

Copyright (c) 2005 National Association of Criminal Defense Lawyers, Inc.
The Champion

November, 2005

29 Champion 49

COLUMN: BOOK REVIEW

Reviewed by Eric M. Freedman

NACDL member Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra Law School in Hempstead, NY. He specializes in post-conviction representation, with a particular emphasis on capital cases, and is the author of *HABEAS CORPUS: RE-THINKING THE GREAT WRIT OF LIBERTY* (NYU Press 2001). He is currently assisting in the representation of the prisoners at Guantanamo Bay.

Eric M. Freedman
Hofstra University School of Law
Hempstead, NY 11550
516-463-5167
E-MAIL lawemf@hofstra.edu

TEXT:

[*49]

Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg In Weimar, Germany

By Douglas G. Morris
University of Michigan Press (2005)
\$ 35; 464 pages
Reviewed By Eric M. Freedman

Emerging from the Constitutional Convention, Benjamin Franklin was asked by a Philadelphian, "Well, doctor, are we to have a republic or a monarchy?" to which Franklin gravely replied, "A republic, if you can keep it."

The citizens of the Weimar Republic, as we know to our sorrow, could not keep it. The United States today is not Nazi Germany -- but the Weimar Republic was not Nazi Germany either. That it would be hijacked under the forms of law and transformed into a tyranny was neither obvious (perhaps not even plausible) to its citizens nor inevitable. The citizens of this republic would be foolish to forget the lessons the citizens of that one learned at such cost.

This book, written as a Ph.D. thesis by Douglas G. Morris while he continued his full-time practice as a federal public defender in the Eastern District of New York, illuminates one important aspect of the murder of the Weimar Republic -- one that makes this a remarkably timely work of history.

When tested by cases requiring judicial neutrality, the Weimar judiciary proved to be thoroughly politicized. Largely left-over servants of the Kaiser's government, the judges were an overwhelmingly homogeneous group that was more sympathetic to the right-wing political movements of the time than either the general public or its elected representatives. As judicial rulings reflected this bias, Morris recounts, injustices "spread like a rash" through the legal system, infecting both political and non-political cases and ultimately making the destruction of the republic that much easier.

Morris tells this story by following the major cases that occupied Max Hirschberg, a high-profile criminal defense lawyer who practiced in Munich during 1919-34, the very time and place where the storm clouds of the right-wing takeover of Germany slowly gathered and eventually burst.

Hirschberg's varied docket included both political cases (including two in which he confronted Hitler himself) and non-political ones (several of which resulted in the exoneration of murder defendants). In both contexts he had a special interest in miscarriages of justice. Hirschberg came to believe that the cause of wrongful convictions in ordinary cases was the familiar dreary litany that still plagues us today -- lying witnesses, botched forensic analyses, erroneous eyewitness identifications, prosecutors with tunnel vision, and indolent defense counsel -- but that the legal system's ability to apply a cure was impeded by the same developments that were simultaneously undermining it in political cases.

Individual prosecutions involving rival political groups were, as Hirschberg observed early on, judged by "a double standard [that was] blind to the crimes of the nationalists and fascists but pitiless against the slightest offense of the revolutionaries and proletariat."

Perhaps more ominously in structural terms, the authorities then began charging journalists with "national treason," which consisted of the disclosure of information that the defendant knew "must be kept secret for the good of Germany." So, for instance, if a newspaper reported (or even planned to report) that Germany was secretly re-arming in violation of the Treaty of Versailles, the reporter could be charged with this crime on the theory that it was not "for the good of Germany" to reveal that it was breaching its treaty obligations.

Intriguingly, Morris reports, in its early stages such prosecutorial creativity garnered judicial support not because of any commands from on high "but from a pervasive right-wing ideology shared by an overwhelming majority of judges. This ideology was the invisible hand that gave political cases ... a predictability that emboldened rightists while intimidating leftists." In short, the Weimar judiciary would have benefited greatly from a diverse pool of judges who worked out legal problems one at a time and engaged each other in an open debate concerning the appropriateness of particular applications of state power.

The republic's legal system was also characterized by a pattern in which curtailments of procedural rights, originally imposed in a limited group of cases thought to represent a direct threat of the violent overthrow of the government, expanded to more and more crimes.

Increasing numbers of defendants faced trials in closed courtrooms filled with armed policemen purportedly guarding against potential security breaches before panels of judges personally selected by the chief judge in which they were required to defend themselves against amorphous charges [*57] supported by secret evidence argued *ex parte* to the tribunal by the prosecution.

These were not developments that took place over the protests of the judges -- in fact, in many cases, it was the judges who were responsible for them.

Eventually the Nazis' power grew to the point where the judges became irrelevant. That was when Hirschberg himself was put into "protective custody." As Morris explains, "By declaring that someone threatened (or might in the future threaten) the public order, the Nazis empowered themselves to arrest whomever they wanted for as long as they wanted. No judicial warrants authorized the arrests, and no court orders could end the detentions." Hirschberg was eventually released after some months, apparently as a result of a tussle for influence among party higher-ups.

By then, of course, the Weimar Republic's legal system was in a death spiral. Within a year, Hirschberg had fled the country. He ultimately made his way to the United States, where he died in 1964.

This is not a book that will tell you how to better try your case or argue your appeal. But, some day when you are tempted to be content with "good enough," it may inspire you to put an extra bit of effort into those activities. For it will forcefully remind you that in advocating zealously for your client -- and in pressing the judicial system hard to ensure that it turns square corners -- you are helping to keep your country a republic.

GRAPHIC:
PICTURE, no caption