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## Of Nazis, Americans, and Educating Against Catastrophe

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# Of Nazis, Americans, and Educating Against Catastrophe

ERIC L. MULLER†

## INTRODUCTION

Robert Jackson's Convocation Address on the occasion of the University of Buffalo's Centennial was odd in one respect: it presented a thesis that it did not try to support. Jackson's argument at the outset of his speech was hardly surprising in a university setting: "[I]t is my conviction that improvement through education offers the last clear chance of civilization to avoid catastrophe."<sup>1</sup> A moment later he spoke generally of the "glorification of war and the warrior"<sup>2</sup> in western learned culture and, intriguingly, characterized war as a *professional* failing: the machinery that would prevent war, he argued, "always broke down when the stress came because its peace professions were superficial while its background of war psychology was deep and permanent."<sup>3</sup>

But these were his last words clearly relating to education in the address. He quickly moved on to a different matter: the utility of the Nürnberg trials in instilling and enforcing norms of peace in international law.<sup>4</sup> To give an

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1. Robert H. Jackson, *Address at the University of Buffalo Centennial Convocation, October 4, 1946*, 60 BUFF. L. REV. 283, 284 (2012).

2. *Id.*

3. *Id.* at 285.

4. *Id.* at 287 ("The long-range significance of the Nurnberg trial lies in the effort to demonstrate or to establish the supremacy of law over such lawless and catastrophic forces as war and persecutions, and to clarify and implement the

account of Nürnberg was no doubt pressing in his mind on October 4, 1946; the guilty verdicts against eighteen of the twenty-one defendants were just three days old, and the whole world was awaiting the hangings of eleven of the convicts.<sup>5</sup> Jackson surely is not to be faulted for failing to reason his way, in the space of three days, from the example of the Nürnberg trials all the way to a comprehensive account of how “improvement through education” might enhance the protection of minorities. But for a speech at a major research university’s centennial celebration, delivered in academic regalia, Jackson’s address was curiously silent on the message about education that it promised.

Nearly five years later, Justice Jackson came back to Buffalo to deliver a major address at the University of Buffalo Law School. Same setting, similar expectations—and a similar silence. Jackson was typically eloquent in sketching what he called the “American dilemma”<sup>6</sup> in which the domestic legal system is called upon to reconcile claims for security and liberty without “los[ing] our heritage.”<sup>7</sup> Jackson described the problem beautifully, illustrating it with historical episodes including the United States Supreme Court’s 1944 decision upholding the government’s forced removal of tens of thousands of American citizens of Japanese ancestry from the West Coast in the spring of 1942.<sup>8</sup> But again, this time in a room full of lawyers and law students, he edged away from the question of education’s role in the process of reconciling values. “It is customary,” said Jackson at the very end of his address, “to tell students how urgently these great issues challenge them, and how

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law for the practical task of doing justice to offenders, and for the academic task of setting straight the thinking of responsible men on these subjects.”).

5. Only ten would be executed on October 16, 1946; Hermann Göring cheated the hangman by committing suicide the night before his appointment at the gallows. Dana Adams Schmidt, *Guilt Is Punished*, N.Y. TIMES, Oct. 16, 1946, at 1.

6. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 117 (1951).

7. *Id.* at 115.

8. See *id.* at 115-16 (evaluating *Korematsu v. United States*, 323 U.S. 214 (1944)).

soon they will have to face the greatest challenge of history[, but] I forbear such extravagances.”<sup>9</sup> If his audience of lawyers-in-training—and their trainers—were to learn a few of the skills of a “peace profession,” to use Jackson’s turn of phrase,<sup>10</sup> they were not going to learn them from Jackson.

The moment is ripe for consideration of Jackson’s suggestion of a role for education in tempering the excesses of a war mentality. We have recently seen high-ranking, prestigiously educated government lawyers help develop and defend interrogation techniques for detainees that can fairly bear the label of torture.<sup>11</sup> These lawyers have not, thus far, been meaningfully called to account. This experience suggests the need for greater attention in legal education to matters of principle and conscience, and perhaps some study of moments in the history of the legal profession when lawyers have served causes of great injustice. At the same time, our anemic economy is placing strong pressure on law schools to produce graduates who are ready for the pragmatics of law practice.<sup>12</sup> This reality pushes us in a rather different direction.

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9. *Id.* at 117.

10. I do not mean to suggest that Jackson himself understood the practice of law to be a “peace profession.” Indeed, Jackson’s 1945 vote—the necessary fifth—to uphold the decision of the Illinois bar to deny a law license to a pacifist conscientious objector implies that Jackson did not see lawyers as agents in a campaign of resisting the excesses of war. See *In re Summers*, 325 U.S. 561 (1945). An interesting question lurks here as to why Jackson, openly advocating for legal processes to restrain and temper the instinct to war, would have approved of a state bar association’s decision not to license a pacifist. But that is a biographical question about Jackson himself that is outside the scope of this Essay.

11. I refer, of course, to John Yoo and Jay Bybee of the Bush Administration’s Office of Legal Counsel. See, e.g., Letter from John Yoo, Deputy Assistant Gen. of the U.S., to Alberto R. Gonzales, Counsel to the President of the U.S. (Aug. 1, 2002); Memorandum from Jay Bybee, Assistant Attorney Gen. of the U.S., on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, to Alberto R. Gonzales, Counsel to the President of the U.S. (Aug. 1, 2002).

12. See Alfred S. Konefsky & Barry Sullivan, *There’s More to the Law than Practice Ready*, CHRON. OF HIGHER EDUC., Oct. 28, 2011, at A30; see also David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1.

This Essay offers some preliminary thoughts about how we might fill in some of the blanks in Jackson's message about the value of education as a counterweight to wartime excesses. It pairs the stories of two relatively high-ranking lawyers from different countries who oversaw the forced removal of racially defined state enemies during World War II, motivated not chiefly by virulent racism or psychopathology but by something more uncomfortable to acknowledge: the pressure of professional ambition. In the key years between Jackson's two Buffalo speeches, both of these men avoided public accountability for their acts of repression. Both lived out the rest of their lives more or less in peace. This Essay explores some of the all-too-human forces that tend to lead societies—as they led Germany and the United States—away from honestly reckoning with the choices people make to harness their professional energies to advance systems of repression. Indeed, it uses Jackson's own ambivalent response to the wartime imprisonment of Japanese Americans to illustrate those very forces. Finally, this Essay takes up Jackson's call for deploying education as civilization's last clear chance to avoid the catastrophic mistreatment of minorities. It offers some tentative thoughts about how legal education might provide a moral grounding that would counterbalance the everyday ambitions and administrative pressures that can lead the members of a learned profession to sustain and nurture systems of repression.

#### I. TWO DESIGNERS OF DEPORTATION: BENNO MARTIN AND KARL BENDETSSEN

I begin with a comparison of two men, a German and an American, that will strike many as tendentious and heavy-handed, even outrageous. By the time the comparison is complete, I hope to have persuaded at least some readers that it is not, and that our instinct to recoil from the comparison of German and American wartime excesses is itself revealing of a force that undermines honest reckoning.

The comparison is of the activities of two influential men in the winter and spring of 1942. The German was

Benno Martin, the forty-nine year old chief of police in the Bavarian city of Nürnberg.<sup>13</sup> The American was Karl Bendetsen, a U.S. Army colonel who was the commanding officer of the Wartime Civil Control Administration (“WCCA”), a unit of the Army’s Western Defense Command based in San Francisco.<sup>14</sup> Both were trained in law. Martin, born in 1893 in the southwestern German city of Kaiserslautern, studied jurisprudence and law before the First World War and resumed those studies after the war ended.<sup>15</sup> He received his juris doctorate in 1923 from Erlangen University while on the staff of the Bavarian state police, earning the highest grade on his terminal examination.<sup>16</sup> Bendetsen, born in 1907 in Aberdeen, Washington, was a 1932 graduate of Stanford Law School who left the private practice of law in 1940 to enter the Army.<sup>17</sup> The central point of comparison, however, is not that both were lawyers. It is that early in 1942, both men had authority to oversee the forcible removal and exile of a racially defined internal enemy. In Martin’s case, the enemy was Jews.<sup>18</sup> In Bendetsen’s, the enemy was people of Japanese ancestry.

A. *Benno Martin and the Forced Removal of the Jews of Franconia*

Martin came from a Catholic family that for several hundred years had sent its young men into civil service.<sup>19</sup>

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13. Little has been written about Benno Martin in English. The leading source on him is a somewhat suspiciously sympathetic dissertation by Utho Grieser, *HIMMLERS MANN IN NÜRNBERG* (1974).

14. The leading source on Karl Bendetsen is KLANCY CLARK DE NEVERS, *THE COLONEL AND THE PACIFIST* (2004).

15. See Benno Martin, *Lebenslauf* (resumé), Aug. 15, 1935, at 1, Bundesarchiv Berlin (copy on file with author).

16. See EDWARD N. PETERSON, *THE LIMITS OF HITLER’S POWER* 248 (1969).

17. DE NEVERS, *supra* note 14, at 46, 52-53, 61.

18. We do not think of Jews as a “racially” defined group, but that is how Nazi ideology defined Jews. See ANDRÉ MINEAU, *THE MAKING OF THE HOLOCAUST: IDEOLOGY AND ETHICS IN THE SYSTEMS PERSPECTIVE* 103 (1999).

19. GRIESER, *supra* note 13, at 72.

His sympathetic biographer argues that this family tradition impelled him (and many other bureaucrats) to serve every regime and facilitate its authority regardless of the regime's politics.<sup>20</sup> Martin's own political persuasion was, however, decidedly nationalist and conservative, as was his wife's. Their sympathies and votes during the Weimar period were mostly for the reactionary DNVP (German National People's Party).<sup>21</sup>

A dashing, broad-shouldered man well over six feet tall,<sup>22</sup> Martin joined the Bavarian state police in 1919.<sup>23</sup> Within four years, at the young age of thirty, Martin was promoted from within the ranks to an administrative position in the political section of the central police office for the Nürnberg-Fürth district in the city of Nürnberg.<sup>24</sup> He quickly distinguished himself for two things: a no-nonsense law-and-order agenda and a single-minded focus on his own advancement. Neither of these was uncomplicated in Nürnberg, the home turf of one of the National Socialists' most rabid and unstable anti-Semites, Julius Streicher, and Streicher's newspaper *Der Stürmer*.<sup>25</sup> One of Adolf Hitler's few true intimates, Streicher became the Nazi Party's "Gauleiter," or district boss, for the Franconia region in 1928.<sup>26</sup> Martin's strategy in these early years was to protect Streicher and his thugs from prosecution where he could while simultaneously cultivating a relationship with Hitler directly and with Heinrich Himmler, the commander of the SS and an opponent of Streicher's within the Nazi Party.<sup>27</sup>

Martin did not become a party member until May 1, 1933, a few months after Hitler's seizure of power.<sup>28</sup> He later

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20. *See id.*

21. *See id.* at 74.

22. PETERSON, *supra* note 16, at 248-49.

23. *See* Martin, *supra* note 15, at 1.

24. *See id.*

25. ERIC G. REICHE, THE DEVELOPMENT OF THE SA IN NÜRNBERG, 1922-1934, at 16-17 (2002).

26. *See id.* at 18, 83.

27. *See* GRIESER, *supra* note 13, at 62-66; PETERSON, *supra* note 16, at 251.

28. *See* Martin, *supra* note 15, at 2.

explained that he waited until after Hitler came to power because Streicher thought he would be more useful to the Party outside it than within it.<sup>29</sup> The ascension of the Nazis to power led to reshufflings of local power across Germany, and with the support of Streicher and Himmler, two powerful men who mistrusted each other, Martin was beautifully positioned to capitalize on it. In late September 1934, a few months after adding SS membership to his resumé, Martin was appointed Nürnberg's police chief, a position he held until mid-December of 1942.<sup>30</sup>

As an ever-rising star in the Reich, Martin might be assumed to have been a National Socialist zealot and a rabid anti-Semite. He appears to have been neither. Through the 1930s he often used his authority to "moderate or deflect the action of the party radicals, and in time to end the power of his onetime protector, Streicher."<sup>31</sup> And although Martin had no qualms about using a house expropriated from a Nürnberg Jew as his official residence,<sup>32</sup> it is well documented that Martin deployed police power to protect Nürnberg's Jews from the most extreme degradations attempted by Streicher and his mob, warned some Jews in advance of police actions, and helped some to emigrate.<sup>33</sup> It is not that Martin did not appreciate the violent, even annihilatory nature of the Nazis' darker aspirations; it is rather that he told himself that such things would never actually come to pass.<sup>34</sup> Perhaps the shrewdest assessment of Martin came from Reinhard Heydrich, the Chief of the Reich Main Security Office and architect of the

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29. See GRIESER, *supra* note 13, at 77.

30. See Martin, *supra* note 15, at 2.

31. PETERSON, *supra* note 16, at 251.

32. See Edith Raim, *Die Strafverfahren wegen der Deportation der Juden aus Unter- und Mittelfranken nach 1945*, in *WEGE IN DIE VERNICHTUNG: DIE DEPORTATION DER JUDEN AUS MAINFRANKEN, 1941-1943*, at 178, 183 (2003).

33. See GRIESER, *supra* note 13, at 256-57; PETERSON, *supra* note 16, at 267-68.

34. See GRIESER, *supra* note 13, at 256.



plans to murder all of the Jews of Europe.<sup>35</sup> In March of 1942, when SS chief Himmler was considering Martin for a promotion, Heydrich wrote to him that while Martin's police work in Nürnberg had been satisfactory at a technical level, it was always in service of Martin's own personal ends rather than National Socialism's.<sup>36</sup>

And yet, when the time came in late 1941 for Heydrich to implement the plan for deporting Germany's Jews to the East where they would be murdered, the task of organizing and implementing that deportation for the Franconia region fell to its police chief Benno Martin. And while Martin had served as something of a buffer for Nürnberg's Jews against the worst excesses of the November 1938 pogroms we know as "*Kristallnacht*,"<sup>37</sup> this was a forcible mass uprooting and exile that left little room for fudging. The first deportation came at the very end of November, 1941: one thousand Jews were roused from their homes, placed on trains, and shipped off to Riga.<sup>38</sup> This was a large operation with many details to coordinate: a gathering point needed to be found and prepared; trains needed to be secured; police personnel needed to be deployed to gather, register, search, and guard the deportees; and officials needed to be appointed to examine and inventory the property the deportees tried to bring with them.<sup>39</sup> The official planning document dated November 11, 1941, made clear that Martin "personally oversaw the overall performance" of this operation and assigned responsibility for its execution to a subordinate.<sup>40</sup>

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35. MICHAEL WILDT, *AN UNCOMPROMISING GENERATION: THE NAZI LEADERSHIP OF THE REICH SECURITY MAIN OFFICE 148-64* (Tom Lampert trans., Univ. of Wis. Press 2009) (2003); *see also infra* note 102 and accompanying text.

36. Heydrich's letter appears in translation in PETERSON, *supra* note 16, at 252, and in the original German in GRIESER, *supra* note 13, at 240.

37. *See* GRIESER, *supra* note 13, at 138-44; PETERSON, *supra* note 16, at 270-71.

38. *See* ANDREJ ANGRICK & PETER KLEIN, *THE "FINAL SOLUTION" IN RIGA: EXPLOITATION AND ANNIHILATION, 1941-1944*, at 205 (Ray Brandon trans., Berghahn Books 2009) (2006).

39. *See* CHRISTOPHER BROWNING, *THE ORIGINS OF THE FINAL SOLUTION: THE EVOLUTION OF NAZI JEWISH POLICY, SEPTEMBER 1939-MARCH 1942*, at 383 (2007).

40. The order is quoted in GRIESER, *supra* note 13, at 262.

He would later maintain that even here he sought to temper the harshness of the blow, insisting that he had let it be known he would not tolerate any “*Schweinerei*” (mischief), had allowed the head of the Jewish community in Nürnberg to decide who should be on the transport, and had chosen an out-of-the-way (and therefore less stigmatizing) assembly point for the Jews.<sup>41</sup> Yet it is clear that *Schweinerei* did in fact occur; police and SS men pocketed large amounts of money that the Jews were supposed to be permitted to take with them, and a huge “party of celebration” took place at the assembly site after the trains pulled away, with everyone enjoying and making off with the foods and luxury items that the deportees had been forced to leave behind.<sup>42</sup>

While Martin remained police chief, four more deportations of Franconia’s Jews took place, on March 24, April 25, September 10, and September 23, 1942.<sup>43</sup> The April 25th deportation left not from Nürnberg but from Würzburg, another Bavarian city with its own Gestapo branch that was answerable to Martin’s office in Nürnberg.<sup>44</sup> The Würzburg branch carried out that deportation under orders from Nürnberg and under the watchful eyes of two observers sent by Martin.<sup>45</sup> Martin was not directly involved in that deportation, but did take the time a few days after its completion to write a thank-you note to Würzburg’s police chief, the commander of the “*Schupo*” (uniformed police), and the SS district leader for their work in bringing it off.<sup>46</sup>

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41. See *id.* at 262-63; PETERSON, *supra* note 16, at 273.

42. ERIC A. JOHNSON, NAZI TERROR: THE GESTAPO, JEWS, AND ORDINARY GERMANS 400 (2000).

43. See GRIESER, *supra* note 13, at 264.

44. See Herbert Schott, *Die ersten drei Deportationen mainfränkischer Juden 1941/42*, in *WEGE IN DIE VERNICHTUNG: DIE DEPORTATION DER JUDEN AUS MAINFRANKEN, 1941-1943*, *supra* note 32, at 73, 117.

45. *Id.*

46. See GRIESER, *supra* note 13, at 265.

In total, about 4500 Jews were sent eastward in the deportations undertaken under Martin's authority.<sup>47</sup> Fewer than one hundred survived.<sup>48</sup>

In December of 1942, Benno Martin was promoted to a high-ranking position ("*Höhere SS-und Polizeiführer*") in the SS.<sup>49</sup>

B. *Karl Bendetsen and the Forced Removal of Japanese and Japanese Americans from the West Coast*

Karl Bendetsen<sup>50</sup> grew up in Aberdeen, Washington, a gritty coastal mill town.<sup>51</sup> All of his grandparents were Jewish immigrants from Lithuania and Poland.<sup>52</sup> His father owned a successful clothing store in Aberdeen's small commercial area.<sup>53</sup> The young Bendetsen was "tall, good-looking, and self-assured,"<sup>54</sup> attributes that surely helped him when he lied about his age and joined the Washington National Guard at the age of fourteen.<sup>55</sup>

Bendetsen attended Stanford University, where he completed the Reserve Officers' Training Course ("ROTC"), and upon receiving his undergraduate degree he decided to stay at Stanford for law school.<sup>56</sup> He received his law degree in 1932 and returned to his hometown to practice law.<sup>57</sup> He mixed in the community, as one would expect a young lawyer seeking business to do.<sup>58</sup> Later in life, Bendetsen

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47. *Id.*

48. *See id.*

49. *See id.* at 242.

50. The family name was actually Bendetson. As an adult, Karl changed the spelling to "Bendetsen," abandoned Judaism, and invented a Danish lineage for himself. *See* DE NEVERS, *supra* note 14, at 11, 304.

51. *Id.* at 44-46.

52. *Id.* at 44-45.

53. *Id.* at 46.

54. *Id.* at 51.

55. *Id.* at 50.

56. *Id.* at 52-54.

57. *Id.* at 54.

58. *See id.* at 55-56 (describing Bendetsen's early career and social life).

would say that he had known “many, many Japanese.”<sup>59</sup> Aberdeen was in fact home to a small Japanese community of about eighty people,<sup>60</sup> but there is no evidence that Bendetsen was intimate with that community, or, for that matter, that he held views about his Japanese immigrant neighbors and their children that differed from what one would expect at that time and place.

Bendetsen served as an officer in the U.S. Army Reserve throughout the 1930s,<sup>61</sup> but as the prospects of war grew, his thoughts turned toward active duty. He gravitated toward the Army’s Judge Advocate General section because of a personal contact he had there, accepting a permanent appointment to that unit early in 1940 at the rank of captain.<sup>62</sup> He felt at first like little more than an errand boy,<sup>63</sup> but he soon found cases that would draw attention to himself. He quickly impressed the Judge Advocate General himself, Major General Allen W. Gullion.<sup>64</sup> In early July of 1941, the Army reestablished the Office of the Provost Marshall General with Gullion at the helm.<sup>65</sup> Gullion brought Bendetsen along as his assistant.<sup>66</sup> The young Army lawyer, suddenly promoted to the rank of major, was all of thirty-three years old.<sup>67</sup>

Major Bendetsen’s involvement in the mass removal of Japanese and Japanese Americans after the Pearl Harbor attack came in two distinct stages. The first stage lasted from the end of December 1941 through mid-February 1942, with Bendetsen functioning as something of an

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59. *Id.* at 11.

60. *Id.* at 36.

61. Interview by Jerry N. Hess with Karl R. Bendetsen, in N.Y., N.Y. (Oct. 24, 1972) (conducted for the Harry S. Truman Library), *available at* <http://www.trumanlibrary.org/orallhist/bendet1.htm> [hereinafter Bendetsen Interview].

62. DE NEVERS, *supra* note 14, at 60.

63. *Id.* at 61.

64. *See id.* at 61-62.

65. *Id.* at 62.

66. *Id.*

67. *See id.* at 46, 62.

intermediary among the various Army units developing the policy of mass removal. The second stage began in mid-February 1942 and lasted through early summer, with Bendetsen, buoyed by yet another promotion, stepping into the role of War Department factotum for the implementation of the removal policy.

After the Pearl Harbor attack, officials across the federal civilian and military bureaucracy recognized the pressing need to develop a policy for controlling enemy aliens around sites of strategic importance, but no one was clear on who would be responsible for it. One candidate was Lieutenant General John DeWitt, the commander of the newly created Western Defense Command at the Presidio in San Francisco.<sup>68</sup> DeWitt's early position on the enemy alien question was cautious; he thought the problem would best be handled through civilian channels, and he did not believe that any sort of mass roundup was advisable.<sup>69</sup> Another candidate was the Justice Department, which, on the basis of the FBI's view that it had the enemy alien problem firmly in hand, was even more restrained than DeWitt on these questions.<sup>70</sup> The third candidate was Karl Bendetsen's boss, Provost Marshall General Allen Gullion, who was convinced from the start that only an all-out program of forcibly removing all people of Japanese ancestry from the West Coast would meet the political and military demands of the moment.<sup>71</sup>

Operationally, General DeWitt was at the center of the policy debate, but he was vacillating and ineffectual—"the creature of the last strong personality with whom he had contact," as Roger Daniels put it.<sup>72</sup> Gullion quickly saw that the key to controlling the policy was controlling DeWitt, a job he gave to Bendetsen. Starting around the first of the

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68. ROGER DANIELS, *CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II* 36 (1971).

69. *Id.* at 40.

70. See PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 25-33 (1983).

71. See DANIELS, *supra* note 68, at 40; DE NEVERS, *supra* note 14, at 82.

72. DANIELS, *supra* note 68, at 44.

year, Bendetsen began an intense period of shuttle diplomacy, traveling back and forth between Washington, DC, and the Presidio, meeting repeatedly with General DeWitt and with Justice Department officials in both locations.<sup>73</sup> But he was not a neutral broker in the discussions; he was advancing Gullion's agenda of removing and confining all of the West Coast's ethnic Japanese population and divesting the civilian Justice Department of influence over that agenda.<sup>74</sup>

The policy for which Bendetsen advocated was unquestionably racial. In an early February 1942 memorandum on what he called the "Japanese problem," Bendetsen wrote that "[t]he vast majority of those who have studied the Oriental mind assert that a substantial majority of Nisei<sup>75</sup> bear allegiance to Japan and . . . will engage in organized sabotage, particularly, should a raid along the Pacific Coast be attempted by the Japanese."<sup>76</sup> Just days later, in a memorandum justifying the decision to uproot every person of Japanese ancestry from their homes, Bendetsen argued that "[t]he Japanese race is an enemy race" and that while many members of the Nisei generation had become "Americanized," the "racial strains" tending toward disloyalty were "undiluted."<sup>77</sup> Even decades later, at the end of his life, Bendetsen insisted that the Japanese, regardless of citizenship, were a race apart. He maintained to an interviewer in 1972 that "the preponderance of all persons of Japanese ancestry residing on the West Coast . . . had largely concentrated themselves into specific and readily identifiable clusters" where they "carried on their

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73. See DE NEVERS, *supra* note 14, at 81-94, 98-109.

74. See DANIELS, *supra* note 68, at 40, 44-45; DE NEVERS, *supra* note 14, at 81-88.

75. "Nisei" refers to the second generation of the Japanese community in the United States, those born in the United States to immigrant parents. JAPANESE AM. NAT'L MUSEUM, *ENCYCLOPEDIA OF JAPANESE AMERICAN HISTORY* 310 (2001).

76. DE NEVERS, *supra* note 14, at 103 (quoting Bendetsen memorandum of February 4, 1942).

77. IRONS, *supra* note 70, at 59 (quoting Bendetsen memorandum of February 13, 1942).

own culture [and] their own educational system” which “generate[d] a separate way of life.”<sup>78</sup>

The details of Bendetsen’s interventions in the developing policy debate in January and early February of 1942 have been amply documented elsewhere and are not important to the current account. The important point is that he succeeded in steering the debate in favor of the mass uprooting and exclusion of every person of Japanese ancestry from the West Coast. The task was not easy; it required him to outmaneuver high-ranking Justice Department lawyers who maintained that the mass removal of American citizens would be unconstitutional.<sup>79</sup> But in the end, he prevailed. On February 19, 1942, President Franklin Roosevelt signed the executive order that delegated to General DeWitt the power to declare military zones within the Western Defense Command, from which he could order the removal of civilians.<sup>80</sup>

Major Bendetsen might have thought that day that his tasks on Japanese American exclusion were complete, but he was mistaken. Having won the power to uproot more than 110,000 people from their homes, General DeWitt confronted the massive logistical problem of implementing the program. He turned to the young and ambitious lawyer who had helped bring the program into being. On March 11, 1942, DeWitt informed Bendetsen that he was delegating to him the power to carry the President’s executive order into effect.<sup>81</sup> It was to be Bendetsen’s job “to organize a bureaucracy to effect a mass evacuation and to construct both temporary and permanent housing”<sup>82</sup> for the entire ethnically Japanese population of the West Coast. To sweeten the deal, DeWitt conferred on Bendetsen yet another promotion, this time to the rank of colonel, which

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78. Bendetsen Interview, *supra* note 61.

79. See IRONS, *supra* note 70, at 62.

80. GREG ROBINSON, BY ORDER OF THE PRESIDENT 108 (2001).

81. See DE NEVERS, *supra* note 14, at 128.

82. *Id.*

Bendetsen would note decades later “made [him] the youngest in that grade at that time.”<sup>83</sup>

In this second phase of his involvement with mass exclusion, Bendetsen shifted from the role of intermediary and draftsman to the role of boss. On March 11, 1942, DeWitt created the Wartime Civil Control Administration (“WCCA”) within the Western Defense Command and tasked it with the responsibility of overseeing the removal of Japanese and Japanese Americans from the West Coast.<sup>84</sup> He placed Bendetsen at its helm.<sup>85</sup> The young colonel threw himself into the dizzying task. His pilot project, on March 30th, was at Bainbridge Island near Seattle: with a week’s notice, forty-five Japanese families consisting of ninety-one aliens and 180 American citizens were placed on a ferry to Seattle and then shifted to a train for the long trip to a new confinement facility called Manzanar that was under construction in the Owens Valley of California.<sup>86</sup> The Bainbridge Island deportation served as a template for the process that Bendetsen repeatedly oversaw in the following few months up and down the West Coast. The logistics of the process were overwhelming. Bendetsen and his WCCA were responsible for dividing the coast into exclusion zones and districts, notifying and registering the affected population, arranging for transportation, coordinating efforts at dealing with property being left behind, selecting and building confinement sites, and hundreds of other tasks major and minor.<sup>87</sup> By the time the spring of 1942 turned to summer, much of Bendetsen’s work was complete. He had overseen the removal and confinement of more than 110,000 aliens and U.S. citizens on the basis of their ancestry.<sup>88</sup>

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83. Bendetsen Interview, *supra* note 61.

84. DE NEVERS, *supra* note 14, at 128; LOUIS Fiset, *CAMP HARMONY: SEATTLE’S JAPANESE AMERICANS AND THE PUYALLUP ASSEMBLY CENTER* 49 (2009).

85. DE NEVERS, *supra* note 14, at 128.

86. *See id.* at 135; U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 109 (1997) [hereinafter *PERSONAL JUSTICE DENIED*].

87. *See* DE NEVERS, *supra* note 14, at 136-39, 153-54.

88. *Id.* at 143.



In November of 1942, as Nürnberg police chief Benno Martin was preparing for his promotion into the higher ranks of the SS, the U.S. Army awarded Colonel Karl Bendetsen its Distinguished Service Medal on the recommendations of Gullion and DeWitt.<sup>89</sup> *Time Magazine*, reporting on the award, called Bendetsen's work "the biggest moving job in U.S. history."<sup>90</sup>

C. *Calibrating the Comparison of Martin and Bendetsen*

There is more of the stories of Benno Martin and Karl Bendetsen to tell; I have as yet said nothing of how the men were (and were not) later called to account for their wartime conduct. Before comparing the processes of post-war reckoning, however, I would like to pause for a few clarifying comments about the comparison I've already drawn. Some readers, I suspect, might object to any comparison of American and Nazi policy, because American policy was not genocidal. The deprivations inflicted on Jews at the eastern terminus of their deportations differed not only in degree but also in kind from those visited on the ethnic Japanese at the end of their eastward exile. Some might see the very idea of comparing what Karl Bendetsen did with what Benno Martin did as an exercise in presentism, an unfair imposition on Bendetsen of the moral sense of a later generation.

As it happens, however, comparing American with Nazi policy is no anachronism; it is something that occurred to people of Bendetsen and Martin's own era. For example, the comparison occurred to—and roiled—Justices of the United States Supreme Court during World War II. In June of 1943, the Court was presented with a constitutional challenge to a dusk-to-dawn curfew that Bendetsen had implemented (with General DeWitt's signature) for Americans of Japanese ancestry in late March of 1942.<sup>91</sup> The Court upheld the curfew, but Justice Frank Murphy, in a concurring opinion, worried that placing "no less than

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89. *Id.* at 185.

90. *Aliens: Medal for Moving*, *TIME*, Nov. 30, 1942, at 22.

91. *See Hirabayashi v. United States*, 320 U.S. 81, 83-84 (1943).

70,000 American citizens . . . under a special ban and depriv[ing them] of their liberty because of their particular racial inheritance[ ] . . . b[ore] a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe.”<sup>92</sup> A year later, Justice Roberts suggested such a resemblance in a case presenting a constitutional challenge to the mass exclusion and confinement of Americans of Japanese ancestry.<sup>93</sup> In a dissent from the Court’s six-to-three decision to uphold the program, Justice Roberts described the matter as “the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry.”<sup>94</sup> The term “concentration camp” rankled the author of the majority opinion, Justice Black, enough to provoke a dispute about how apt the analogy was. “Regardless of the true nature of the assembly and relocation centers” for Japanese Americans, said Justice Black, “we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies.”<sup>95</sup> And in a 1943 opinion invalidating a compulsory flag salute for public schoolchildren, Justice Jackson compared American efforts to compel veneration of the flag to “the fast failing efforts of our totalitarian enemies.”<sup>96</sup>

What is more, the comparison of American and German deportations occurred *to Benno Martin himself* (or at least to a lawyer representing him). Early in the 1950s, as Martin defended himself in a German domestic court against criminal charges arising from the deportation of Franconia’s Jews, Martin’s lawyer sought to normalize the German policy by comparing it to the contemporaneous American program: “Pure evacuation measures,” he argued, “were carried out neither solely against Jews nor solely by

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92. *Id.* at 111 (Murphy, J., concurring).

93. *See Korematsu v. United States*, 323 U.S. 214 (1944).

94. *Id.* at 226 (Roberts, J., dissenting).

95. *Id.* at 223 (majority opinion).

96. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). I thank John Barrett for reminding me of this apt example.

Germans; in fact the American General DeWitt, as High Commander of the American West Coast, gathered 112,000 American citizens of Japanese ancestry living on the West Coast in camps in the country's interior after the start of the war with Japan."<sup>97</sup> The German court was not persuaded by the analogy, but the point here is that the idea of seeing commonality in the two systems of racial deportation is not only not *unfairly* presentist; it is not presentist at all.

Some might object to comparing Martin with Bendetsen on the basis that the contexts of the two deportations were different: Jews posed no threat to German security, while the Japanese did pose such a threat to and in the United States. This objection, which sounds faintly in the doctrine of justification, is mistaken for at least two reasons. For one, even if it is correct that the Japanese posed enough of a military threat to the U.S. mainland in early 1942 to support mass action against a domestic enemy,<sup>98</sup> Karl Bendetsen's program did not distinguish between Japanese aliens and U.S. citizens. The only thing that connected U.S. citizens of Japanese ancestry to the Japanese military enemy was a belief in the idea of a racially-defined enemy of the state, which was a notion with a German pedigree as well. Second, this objection fails to recognize that in Nazi ideology, Jews absolutely *did* pose a threat to German security. As the Nazis saw things, Jews were responsible for the "stab in the back" that undid Germany in World War I and led to the punitive stipulations of the Versailles Treaty; they were the core of Bolshevism, National Socialist Germany's nemesis; they were responsible for the hyperinflation that beset Germany in the Weimar years;<sup>99</sup>

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97. 4 JUSTIZ UND NS-VERBRECHEN 554 (1970) (author's translation from German).

98. There was ample evidence at the time that they did not. See Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1354-68 (2010).

99. DAVID A. WELCH, *JUSTICE AND THE GENESIS OF WAR* 132 (1995) ("Hitler blamed the Jews for Germany's stab in the back. . . . He blamed them for bringing the scourge of Bolshevism into the world."); Donald L. Niewyk, *Weimar*, in 2 *ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION* 759, 760 (Richard S. Levy ed., 2005) ("The participation of Jews in

and young Jewish men assassinated Nazi officials or plotted violence against Nazi offices in several different episodes in the 1930s.<sup>100</sup> To suggest that Americans rightly worried about Americans of Japanese ancestry while Germans arbitrarily victimized Jews is to misunderstand both the American and the German frame of mind.

Some might recoil from comparing Bendetsen to Martin on the basis that while Bendetsen was a cog in the machinery of exclusion and confinement, Martin was a cog in the exponentially more immoral machinery of mass murder. This observation starkly distinguishes the two systems, but less so the two men. Nothing in the historical record suggests that Martin knew that the deportations he was arranging in late 1941 and early 1942 were the first steps of a march to mass murder.<sup>101</sup> Martin was an important regional police chief, but he was not party to the planning that was taking place above his head, at the level of a Heinrich Himmler or a Reinhard Heydrich, to turn the object of the Nazi program for the Jews from forced emigration to physical annihilation. He had no seat at the table at the Wannsee Conference in January 1942, where a range of upper-level Nazi bureaucrats acceded to Heydrich's control over a program of industrialized genocide.<sup>102</sup> His work in Nürnberg in late 1941 and very early 1942 would have given him no word of the gas chambers and crematoria

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leftist and antiwar agitation was held as proof that that they had helped deliver a 'stab in the back' to the German army in 1918.”).

100. See *Student Admits Killing Nazi Chief*, N.Y. TIMES, Dec. 10, 1936, at 18 (recounting David Frankfurter's murder of Wilhelm Gustloff in Switzerland); *Germans Execute Hirsch, U.S. Citizen*, N.Y. TIMES, June 5, 1937, at 1 (reporting on the guillotining of Helmuth Hirsch for a plan to blow up the offices of Julius Streicher's anti-semitic newspaper *Der Stürmer*); *Reich Embassy Aide in Paris Shot to Avenge Expulsions by the Nazis*, N.Y. TIMES, Nov. 8, 1938, at 1 (reporting on Herschel Grynszpan's shooting of Ernst vom Rath at the German Embassy in Paris to avenge the Reich's exile of Polish immigrant Jews from Germany).

101. There is also no evidence in the historical record that Martin knew what awaited the Jews deported on his watch in September of 1942, but it is hard to believe that by that late point Martin would not at least have heard rumors of mass killings. See BROWNING, *supra* note 39, at 391.

102. See MARK ROSEMAN, *THE VILLA, THE LAKE, THE MEETING: WANNSEE AND THE FINAL SOLUTION* (2003) (summarizing and analyzing the Wannsee Conference of 1942).

that were under construction or just coming on-line at Chelmno, Belzec, Birkenau, and Sobibor.<sup>103</sup> What Benno Martin had to account for was designing and overseeing a system that forced people defined as a racial enemy out of their communities and into indefinite exile as vulnerable wards of the state. That is also what Karl Bendetsen did. To be sure, the American affirmatively knew something that the German did not, namely that the deportees would not face physical brutality or disease at their destinations and would have at least some assistance in holding on to their property. But Bendetsen could not absolutely count on that in the future. What turns might American policy have taken toward its Japanese American captives if, in the months and years following the round-ups, the war had gone badly? Whatever fate might have awaited Japanese Americans, it would have been Karl Bendetsen's deportations and imprisonments that placed them directly in harm's way and made them an easy, captive target.<sup>104</sup>

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103. See YAACOV LOZOWICK, *HITLER'S BUREAUCRATS* 103 (Haim Watzman trans., Continuum 2002) (2000) ("The death camps were still not fully operational, so news of them could not reach either the Jews or the local bureaucrats in the cities of Germany."); Peter Fritzsche, *The Holocaust and Knowledge of Murder*, 80 J. MODERN HIST. 594, 610-11 (2008) ("The precise fate that awaited the evacuated Jews was not clear."). *But cf.* GRIESER, *supra* note 13, at 266 ("Mit Recht weist Adler darauf hin, daß in Anbetracht seiner hohen Stellung Martins Anwesenheit bei Anlässen vorauszusetzen ist, bei denen Himmler unverhüllt über die Vernichtung der Juden sprach.") ("Adler correctly suggests that in light of Martin's high post, one must assume he was present at events where Himmler spoke openly of the annihilation of the Jews.").

104. From the opposite direction, some might object that comparing Martin to Bendetsen is unfair *to Martin*, because the American was responsible for both developing and implementing the entire mechanism of racial exclusion for the nation, whereas Martin did not develop the program he implemented and carried into execution in only one region. This objection has some force. Bendetsen was the combined architect and project manager for the mass removal and confinement of the entirety of the West Coast's ethnically Japanese population. In terms of the scope of Bendetsen's competency, Adolf Eichmann is probably a more apt analogue than Benno Martin. Eichmann was the project manager of mass movements of human beings in a way that Bendetsen also was, but Martin was not. However, because Eichmann knew that death awaited the deportees, even directly witnessing some of the killing, he cannot serve as a useful or fair analogue to Bendetsen. Martin is a much closer approximation. For more on Adolf Eichmann's role in the "Final Solution," see DAVID CESARANI, *BECOMING EICHMANN* (2006); DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* (2011).

And yet, in the face of this, some will undoubtedly continue to recoil from comparing the American and German deportation planners. There is an undeniable sense in the American popular mind that anything in the story of Nazi Germany is of a different order from everything in the American experience. To some extent, this may derive from the continued sway in the American imagination of a monolithic image of Nazi Germany that scholars long ago discredited—one in which Germany was a crushingly hierarchical terror state bent on genocide from the moment the Nazis came to power.<sup>105</sup> Americans' refusal to contemplate Germany's racial deportations as an analogue to America's may also reflect an offshoot of a broader American exceptionalism—an emotional commitment to the idea that whereas other countries' impositions on minorities are deplorable, ours are debatable. On this account, the refusal might serve as evidence of an American discomfort with honest reckoning with its past if that reckoning entails pointing a finger at individual wrongdoers, especially powerful ones.<sup>106</sup> Justice Jackson may have betrayed some of that American discomfort with reckoning when he returned to Buffalo for his 1951 speech. I will return to this question after examining the processes of reckoning that unfolded for Benno Martin and Karl Bendetsen.

#### D. *Failures of Reckoning*

Bendetsen and Martin lived somewhat parallel lives in 1942, starting the year overseeing the forced removal of thousands and ending it with awards and promotions. Within a few years, their paths diverged. At one level, those

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105. See RODERICK STACKELBERG, *HITLER'S GERMANY: ORIGINS, INTERPRETATIONS, LEGACIES* 139 (1999) (supporting the existence of the "monolithic image"). Much of the disassembly of the myth of a monolithic genocidal terror state came from the scholarly debate in the 1970s and 1980s between the so-called "intentionalists" and "functionalists." See Henry L. Mason, *Implementing the Final Solution: The Ordinary Regulating of the Extraordinary*, 40 *WORLD POL.* 542, 543-51 (1988) (summarizing the debate).

106. On the reluctance to condemn historical injustices, see, for example, Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 *N.C. L. REV.* 757 (2009) (noting reluctance of scholars to condemn an influential nineteenth-century jurist who was an abusive owner and trader of slaves).

paths might look like nothing more than an illustration of the axiom that history is written by the victors. In reality, though, the lesson of their post-war lives is more ambiguous than that.

At the end of the war, Benno Martin was captured by Allied forces and imprisoned and interrogated at Nürnberg.<sup>107</sup> He was not among those prosecuted for war crimes before the international tribunal at Nürnberg and was transferred to German custody in 1948 for trial in the country's domestic courts.<sup>108</sup> In 1949, the state prosecutor charged Martin with the crime of aiding and abetting a state official's deprivation of liberty resulting in death.<sup>109</sup> This triggered a four-year odyssey of trials, appeals, retrials, and more appeals. In the end, Benno Martin walked free, acquitted on the weakest and most implausible of his grounds of defense.

In his first trial, the District Court for the Nürnberg-Fürth district found Martin guilty and sentenced him to a term of three years' imprisonment. The court rejected Martin's contention that the deportations were legal under German law because Jews had been defined as state enemies, concluding that "[l]aws and decrees lack legal status if they treat human beings as subhumans and deny them basic human rights."<sup>110</sup> Martin claimed that he did not know the deportations were illegal, but the court concluded that as a senior bureaucrat, Martin "knew all about the constantly more severe measures imposed on the Jews and

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107. See Office of U.S. Chief Counsel for War Crimes, Interrogation Summary No. 1510, Interrogation of Dr. Benno Martin, Mar. 14, 1947, *microformed on* Nat'l Archives & Records Admin., Record Group 238, Microfilm M1019, Reel 45, Slide 29; Office of U.S. Chief Counsel for War Crimes, Interrogation Summary No. 2917, Interrogation of Dr. Benno Martin, July 24, 1947, *microformed on* Nat'l Archives & Records Admin., Record Group 238, Microfilm M1019, Reel 45, Slide 50.

108. See GRIESER, *supra* note 13, at 294.

109. In German, the charge was *Beihilfe zur Freiheitsberaubung im Amt mit Todesfolge*. See Raim, *supra* note 32, at 184.

110. Henry Friedlander, *The Deportation of German Jews: Post-War Trials of Nazi Criminals*, 29 LEO BAECK INSTITUTE YEARBOOK 201, 220 (1984). The court decision that Friedlander summarizes can be found, in German, in 4 JUSTIZ UND NS-VERBRECHEN, *supra* note 97, at 525-87.

had to recognise that they would lead to their destruction.”<sup>111</sup> The court rejected Martin’s defense that he had acted under duress. It concluded that while Martin could have left the details of the deportations to subordinates, he chose to attend to them himself out of his own free will.<sup>112</sup> Finally, the court was not persuaded by Martin’s claim that he had involved himself in the deportations only to protect the deported Jews from the more brutal treatment they would have endured at the hands of Nazi fanatics like Julius Streicher and Reinhard Heydrich. In the court’s view, Martin positioned himself against Streicher and Heydrich out of “ambition and a desire for status.”<sup>113</sup>

Martin appealed his conviction to the Bavarian Circuit Court.<sup>114</sup> The court reversed the conviction in 1950.<sup>115</sup> While deportation for murder would have been illegal under German law, the court reasoned, deportation alone was lawful in some circumstances.<sup>116</sup> The Circuit Court concluded that the trial court had not delved deeply enough into the question of exactly what Martin knew about the deportations; if he did not know that they were preludes to murder, he would have lacked a criminal mental state.<sup>117</sup> On remand, in 1951, the District Court retried and acquitted Martin on the ground suggested by the Circuit Court: he did not know the deportations would lead to death and were therefore illegal.<sup>118</sup>

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111. Friedlander, *supra* note 110, at 220.

112. *Id.*

113. *Id.* at 220-21.

114. *Id.* at 221. The Bavarian Circuit Court opinion can be found in 4 JUSTIZ UND NS-VERBRECHEN, *supra* note 97, at 588-616.

115. Friedlander, *supra* note 110, at 221.

116. *Id.*

117. *See id.*

118. *Id.* at 221. The District Court decision can be found in 8 JUSTIZ UND NS-VERBRECHEN 465-505 (1972).



The state's attorney appealed the acquittal, this time to Germany's highest appellate court, the *Bundesgerichtshof*.<sup>119</sup> In 1952, it reversed the trial court's acquittal, rejecting that court's (and, implicitly, the Bavarian Circuit Court's) approach to the question of what amounted to guilty knowledge.<sup>120</sup> Even if Martin did not know that the deportations would lead to death, the *Bundesgerichtshof* reasoned, Martin surely knew that "an entire people were torn from their familiar surroundings only because of their race."<sup>121</sup> That knowledge was enough to establish Martin's criminal liability. Back the case went to the District Court.

Ruling in July of 1953, the District Court acquitted Martin for the final time.<sup>122</sup> It concluded that Martin, having received a "classical and Christian education," ought to have known that deporting Jews was illegal.<sup>123</sup> But, somewhat incredibly, it concluded that Martin had participated in the deportations only under duress, fearful that he would himself be taken to a concentration camp or even killed if he failed to obey orders.<sup>124</sup> This basis for acquittal conflicted embarrassingly with Martin's self-portrayal throughout all of his trials and appeals as a kindly official who often took steps to soften the impact of the Nazi racial policies on the Jews and to reign in the more extreme elements of the Nazi Party in Nürnberg. But the acquittal stuck. Benno Martin left court a free man. He lived another twenty-two years, dying in Munich in 1975 at the age of eighty-two.

While Benno Martin was facing his first trial in Germany in 1949 after several years of detention by American and then German authorities, Karl Bendetsen was continuing to build his career in the United States. He had left the Army in December of 1945 and joined a

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119. Friedlander, *supra* note 110, at 221. The *Bundesgerichtshof*'s decision can be found in 8 JUSTIZ UND NS-VERBRECHEN, *supra* note 118, at 506-14.

120. Friedlander, *supra* note 110, at 221.

121. *Id.* at 221.

122. *Id.* at 221. The District Court's opinion can be found in 11 JUSTIZ UND NS-VERBRECHEN 185-203 (1974).

123. Friedlander, *supra* note 110, at 221.

124. *Id.*

management consulting firm in California, only to return to Washington in 1948 to serve as a special assistant to Secretary of Defense James Forrestal on budget matters.<sup>125</sup> In 1949, he organized the office of General Counsel to the U.S. Army and was the first to serve in the position.<sup>126</sup>

Army Secretary Gordon Gray then made known that he wished to appoint Bendetsen as Assistant Secretary of the Army.<sup>127</sup> This was the first moment when Bendetsen's past began to dog him, at least a little bit. Late in August of 1949, the United States Court of Appeals for the Ninth Circuit made national headlines<sup>128</sup> when it condemned aspects of the government's wartime treatment of Japanese Americans as "cruel" and "inhuman" and scorned General DeWitt's "doctrine of enemy racism inherited by blood strain" as "an anthropological absurdity."<sup>129</sup> The court's opinion galvanized those voices that were beginning to look back critically on the program that Bendetsen had helped to design and had operated. The National Democratic Party geared up to oppose Bendetsen's nomination, and the Japanese American Citizens League quickly announced its opposition as well.<sup>130</sup> The situation grew a bit more uncomfortable for Bendetsen early in 1950, when a letter critical of him by a Catholic priest in Los Angeles surfaced. Father Hugh Lavery of the Catholic Maryknoll Mission wrote that in overseeing the removal of Japanese Americans from Los Angeles, Bendetsen had "showed himself a little Hitler" who decreed that orphans had to be evicted even if, in Bendetsen's words, "they have one drop of Japanese blood in them."<sup>131</sup> Letters began to pour into the White House

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125. Interview by Jerry N. Hess with Karl R. Bendetsen, in N.Y., N.Y. (Nov. 9, 1972) (conducted for the Harry S. Truman Library), *available at* <http://www.trumanlibrary.org/oralhist/bendet2.htm>.

126. *Id.*

127. DE NEVERS, *supra* note 14, at 242.

128. *Nisei Citizenship Upheld on Appeal*, N.Y. TIMES, Aug. 27, 1949, at 5.

129. *Acheson v. Murakami*, 176 F.2d 953, 954, 957 & n.1a (9th Cir. 1949).

130. DE NEVERS, *supra* note 14, at 250.

131. Drew Pearson, *The Merry Go-Round*, WASH. POST, Feb. 3, 1950, at B15.

urging President Truman not to make the appointment.<sup>132</sup> Bendetsen allowed in a letter to the Army Secretary that he was suffering “a most unhappy and frustrating experience.”<sup>133</sup> But in the end, the protests came to nothing, and Bendetsen won Senate approval in February of 1950.<sup>134</sup> He was forty-two years old.<sup>135</sup>

Two years later, Bendetsen’s rise continued. When Archibald Allen, the Under Secretary of the Army, resigned to run for political office, President Truman nominated Bendetsen to take his place.<sup>136</sup> Confirmation this time was swift and uncontested. The Senate confirmed him in early May of 1952.<sup>137</sup> As the German *Bundesgerichtshof* announced that Benno Martin should be answerable for “tearing an entire people from their familiar surroundings only because of their race,” Karl Bendetsen, at age forty-four, came to occupy the second-highest civilian position in the U.S. Army.

He left that position late in 1952 to join the Champion Paper & Fiber Company, a large paper and wood products concern, as a consultant.<sup>138</sup> Within three years he became vice-president and general manager of its Texas division.<sup>139</sup> By 1965, he became the company’s chief executive officer.<sup>140</sup> He retired in 1972.<sup>141</sup>

The forced removal and imprisonment of Japanese Americans disturbed Bendetsen’s retirement in the 1980s. A new generation of Japanese Americans, buoyed by the successes of the civil rights and ethnic and racial pride

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132. DE NEVERS, *supra* note 14, at 359 n.43.

133. *Id.* at 253 (quoting Bendetsen).

134. *Id.* at 255.

135. *Id.*

136. *Bendetsen Named Under Secretary*, N.Y. TIMES, Apr. 24, 1952, at 12.

137. *Bendetsen Confirmed*, WASH. POST, May 7, 1952, at B12.

138. DE NEVERS, *supra* note 14, at 267.

139. *Id.*

140. *Karl Bendetsen Dies; Internment Planner in 1942*, WASH. POST, June 30, 1989, at C4.

141. *Id.*

movements, began pressing in the 1970s for redress for what they and their families had suffered during the war.<sup>142</sup> In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians and charged it with the duty to examine the justification for the program of mass exclusion and incarceration that Bendetsen had had such a large hand in engineering.<sup>143</sup> Bendetsen was hostile to the entire enterprise, calling the idea of financial compensation a “raid on the [t]reasury.”<sup>144</sup> But when he was called as a witness at a public hearing, he defiantly refused to concede that the program had been a mistake.<sup>145</sup> It was not an easy appearance for him. Accustomed to giving orders and presiding over corporate board meetings, the seventy-four year old Bendetsen was interrupted by boos and hisses from the audience of former internees and their descendants and supporters.<sup>146</sup> While he tried to downplay the significance of what he had earlier bragged was his central role in conceiving and implementing the program,<sup>147</sup> he stood by the view that “human nature” would have led Americans of Japanese ancestry to join forces with invading Japanese soldiers in 1942.<sup>148</sup> The coverage of his testimony in the national media was far from flattering.<sup>149</sup> His hometown newspaper speculated that Bendetsen “must

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142. See generally ROBERT SADAMU SHIMABUKURO, *BORN IN SEATTLE: THE CAMPAIGN FOR JAPANESE AMERICAN REDRESS* (2001) (summarizing the movement for redress for prior generations of Japanese Americans’ suffering that occurred during World War II internment).

143. See *PERSONAL JUSTICE DENIED*, *supra* note 86, at xvii.

144. DE NEVERS, *supra* note 14, at 9 (quoting Bendetsen).

145. See *id.*

146. *Id.*

147. *Id.* at 185.

148. IRONS, *supra* note 70, at 355.

149. See *Ex-Officer Defends Japanese Camps*, L.A. TIMES, Nov. 2, 1981, at A2; Lee May, *Japanese Confined for Own Good, Internment Leader Contends*, L.A. TIMES, Nov. 3, 1981, at A20; *Relocation Officer Defends WWII Act*, CHI. TRIB., Nov. 3, 1981, §1, at 3; Ken Ringle, *Architect of Relocation Prefers Case Stay Shut*, WASH. POST, Dec. 8, 1982, at A18; *World War II Internment Is Defended*, N.Y. TIMES, Nov. 3, 1981, at B13.

have wondered whether he was a defendant" in the eyes of the commissioners questioning him.<sup>150</sup>

In 1983, the Commission issued its report.<sup>151</sup> It concluded that the mass exclusion and imprisonment of people of Japanese ancestry had been the unjust product of racism, hysteria, and failed leadership.<sup>152</sup> It recommended an apology and redress payments for the surviving victims.<sup>153</sup> Karl Bendetsen was left privately fuming at the repudiation of the policies he had nurtured and implemented.<sup>154</sup> Meanwhile, an editorialist in the *San Jose Mercury News* predicted that however successful a life Bendetsen had lived, "history . . . [might] treat him more critically."<sup>155</sup>

Bendetsen did not live to appreciate much more of the unraveling of his reputation, however. He slipped into the clutches of Alzheimer's disease in the mid-1980s and died in 1989 at the age of eighty-one.<sup>156</sup> He was buried in Arlington National Cemetery.<sup>157</sup>

## II. JUSTICE JACKSON AND THE AVERSION TO RECKONING

Justice Jackson's two speeches in Buffalo bracketed an important segment of the post-war lives of Benno Martin and Karl Bendetsen. In 1946, Martin was in Allied custody, being held for possible prosecution; Bendetsen was in the private sector, working his way up the corporate ladder. By 1951, Martin was well on his way to ultimate exoneration, having seen an early conviction reversed on appeal and then an acquittal in the trial court on remand, and Karl Bendetsen had shrugged off moderate public criticism to

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150. DE NEVERS, *supra* note 14, at 9.

151. PERSONAL JUSTICE DENIED, *supra* note 86, at xvii.

152. *Id.* at 18.

153. *See id.* at 462-64.

154. *See* DE NEVERS, *supra* note 14 at 286.

155. *Id.* at 283 (quoting Wes Payton, *Bendetsen Awaits History's Verdict on Relocation*, SAN JOSE MERCURY NEWS, Oct. 9, 1983, at 7C).

156. *See id.* at 291-92.

157. *Id.* at 292.

assume the position of Assistant Secretary of the U.S. Army. These were two key planners of wartime racial exiles of civilians in Germany and the United States, and in the five years between Justice Jackson's two speeches, neither had been successfully called to account.

Justice Jackson predicted in 1946 that the Nürnberg trials would prove significant in three ways: they would "demonstrate . . . the supremacy of law over such lawless and catastrophic forces as war and persecutions," "implement the law for the practical task of doing justice to offenders," and "set[ ] straight the thinking of responsible men on these subjects."<sup>158</sup> They would, Jackson imagined, unleash a wave of educative reckoning and cement the role of law in restraining what Jackson called the psychology of war.<sup>159</sup> Yet the five years that followed saw little of the sort; both American and German societies seemed more eager to avert their gaze from past excesses than to learn from them.

If we look carefully at Justice Jackson's 1951 address, we can see traces of the psychology that led away from reckoning rather than toward it. He began near where he had left off in 1946, reminding his listeners that the rule of law and its "impersonal forces" were the only things "strong enough" to protect the liberties of citizens.<sup>160</sup> But he quickly set the American experience in World War II apart from that of every other combatant: unlike other nations, Jackson said, we came through the war "without serious . . . impairment of our system of ordered liberty under law."<sup>161</sup> It should go without saying that the tens of thousands of U.S. citizens forced from their homes and confined for years on account of their Japanese ancestry might have quibbled with Jackson's definition of a "serious impairment of our system of ordered liberty." At this point in his address, Jackson was not considering the case of Japanese Americans; he was making an observation about our

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158. Jackson, *supra* note 1, at 287.

159. *Id.* at 285 ("[The political machinery's] background of war psychology was deep and permanent.").

160. Jackson, *supra* note 6, at 104.

161. *Id.*

nation's having survived the war without the traumatic upheaval in government structure that invasions, bombings, and mass domestic mobilizations can trigger. In this sense, his point is unassailable. But it is also noteworthy for the blind eye it turned to a point of contact rather than disjunction with the wartime failings of other nations.

When Jackson, later in his 1951 address, turned directly to the Japanese American wartime experience, his inclination to place his country and its wrongdoers outside the didactic scope of Nürnberg became clearer. He presented the case of *Korematsu v. United States*<sup>162</sup> as a leading example of the difficult wartime challenges that come before American courts—situations in which government officials defend “[m]easures violative of constitutional rights” with claims of military necessity that are “not provable by ordinary evidence.”<sup>163</sup> Jackson did not equivocate on his view of the legal merits of the program of “remov[ing] all persons of Japanese ancestry, including native-born American citizens, from the west coast and herd[ing] them into camps in the interior.”<sup>164</sup> “It seemed to me then,” Justice Jackson said in Buffalo in 1951, “and does now, that the measure was an unconstitutional one.”<sup>165</sup>

A judge wishing to apply the teachings of Nürnberg—to “demonstrate . . . the supremacy of law over such lawless and catastrophic forces as war and persecutions,” as Jackson put it in 1946<sup>166</sup>—might be expected to conclude that the judiciary had the obligation to review and overturn such a wartime measure. As Jackson noted in 1951,<sup>167</sup> that is just what Associate Justices Frank Murphy and Owen Roberts voted to do in their *Korematsu* dissents.<sup>168</sup> But

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162. 323 U.S. 214 (1944).

163. Jackson, *supra* note 6, at 115.

164. *Id.*

165. *Id.* at 115-16.

166. Jackson, *supra* note 1, at 287.

167. Jackson, *supra* note 6, at 115.

168. See *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting).

Jackson did not join their opinions. Dissenting separately, he instead reasoned that because the courts were incompetent to evaluate the merits of the government's claims of military necessity, they should decline to reach the issue of the measure's legality and instead declare the issue inappropriate for a civilian court's adjudication.<sup>169</sup> Jackson readily admitted that under his approach, "had the military authorities attempted to enforce the measure by their own force and authority," rather than with a court's, it would not be appropriate for a court to "attempt active interference."<sup>170</sup> He conceded that what he had in mind came "close to a suspension of the writ of habeas corpus or recognition of a state of martial law at the time and place found proper for military control."<sup>171</sup>

What a stunning position for an advocate of the rule of law as a restraint on wartime excesses! Jackson admitted a touch of discomfort with this position; he acknowledged in 1951 that none of the Justices' positions in *Korematsu*—including his own—was "wholly satisfying."<sup>172</sup> But in memorable language in the *Korematsu* dissent itself, Jackson took comfort from the expectation that the judgments of American military leaders could be restrained by the will of the people:

If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.<sup>173</sup>

How odd. For the rest of the world, Justice Jackson preached the rule of law as an agent of reckoning. Law would accomplish the "practical task of doing justice to offenders" and "set[ ] straight the thinking of responsible

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169. *See id.* at 242 (Jackson, J., dissenting).

170. Jackson, *supra* note 6, at 116.

171. *Id.*

172. *Id.* at 115.

173. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).



men.”<sup>174</sup> For the United States, Justice Jackson was prepared to trust these tasks to politics.<sup>175</sup>

Jackson was no Pollyanna; he did not pretend that the “psychology of war” posed no challenges for the United States. He simply maintained in 1951 that those challenges lay ahead—in the growing threat of Communism—rather than immediately behind.<sup>176</sup> But here is the curious blind spot<sup>177</sup> in Jackson’s vision: experience had already proven this false.<sup>178</sup> Politics had not been up to the task of preventing the mass racial exile and incarceration of Japanese Americans in 1942.<sup>179</sup> Worries about “the moral judgments of history” had not been large enough to stop military officials in their tracks. And even as Justice Jackson spoke, the American architect of exile and incarceration, Karl Bendetsen, continued on his youthful, meteoric rise to the top echelon of the Army.

What Justice Jackson presented was a form of American exceptionalism, but there is little reason to think that hesitating to condemn wrongdoers with the force of law actually is a uniquely American instinct. Remember that

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174. Jackson, *supra* note 1, at 287.

175. Nothing in the years between 1944, when *Korematsu* was decided, and 1951, when Jackson spoke at Buffalo, changed his mind. He said in his 1951 speech that he “[could] add nothing to [his] dissent” in *Korematsu*. Jackson, *supra* note 6, at 116.

176. *See id.* (commenting on the Communist coup in Czechoslovakia).

177. *But cf.* John Q. Barrett, *A Commander’s Power, A Civilian’s Reason: Justice Jackson’s Korematsu Dissent*, 68 LAW & CONTEMP. PROBS., Spring 2005, at 57 (arguing that Jackson’s *Korematsu* dissent reflected a wise appreciation for the wartime limits of the powers of the civilian judiciary).

178. For a related criticism of Justice Jackson’s position in *Korematsu*, see Dennis J. Hutchinson, “*The Achilles Heel*” of the Constitution: *Justice Jackson and the Japanese Exclusion Cases*, 2003 SUP. CT. REV. 455, 493.

179. Indeed, politics *extended* the length of the imprisonment of Japanese Americans from early summer of 1944, when President Roosevelt’s top military and civilian advisors had come to believe the program could no longer be justified, through November of 1944, when the President finally agreed to rescind mass exclusion. Roosevelt did not wish an early announcement of the end of mass exclusion to damage the chances of Democratic congressional candidates on the West Coast in the November election. *See* ROBINSON, *supra* note 80, at 216-23.

the courts of West Germany exonerated Benno Martin for deporting the Jews of Nürnberg. And this was no isolated case: “Between 1950 and 1962 the West Germans investigated 30,000 former Nazis . . . tried 5,426, *and acquitted 4,027.*”<sup>180</sup> That is an acquittal rate of seventy-five percent. The perpetrators whose convictions stuck were mostly the low-ranking thugs with blood on their hands; the mid- and upper-level functionaries who set up and ran the machinery of repression from their desks were most often exonerated.<sup>181</sup> Scholars debate the reasons, but the continued presence of former Nazis in the West German judiciary surely played a role, as did the geopolitical need of the United States to bolster West Germany in the fight against Soviet communism.<sup>182</sup> For this latter reason, American pressure on the West Germans to root out and punish their Nazi malefactors largely evaporated in the late 1940s.<sup>183</sup> With no external pressure to keep their gaze on their uncomfortable past, most West Germans preferred to look away.<sup>184</sup> Benno Martin, his name cleared, returned home and lived the last three decades of his life in peace.

### III. EDUCATING AGAINST AMBITION

It would be useful at this rather bleak moment to recall the promise of Justice Jackson’s 1946 address—his opening argument that “improvement through education offers the last clear chance of civilization to avoid catastrophe.”<sup>185</sup> In a world where psychological and political forces and the passage of time naturally tend to shift our attention away

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180. REBECCA WITTMANN, *BEYOND JUSTICE: THE AUSCHWITZ TRIAL* 15 (2005) (emphasis added).

181. See MARY FULBROOK, *GERMAN NATIONAL IDENTITY AFTER THE HOLOCAUST* 59-60 (1999).

182. See CESARANI, *supra* note 104, at 214, 333; FULBROOK, *supra* note 181, at 48-55; JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANYS* 267-333 (1997).

183. See, e.g., FULBROOK, *supra* note 181, at 48-55.

184. See, e.g., CESARANI, *supra* note 104, at 214 (“Everyone wanted to forget the war, the atrocities, the Nazis.” (quoting Tuvia Friedmant)).

185. Jackson, *supra* note 1, at 284.

from attributing responsibility for the excesses of war, can education help to counteract those forces? Can education strengthen our resolve to demonstrate the supremacy of law over the excesses, including the persecutions, of wartime?

Like Justice Jackson, I answer that question affirmatively, but I offer the somewhat comparable bureaucratic careers of Karl Bendetsen and Benno Martin, rather than the trials of the highest-ranking Nazi perpetrators at Nürnberg, as a lesson. As a pedagogical tool, a monster like Hermann Göring is not especially useful. Most people rightly have a hard time seeing much of themselves in him. Few of us come so tightly in the grips of a philosophy of racial hatred as Göring; few rise to such high levels of government power; and fewer still use that power in such unambiguously evil ways. To hold Hermann Göring out as an example of what not to be in life is to offer little. Condemning him is morally essential but not particularly morally instructive to the ordinary person.

Studying the lives of Karl Bendetsen and Benno Martin is a different matter. Neither of these men, trained in law, appears to have been a particularly extreme racist in the context of his time and place. Neither stood at the pinnacle of governing power in his country; both men were public servants toiling at the upper level of their respective bureaucracies. Each was able to tell himself a plausible story about how much worse things would have been if a more unscrupulous person had held his office. And yet each set in motion the mass uprooting and physical isolation of a vulnerable population.

What links the professional lives of these two lawyers is not virulent racial hatred or extreme bloodthirstiness. It is the warping influence of bureaucratic ambition. These were two striving men. Although it is uncomfortable to defer to the character analysis of a criminal like Reinhard Heydrich, his assessment of Benno Martin seems corroborated by the facts of Martin's life: what guided the Nürnberg police chief in his career was most of all a desire to climb in rank and prestige. Sometimes Nazi racial policies were stepping stones for him; at other times, they appear to have been stumbling stones around which he gingerly picked a path. But the path was the thing, and he trod it, in the space of a

decade, from the middling ranks of a city police force all the way to the position of “*Höhere SS-und Polizeiführer*” (Higher SS and Police Leader), for his entire region of Germany.

The same was true for Karl Bendetsen. In a far shorter time than Martin managed his ascent, Bendetsen rose from captain to major to colonel, serving in the latter position, as he liked to brag, as the youngest man in rank. Within six months after the United States entered the war, Bendetsen sat atop a unit of the Western Defense Command that was more or less of his own creation, asserting near-complete authority over civilians across a huge swath of the country. And there can be no question that the springboard to all of this was Bendetsen’s own ambition—his willingness to harness his lawyerly energies to a policy of racial isolation and control that he knew the country’s top civilian lawyers and security officials thought unnecessary and illegal. When Bendetsen received the Army’s Distinguished Service Medal in 1942, and then rose to the rank of second-highest civilian official in the Army a decade later at the age of forty-four, these accomplishments could only have seemed to him a confirmation of his strategy of striving.

Anyone who has ever worked a desk job in an organization should be able to recognize behaviors and motivations of this sort. A chilling example of it comes from Laurence Hewes, the regional director of the Farm Security Administration (“FSA”) in San Francisco at the moment in the spring of 1942 when Bendetsen’s WCCA took charge of the mass removal of Japanese Americans.<sup>186</sup> Hewes personally opposed the removal of Japanese Americans, but was detailed by the Department of Agriculture to provide support for it.<sup>187</sup> He attended a mid-March meeting at which Bendetsen explained to the assembled military and civilian bureaucrats the enormous, logistically daunting program of mass removal they were responsible for assisting.<sup>188</sup> At the end of the session, Bendetsen described the field

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186. LAURENCE I. HEWES, JR., *BOXCAR IN THE SAND* 110 (1957).

187. *Id.* at 163.

188. *Id.* at 164-65.

organization that would be required to bring the plan off. He explained that within just three days, the Army would be establishing forty-eight field stations from northern Washington to southern Arizona to process the deportees, and each of those stations would need an agricultural staff.<sup>189</sup> This was Hewes's department. Hewes was shocked; he asked himself: "How on earth could [he] find forty-eight crews to staff these offices, much less get them to their stations in three days?"<sup>190</sup> Bendetsen patronizingly told the assembled administrators that he understood that they would not be able to accomplish it, but that they should "just get [their] people on the job as fast as [they could.]"<sup>191</sup> It irked Hewes that this Army official doubted the ability of a civilian administrator to get the job done. "By God," he thought, "I'll show the Army something about administration!"<sup>192</sup> Hewes immediately worked the phones and lined up men from as far away as Boise, Salt Lake City, and Denver to be transferred westward to man the stations.<sup>193</sup> Within hours, he was able to go back to Bendetsen, ahead of schedule, for air travel requisitions for his crews.<sup>194</sup> Hewes saw it as a "game . . . of competing with the Army," and took pleasure from the fact that "at a few places we were ahead."<sup>195</sup>

How little it took to turn Hewes from a reluctant participant in a program he found distasteful to a go-getter: a bit of military-civilian competition, a patronizing comment from a rival bureaucrat, and a desire to be seen as exceeding expectations. This is an unusually clear recitation of a mechanism that the historiography of the Holocaust has positioned as a chief explanation for the involvement of so many ordinary people in the Nazi-sponsored deportations, enslavements, shootings, and gassings. Most

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189. *Id.* at 165.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 165-66.

194. *Id.*

195. *Id.* at 166.

historians have rejected Daniel Goldhagen's thesis<sup>196</sup> that Germans became a nation of perpetrators because of virulent, eliminationist anti-semitism deep in the German character.<sup>197</sup> They have instead documented the array of more pedestrian pressures and motivations that led "ordinary men" (to use Christopher Browning's famous phrase)<sup>198</sup> to tolerate and to collaborate in repression, brutality, and murder. Intra- and inter-bureaucratic competition, improvisation, and personal ambition figure prominently in these accounts.<sup>199</sup> Hannah Arendt's account of the German "desk murderer" as a dull, unthinking automaton<sup>200</sup> has been similarly dismantled; historians now see Adolf Eichmann and his ilk as agents creatively striving in settings where reprehensible ideas had become acceptable.<sup>201</sup>

Benno Martin and Karl Bendetsen were gifted at such striving, as were many, many others on whose labors the German and American deportations depended. Functionaries at this level in the Nazi system were not

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196. See generally DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* (1996).

197. On the rejection of Goldhagen, see A.D. Moses, *Structure and Agency in the Holocaust: Daniel J. Goldhagen and His Critics*, 37 *HIST. & THEORY*, May 1998, at 194, 195.

198. CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1993).

199. See *id.* (describing how a battalion of middle-aged reservists murdered thousands of Jews); see also MARTIN BROZAT, *THE HITLER STATE: THE FOUNDATION AND DEVELOPMENT OF THE INTERNAL STRUCTURE OF THE THIRD REICH* 359 (John W. Hiden trans., Longman Inc. 1981) (1969) ("To suggest that the development of Nationalist Socialist policy only consisted in steering towards and carrying out prefabricated long-term ideological aims in small doses is an over simplification. . . . On the contrary, it took place amidst a progressive division of power, an increasingly fragmentary process whereby particularist power apparatuses made themselves independent and where any over-all co-ordination and regularity was missing."); RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961) (detailing Germany's planning and executing of the Holocaust).

200. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 276 (1963).

201. See, e.g., CESARANI, *supra* note 104, at 1-17; LIPSTADT, *supra* note 104, at xix.

Robert Jackson's concern at Nürnberg; his attention and the world's were drawn to the potentates and the zealots. That attention was of course timely and warranted. But the world's attention flagged just when things got uncomfortably interesting—when the question became not how a handful of extra-ordinary men functioned at the top of a repressive system but how a lot of ordinary men ran it. The cases of Martin and Bendetson reveal ambition as a crucial, even if partial, explanation. The point is not that ambition itself is inherently suspect, for in many contexts it is an engine of healthy accomplishment, innovation, and advancement. The point is rather that in contexts where racial identification and isolation had become acceptable, ambition turned toxic.

As we consider Justice Jackson's Nürnberg legacy and his words at Buffalo in 1951, it should be a matter of special discomfort to us that Benno Martin and Karl Bendetsen were both trained in the law. Their legal education gave them the analytical skills to solve difficult problems, but it evidently gave them little in the way of a moral framework for identifying unacceptable answers. Their degrees positioned them well for professional advancement, but they took from their training little to restrain the pull of their ambition.<sup>202</sup>

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202. It should be noted that the pull of ambition was something Robert Jackson himself knew well, sometimes to his own discomfort or the disadvantage of the Supreme Court itself. He absented himself from the Supreme Court's 1945 Term to take up the work at Nürnberg partly out of his desire to step out of what he called "a back eddy" so that he could be involved in the "important things going on in the world." Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 209. His absence only heightened the already bitter tensions on the Court. *Id.* at 210. And while he was at Nürnberg, his powerful ambition to be appointed Chief Justice upon the sudden death of Chief Justice Harlan F. Stone led him to publicize a vicious internal dispute with his rival for the position, Associate Justice Hugo Black, that brought deep embarrassment to the Court. *See id.* at 215-22; Thomas Reedy, *Supreme Court 'Feud' Flares Openly; Jackson Denounces Black as a 'Bully,'* WASH. POST, June 11, 1946, at 1; Editorial, *Twilight of the Court*, CHI. DAILY TRIB., June 12, 1946, at 20 ("[The Court] stands at the lowest ebb of dignity, capacity, and integrity in the history of the nation, and the discredit to which it has been brought is wholly the product of its members thru their own efforts."); Lewis Wood, *Jackson's Attack on Black Stirs Talk of Court Inquiry*, N.Y. TIMES, June 12, 1946, at 1.

This is a matter that concerned Eugene V. Rostow, the former dean of Yale Law School, in 1983, when he published a review of a book that documented the work of high-ranking military and civilian lawyers in crafting and defending the exclusion and imprisonment of Japanese Americans.<sup>203</sup> The reviewed book, Peter Irons's *Justice at War*,<sup>204</sup> usefully narrated a story of infighting between and among military and civilian attorneys and documented their struggles over how to present a defense of the government program to the Supreme Court in cases including *Korematsu v. United States*.<sup>205</sup> Rostow, who had published his own path-breaking criticism of the Supreme Court's Japanese American cases back in 1945,<sup>206</sup> appreciated Irons's detailed telling of the story but dissented from Irons's assessment that the lawyers' conduct was the stuff of scandal: "To a reader accustomed to government procedures and those of litigation," Rostow argued, "Irons' account portrays a normal episode of bureaucratic striving and confusion, and then of adjustment."<sup>207</sup> Rostow did not dispute that the "quality of the work of the lawyers displayed during the Japanese-American internment affair" was "lamentable," but he saw it as calling a question about what he termed "the intellectual weakness of our legal culture."<sup>208</sup> The rebuke of legal education that emerged in his review was sharp. What the episode revealed was that "for the most part the formation of our lawyers is superficial; it is training for craftsmen, not members of a learned profession."<sup>209</sup> It proved itself "incapable of mastering a new and unexpected problem on the basis of

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203. Eugene V. Rostow, *Shame on the Home Front*, WASH. POST, Oct. 23, 1983, at 5 (Book World).

204. IRONS, *supra* note 70.

205. 323 U.S. 214 (1944).

206. Eugene V. Rostow, *The Japanese-American Cases: A Disaster*, 54 YALE L.J. 489, 492 (1945) ("[The Japanese American cases] are a breach, potentially a major breach, in the principle of equality.").

207. Rostow, *supra* note 203.

208. *Id.*

209. *Id.*



first principles” because it “lack[ed] a firm jurisprudential footing.”<sup>210</sup>

Rostow ended his review of Irons’s book with words that well fit today’s occasion, and might have filled in the blanks of Justice Jackson’s 1951 address in Buffalo as well. He wrote that:

The story of the Japanese-American internment is a cautionary tale from which one may draw many lessons. Perhaps the most important in the long run is that our educational system and the learned societies and professional organizations which sponsor and encourage intellectual efforts beyond the university must become more demanding, more coherent, more rigorous, more independent, and more philosophical—above all, more philosophical.<sup>211</sup>

By “philosophical,” I do not understand Rostow to mean that law school should become three years of reading Wittgenstein. I understand him to mean that the process of teaching a person to “think like a lawyer” has to include study of certain moral commitments that anchor the profession and a mode of reflection that encourages practitioners to examine their efforts for their clients against the backdrop of those commitments.

In 1960, the great legal realist Karl Llewellyn advised law students that their task in the first year of law school was “to knock [their] ethics into temporary anesthesia.”<sup>212</sup> Llewellyn intended that the anesthesia should wear off in the second year,<sup>213</sup> but its numbing effect has been anything but temporary. Teaching law students to “think like a lawyer” has, in the main, been stuck for decades in a value-free zone.<sup>214</sup> Stephen Wizner puts it bluntly but aptly: “To

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210. *Id.*

211. *Id.*

212. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 101 (3d ed. 1960).

213. *Id.* at 103.

214. This is not to say that the value-free approach has gone unchallenged; a number of other approaches have been articulated. Judith Wegner’s work has been exemplary in this area. See Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867 (2009); Judith Wegner, *Better Writing, Better Thinking: Thinking Like a Lawyer*, 10 LEGAL WRITING 9

‘think like a lawyer’ means adopting an emotionally remote, morally neutral approach to human problems and social issues; distancing oneself from the feelings and suffering of others; . . . and withholding moral judgment.”<sup>215</sup> Law students “are now taught a process and not a purpose for the law,” as Steve Sheppard puts it; they encounter a “soullessness” that gives them “no coordinated and professional sense of why the law demands what it does, or of what the law should demand.”<sup>216</sup>

Over the years, there have been calls to modify this emptily pragmatic conception of “thinking like a lawyer” in favor of one that is not “value-neutral on matters of value.”<sup>217</sup> Stephen Wizner has been particularly forceful on this point, urging law schools to recognize that it “[i]s . . . possible to discourage fuzzy thinking and sentimentalism, and to teach ‘abstract hypothetical-deductive critical thinking skills,’ while at the same time raising and addressing moral issues and encouraging humane responses to human experience.”<sup>218</sup> Richard Posner, no ideological soul-mate of Wizner’s, has sketched a course syllabus that might help students appreciate moral contours to the lawyer’s role in a way that pushes beyond “a careful exegesis of the American Bar Association’s code of professional ethics.”<sup>219</sup> The imagined course would “bring to bear on law the [w]estern philosophical and ethical tradition,” confronting the student with “the ethical questions about agency and

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(2004). I mean to say here simply that rival approaches have not yet had great success at altering the prevailing definition of “thinking like a lawyer.”

215. Stephen Wizner, *Is Learning to “Think Like a Lawyer” Enough?*, 17 YALE L. & POL’Y REV. 583, 587 (1998); see also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 (1975) (arguing that the role-differentiated morality of the lawyer as a professional leads the lawyer to amoral and even immoral conduct).

216. Steve Sheppard, *Teach Justice*, 43 HARV. C.R.-C.L. L. REV. 599, 599-600 (2008).

217. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 203 (2000).

218. Wizner, *supra* note 215, at 589.

219. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1924 (1993).

advocacy raised by Plato in *Gorgias* and answered by Aristotle in the *Rhetoric*"; with the works of Charles Fried and Anthony Kronman on varying conceptions of the lawyer's role; with philosophical treatments of loyalty and candor; with depictions of lawyers in major works of literature; with the rival understandings of the lawyer's role of critical theorists, legal realists, and feminists; and, most intriguingly for our purposes, "with the behavior of the legal profession in crisis, for example in Nazi Germany."<sup>220</sup>

Posner's draft curriculum is commendable, particularly for his last item, a rare explicit call for the use of historical examples of amoral lawyering as tools of professional ethical instruction. But we can note at least a hint of the exceptionalism in Posner's list that lurked in Justice Jackson's thinking. The teachable example of the morally unmoored attorney is a German lawyer, not an American, a Benno Martin and not a Karl Bendetsen—as if the history of the American legal profession offered up no suitable candidates. Yet surely there are teachable examples in the experiences of the countless American lawyers who supported the territorial expulsion and cultural decimation of native peoples, the enslavement of African Americans and their subjugation and segregation once emancipated, and the mass wartime removal and incarceration of Japanese Americans.<sup>221</sup>

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220. *Id.* at 1924-25. By citing Posner's proposed curriculum, I do not mean to endorse the notion that legal ethics and professionalism are best taught in a conventional reading-based seminar format. In fact, I tend to doubt that a read-and-discuss approach permits students to appreciate the nature of the ethical dilemmas they will face or to practice solving them. There is a robust discussion in the law reviews about how best to reform our methods of teaching ethics and professionalism; one recent and concise summary is Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1092-93 (2006).

221. It should be noted that Posner would not dispute this. RICHARD A. POSNER, *OVERCOMING LAW* 157 (1995) ("[W]e should not suppose that our judges have a margin of moral superiority over our political leaders greater than the margin that the German judges of the Third Reich had over their Leader. The United States has never had a Hitler, so it has never had a judiciary complicit with a Hitler. But we have had slavery, and segregation, and criminal laws against miscegenation ('dishonoring the race'), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-

Sixty-six years after Justice Jackson pointed to education as the “last clear chance of civilization to avoid catastrophe,”<sup>222</sup> we should resolve to study the professional lives of bureaucrat-lawyers like Karl Bendetsen and Benno Martin. We should use the example of their dangerous ambition as a reminder of the need for a trumping professional commitment to defending, among other things, certain basic facets of human dignity, such as the right not to be uprooted, deported, and imprisoned because of the accident of membership in a feared or reviled group. As Richard Weisberg concludes from his study of lawyers in the Vichy regime, we should “step back, take individual responsibility, and recognize that a simple declaration of legalistic resistance to the bad belongs in our system of law, stands a real chance of inspiring other lawyers to a similar stance, and can often be articulated without risk of punishment or even ostracism.”<sup>223</sup>

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Americans; and most of our judges went along with these things without protest.”).

An almost equally instructive educational example—because of the shared foundations of our legal systems—would be the British lawyers of the German-occupied Channel Islands who willingly implemented orders for the registration of the islands’ Jews and the expropriation of their property between 1940 and 1945. See DAVID FRASER, *THE JEWS OF THE CHANNEL ISLANDS AND THE RULE OF LAW, 1940-1945* (2000).

222. Jackson, *supra* note 1, at 284.

223. Richard Weisberg, *The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law*, 17 *CARDOZO L. REV.* 1875, 1895-96 (1996).