see, *e.g.*, N. Y. Times, April 23, 1949, p. 4:

"A Senate Armed Services subcommittee investigating United States military justice in the Malmedy cases interrogated key figures today against the background of an eyewitness story told dispassionately by a survivor of the Nazi massacre of United States prisoners of war from the Battle of the Bulge. . .

(a) survivor . . . Kenneth F. Ahrens of Erie, Pa. . . . found himself with his whole company, suddenly cut off by a SS battalion at a crossroad near Malmedy, Belgium. There was no chance of resistance, he said, and his outfit surrendered as prisoners of war. Soon, he said, they were mowed down by machine-gun bursts from tanks. . . Senator McCarthy objected to the testimony by Mr. Ahrens as being of a nature that would inflame the public and perhaps obscure the handling of justice by the military."