Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say, in this court, that the right of bringing in for adjudication, in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American government, on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows, that a foreign vessel engaged in the African slave-trade, captured on the high seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored. . . .

The general question being disposed of, it remains to examine the circumstances of the particular case. [The Court denied the Portuguese claims, taking judicial notice of the fact that] Americans, and others who cannot use the flag of their own nations, carry on this criminal and inhuman traffic, under the flags of other countries. . . . [The real owner of the Africans claimed by Portugal] belongs to some other nation, and feels the necessity of concealment. [Because the Court was evenly divided over the legitimacy of the Spanish claim, it affirmed the lower court's decree, though it reduced the number of Africans to be restored to the Spanish owners.]

The Problem of the Grudge Informer

Lon L. Fuller

Fuller's imaginary case presents you with a difficult choice: What will you do as the newly elected Minister of Justice? As you read the recommendations of the various deputies, try to detect appeals to one or another of the theories about the nature of law covered in this chapter. Do any of the deputies come close to your solution?

By a narrow margin you have been elected Minister of Justice of your country, a nation of some twenty million inhabitants. At the outset of your term of office you are confronted by a serious problem that will be described below. But first the background of this problem must be presented.

For many decades your country enjoyed a peaceful, constitutional and democratic government. However, some time ago it came upon bad times. Normal relations were disrupted by a deepening economic depression and by an increasing antagonism among various factional groups, formed along economic, political, and religious lines. The proverbial man on horseback appeared in the form of the Headman of a political party or society that called itself the Purple Shirts.

In a national election attended by much disorder the Headman was elected President of the Republic and his party obtained a majority of the seats in the

From Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), pp. 245–253. Reprinted with permission of Yale University Press.

General Assembly. The success of the party at the polls was partly brought about by a campaign of reckless promises and ingenious falsifications, and partly by the physical intimidation of night-riding Purple Shirts who frightened many people away from the polls who would have voted against the party.

When the Purple Shirts arrived in power they took no steps to repeal the ancient Constitution or any of its provisions. They also left intact the Civil and Criminal Codes and the Code of Procedure. No official action was taken to dismiss any government official or remove any judge from the bench. Elections continued to be held at intervals and ballots were counted with apparent honesty. Nevertheless, the country lived under a reign of terror.

Judges who rendered decisions contrary to the wishes of the party were beaten and murdered. The accepted meaning of the Criminal Code was perverted to place political opponents in jail. Secret statutes were passed, the contents of which were known only to the upper levels of the party hierarchy. Retroactive statutes were enacted which made acts criminal that were legally innocent when committed. No attention was paid by the government to the restraints of the Constitution, of antecedent laws, or even of its own laws. All opposing political parties were disbanded. Thousands of political opponents were put to death, either methodically in prisons or in sporadic night forays of terror. A general amnesty was declared in favor of persons under sentence for acts "committed in defending the fatherland against subversion." Under this amnesty a general liberation of all prisoners who were members of the Purple Shirt party was effected. No one not a member of the party was released under the amnesty.

The Purple Shirts as a matter of deliberate policy preserved an element of flexibility in their operations by acting at times through the apparatus of the state which they controlled. Choice between the two methods of proceeding was purely a matter of expediency. For example, when the inner circle of the party decided to ruin all the former Socialist-Republicans (whose party put up a last-ditch resistance to the new regime), a dispute arose as to the best way of confiscating their property. One faction, perhaps still influenced by pre-revolutionary conceptions, wanted to accomplish this by a statute declaring their goods forfeited for criminal acts. Another wanted to do it by compelling the owners to deed their property over at the point of a bayonet. This group argued against the proposed statute on the ground that it would attract unfavorable comment abroad. The Headman decided in favor of direct action through the party to be followed by a secret statute ratifying the party's action and confirming the titles obtained by threats of physical violence.

The Purple Shirts have now been overthrown and a democratic and constitutional government restored. Some difficult problems have, however, been left behind by the deposed regime. These you and your associates in the new government must find some way of solving. One of these problems is that of the "grudge informer."

During the Purple Shirt regime a great many people worked off grudges by reporting their enemies to the party or to the government authorities. The activities reported were such things as the private expression of views critical of the government, listening to foreign radio broadcasts, associating with known wreckers and hooligans, hoarding more than the permitted amount of dried eggs, failing to report a loss of identification papers within five days, etc. As things then stood with the administration of justice, any of these acts, if proved, could lead to a sentence of death. In some cases this sentence was authorized by "emergency" statutes; in others it was imposed without statutory warrant, though by judges duly appointed to their offices.

After the overthrow of the Purple Shirts, a strong public demand grew up that these grudge informers be punished. The interim government, which preceded that with which you are associated, temporized on this matter. Meanwhile it has become a burning issue and a decision concerning it can no longer be postponed. Accordingly, your first act as Minister of Justice has been to address yourself to it. You have asked your five Deputies to give thought to the matter and to bring their recommendations to conference. At the conference the five Deputies speak in turn as follows:

FIRST DEPUTY: "It is perfectly clear to me that we can do nothing about these so-called grudge informers. The acts they reported were unlawful according to the rules of the government then in actual control of the nation's affairs. The sentences imposed on their victims were rendered in accordance with principles of law then obtaining. These principles differed from those familiar to us in ways that we consider detestable. Nevertheless they were then the law of the land. One of the principal differences between that law and our own lies in the much wider discretion it accorded to the judge in criminal matters. This rule and its consequences are as much entitled to respect by us as the reform which the Purple Shirts introduced into the law of wills, whereby

only two witnesses were required instead of three. It is immaterial that the rule granting the judge a more or less uncontrolled discretion in criminal cases was never formally enacted but was a matter of tacit acceptance. Exactly the same thing can be said of the opposite rule which we accept that restricts the judge's discretion narrowly. The difference between ourselves and the Purple Shirts is not that theirs was an unlawful government—a contradiction in terms—but lies rather in the field of ideology. No one has a greater abhorrence than I for Purple Shirtism. Yet the fundamental difference between our philosophy and theirs is that we permit and tolerate differences in viewpoint, while they attempted to impose their monolithic code on everyone. Our whole system of government assumes that law is a flexible thing, capable of expressing and effectuating many different aims. The cardinal point of our creed is that when an objective has been duly incorporated into a law or judicial decree it must be provisionally accepted even by those that hate it, who must await their chance at the polls, or in another litigation, to secure a legal recognition of their own aims. The Purple Shirts, on the other hand, simply disregarded laws that incorporated objectives of which they did not approve, not even considering it worth the effort involved tc repeal them. If we now seek to unscramble the acts of the Purple Shirt regime, declaring this judgment invalid, that statute void, this sentence excessive, we shall be doing exactly the thing we most condemn in them. I recognize that it will take courage to carry through with the program I recommend and we shall have to resist strong pressures of public opinion. We shall also have to be prepared to prevent the people from taking the law into their own hands. In the long run, however, I believe the course I recommend is the only one that will insure the triumph of the conceptions of law and government in which we believe."

SECOND DEPUTY: "Curiously, I arrive at the same conclusion as my colleague, by an exactly opposite route. To me it seems absurd to call the Purple Shirt regime a lawful government. A legal system does not exist simply because policemen continue to patrol the streets and wear uniforms or because a constitution and code are left on the shelf unrepealed. A legal system presupposes laws that are known, or can be known, by those subject to them. It presupposes some uniformity of action and that like cases will be given like treatment. It presupposes the absence of some lawless power, like the Purple Shirt Party, standing above the government and able at any time to interfere with the administration of justice whenever it does not function according to the whims of that power. All of these presuppositions enter into the very conception of an order of law and have nothing to do with political and economic ideologies. In my opinion law in any ordinary sense of the word ceased to exist when the Purple Shirts came to power. During their regime we had, in effect, an interregnum in the rule of law. Instead of a government of laws we had a war of all against all conducted behind barred doors, in dark alleyways, in palace intrigues, and prison-yard conspiracies. The acts of these so-called grudge informers were just one phase of that war. For us to condemn these acts as criminal would involve as much incongruity as if we were to attempt to apply juristic conceptions to the struggle for existence that goes on in the jungle or beneath the surface of the sea. We must put this whole dark, lawless chapter of our history behind us like a bad dream. If we stir among its hatreds, we shall bring upon ourselves something of its evil spirit and risk infection from its miasmas. I therefore say with my colleague, let bygones be bygones. Let us do nothing about the so-called grudge informers. What they did do was neither lawful nor contrary to law, for they lived, not under a regime of law, but under one of anarchy and terror."

THIRD DEPUTY: "I have a profound suspicion of any kind of reasoning that proceeds by an 'either-or' alternative. I do not think we need to assume either, on the one hand, that in some manner the whole of the Purple Shirt regime was outside the realm of law, or, on the other, that all of its doings are entitled to full credence as the acts of a lawful government. My two colleagues have unwittingly delivered powerful arguments against these extreme assumptions by demonstrating that both of them lead to the same absurd conclusion, a conclusion that is ethically and politically impossible. If one reflects about the matter without emotion it becomes clear that we did not have during the Purple Shirt regime a 'war of all against all.' Under the surface much of what we call normal human life went on—marriages were contracted, goods were sold, wills were drafted and executed. This life was attended by the usual dislocations—automobile accidents, bankruptcies, unwitnessed wills, defamatory misprints in the newspapers. Much of this normal life and most of these equally normal dislocations of it were unaffected by the Purple Shirt ideology. The legal questions that arose in this area were handled by the courts much as

they had been formerly and much as they are being handled today. It would invite an intolerable chaos if we were to declare everything that happened under the Purple Shirts to be without legal basis. On the other hand, we certainly cannot say that the murders committed in the streets by members of the party acting under orders from the Headman were lawful simply because the party had achieved control of the government and its chief had become President of the Republic. If we must condemn the criminal acts of the party and its members, it would seem absurd to uphold every act which happened to be canalized through the apparatus of the government that had become, in effect, the alter ego of the Purple Shirt Party. We must therefore, in this situation, as in most human affairs, discriminate. Where the Purple Shirt philosophy intruded itself and perverted the administration of justice from its normal aims and uses, there we must interfere. Among these perversions of justice I would count, for example, the case of a man who was in love with another man's wife and brought about the death of the husband by informing against him for a wholly trivial offense, that is, for not reporting a loss of his identification papers within five days. This informer was a murderer under the Criminal Code which was in effect at the time of his act and which the Purple Shirts had not repealed. He encompassed the death of one who stood in the way of his illicit passions and utilized the courts for the realization of his murderous intent. He knew that the courts were themselves the pliant instruments of whatever policy the Purple Shirts might for the moment consider expedient. There are other cases that are equally clear. I admit that there are also some that are less clear. We shall be embarrassed, for example, by the cases of mere busybodies who reported to the authorities everything that looked suspect. Some of these persons acted not from desire to get rid of those they accused, but with a desire to curry favor with the party, to divert suspicions (perhaps ill-founded) raised against themselves, or through sheer officiousness. I don't know how these cases should be handled, and make no recommendation with regard to them. But the fact that these troublesome cases exist should not deter us from acting at once in the cases that are clear, of which there are far too many to permit us to disregard them."

FOURTH DEPUTY: "Like my colleague I too distrust 'either-or' reasoning, but I think we need to reflect more than he has about where we are headed. This proposal to pick and choose among the acts of the deposed regime is thoroughly objectionable. It is, in fact, Purple Shirtism itself, pure and simple. We like this law, so let us enforce it. We like this judgment, let it stand. This law we don't like, therefore it never was a law at all. This governmental act we disapprove, let it be deemed a nullity. If we proceed this way, we take toward the laws and acts of the Purple Shirt government precisely the unprincipled attitude they took toward the laws and acts of the government they supplanted. We shall have chaos, with every judge and every prosecuting attorney a law unto himself. Instead of ending the abuses of the Purple Shirt regime, my colleague's proposal would perpetuate them. There is only one way of dealing with this problem that is compatible with our philosophy of law and government and that is to deal with it by duly enacted law, I mean, by a special statute directed toward it. Let us study this whole problem of the grudge informer, get all the relevant facts, and draft a comprehensive law dealing with it. We shall not then be twisting old laws to purposes for which they were never intended. We shall furthermore provide penalties appropriate to the offense and not treat every informer as a murderer simply because the one he informed against was ultimately executed. I admit that we shall encounter some difficult problems of draftsmanship. Among other things, we shall have to assign a definite legal meaning to 'grudge' and that will not be easy. We should not be deterred by these difficulties, however, from adopting the only course that will lead us out of a condition of lawless, personal rule."

FIFTH DEPUTY: "I find a considerable irony in the last proposal. It speaks of putting a definite end to the abuses of the Purple Shirtism, yet it proposes to do this by resorting to one of the most hated devices of the Purple Shirt regime, the *ex post facto* criminal statute. My colleague dreads the conclusion that will result if we attempt without a statute to undo and redress 'wrong' acts of the departed order, while we uphold and enforce its 'right' acts. Yet he seems not to realize that his proposed statute is a wholly specious cure for this uncertainty. It is easy to make a plausible argument for an undrafted statute; we all agree it would be nice to have things down in black and white on paper. But just what would this statute provide? One of my colleagues speaks of someone who had failed for five days to report a loss of his identification papers. My colleague implies that the judicial sentence imposed for that offense, namely death, was so utterly disproportionate as to be clearly wrong. But we must

remember that at that time the underground movement against the Purple Shirts was mounting in intensity and that the Purple Shirts were being harassed constantly by people with false identification papers. From their point of view they had a real problem, and the only objection we can make to their solution of it (other than the fact that we didn't want them to solve it) was that they acted with somewhat more rigor than the occasion seemed to demand. How will my colleague deal with this case in his statute, and with all of its cousins and second cousins? Will he deny the existence of any need for law and order under the Purple Shirt regime? I will not go further into the difficulties involved in drafting this proposed statute, since they are evident enough to anyone who reflects. I shall instead turn to my own solution. It has been said on very respectable authority that the main purpose of the criminal law is to give an outlet to the human instinct for revenge. There are times, and I believe this is one of them, when we should allow that instinct to express itself directly without the intervention of forms of law. This matter of the grudge informers is already in process of straightening itself out. One reads almost every day that a former lackey of the Purple Shirt regime has met his just reward in some unguarded spot. The people are quietly handling this thing in their own way and if we leave them alone, and instruct our public prosecutors to do the same, there will soon be no problem left for us to solve. There will be some disorders, of course, and a few innocent heads will be broken. But our government and our legal system will not be involved in the affair and we shall not find ourselves hopelessly bogged down in an attempt to unscramble all the deeds and misdeeds of the Purple Shirts."

As Minister of Justice, which of these recommendations would you adopt?

Trial of Border Guards

During the time between August 1961 and November 1989, it is estimated that more than two hundred people were shot and killed by border guards of the German Democratic Republic (East Germany) as they sought to flee the communist bloc into West Germany. On February 5, 1989, two East Germans, Chris Gueffroy and Christian Gaudian, attempted to escape the GDR. Although they successfully crossed several barriers constructed by the East German government, they were spotted by members of the East German border guard and shot as they tried to climb the final border fence. Gueffroy was killed; Gaudian was wounded and arrested. Subsequent to the reunification of Germany in 1990, public pressure mounted to punish those responsible for border killings. Four guards involved in the shooting of Gueffroy and Gaudian were placed on trial in 1991. Below are excerpts from the court's ruling.

The 23rd Grand Criminal Court—Court of Assizes—of the Berlin State Court, . . . ruled as follows during the Court Session of 20 January 1992:

The following are hereby sentenced:

Defendant H for homicide to a prison sentence of 3 (three) years and six months,

Defendant K for two crimes, committed as combined act, involving attempted homicide, to a prison sentence of 2 (two) years, whose enforcement is suspended for probation.

Defendants Sch and S are acquitted, Defendant H is also acquitted inasmuch as he was charged with another offense of attempted homicide. . . .

Legal Assessment

. . . The punishability of the defendants is to be judged primarily according to the law of the scene of the act as it applied in the former GDR (Article 2, Paragraph 1, Criminal Code). According to . . . the Unification Treaty of 6 September 1990 . . . —apart from a few exceptions—the Criminal Code of the Federal Republic of Germany took effect on 3 October 1990 in the former territory of the GDR . . . at the same time, the Criminal Code of the GDR—apart from some exceptions that are not significant here—has been invalidated. According to . . . the Unification Treaty, Article 2, Criminal Code, with the measures regulated in Article 315 . . . is applicable to acts committed in the GDR prior to the date of effectiveness of the entry of the GDR in the Federal Republic, in other words, prior to 3 October 1990.

The acts committed by the defendants therefore are to be judged first of all according to GDR criminal law which was applicable at the scene of the action at the time of the action (Article 2, Paragraph 1, Criminal Code) and they are thus to be gauged in favor of the defendants in the light of the criminal law of the Federal Republic which has taken its place since. . . .

In the case at hand . . . the punishment threatened under the Criminal Code [of the Federal Republic] is less and therefore . . . this is to be applicable.

The following applies to the individual defendants:

[*Defendant* H]

With the aimed round fired, single-shot, from the Kalashnikov submachine gun, from a range of less than 40 m, in the manner described above, at the upper part of the body of Chris Gueffroy, who was standing at the border fence, facing toward him,

Berlin State Court, Docket No. (523) 2 Js 48/90 (9/91).

Defendant H killed a human being without being a murderer (Article 212, Criminal Code). Chris Gueffroy died on the spot within a few minutes as a consequence of the round which passed through the heart. Even immediate medical assistance could not have prevented the occurrence of death.

Chris Gueffroy's killing was unlawful; the defendant did not have any legally justifying grounds on his side. . . .

According to [the] Border Protection Act, the use of firearms while on Border Guard duty was justified if it served the purpose of preventing the immediately impending execution or continuation of a criminal act which, according to the circumstances, looked like a crime or for the apprehension of persons who were compellingly suspected of a crime. Unlawful border crossing . . . however, was to be classified as a crime only in serious cases. . . . In the case at hand, according to GDR law, there was a serious case of attempted border crossing because the act was committed together with others . . . and because the act was accomplished along with the use of dangerous means or methods, that is to say, with the use of the grappling hook. . . .

. . . In contrast to GDR law, only really grave offenses are qualified as crimes in the Federal Republic. In the then GDR, however, a mere act of "unlawful border crossing" could already become a "crime" if—as in this case—it was committed by at least two persons simultaneously or, to mention another provision that is particularly flexible, "with particular intensity." . . . Firing was permitted in all of these cases; just as to how this was to be done, the law only says: "The life of persons is to be spared to the extent possible." . . .

Within the practice of law, such as it was in effect at the time of the action in what then was the GDR, . . . the soldiers however repeatedly were given the general suggestion during "guard mount"—according to witness Fabian—that no escapee was allowed to slip through and that a "breach of the border" would have to be prevented at all costs. In this way, many soldiers were bound to get the impression and indeed could get the impression that a dead escapee was always better than an escaped escapee with the consequence that their inhibition threshold—when it came to firing their submachine guns at unarmed people—was lowered.

That this is something the superiors wanted in this way is documented particularly clearly by the testimony of witness Fabian according to which soldiers were praised even if they had fired only at a single escapee although, even according to GDR law applicable at that time, it would not have been permitted to fire on him. In such cases, the soldiers were given to understand from the very beginning that they probably just saw a shadow and that nothing would happen to them as a result of unjustified use of firearms.

The case at hand also confirms that the use of firearms in the final analysis was always considered to be justified; there was no investigation at all as to the legality of firearm use; instead, the defendants were praised and rewarded with special leave and monetary bonuses. But if one wished to accept the reality, which corresponded to the legal situation at that time and to what the law was really like in the GDR, . . . then one would indeed have to note that, in Article 30, the GDR Constitution granted its citizens protection of life, physical integrity, and health. . . . From this, one can deduce that government interference in these assets within the context of a legally permissible use of firearms, was bound to be guided strictly by the principle of proportionality, such as it is also spelled out in the Border Protection Act, although inadequately, at that. . . .

In looking into the question as to whether it may be permissible to threaten with death the person who does not want to abide by the exit prohibition and, disregarding it, wants to cross the border, and whether it may if necessary also be permissible to kill him, we run into the question as to whether everything that is formal and that was considered as a right by virtue of interpretation is indeed rightful.

On this score, it has been recognized in Supreme Court jurisprudence, that there is a certain core area of law which no law and no sovereign act may touch according to the legal consciousness of the general public.

On that point, it says the following in a ruling handed down by the Federal Court in 1952 . . . :

"The freedom of a State to determine, for its area, what is lawful and what is unlawful, no matter how widely it is determined, however, is not unlimited. In the consciousness of all civilized nations, with all of their differences revealed by the various national bodies of law, there is a certain nucleus of the law which, according to general legal concepts, must not be violated by any law and by any other sovereign State measure. It encompasses certain basic principles of human behavior that are considered untouchable and that have taken shape with the passage of time among all cultured nations on the fertile ground of coincident basic moral views and which are considered

to be legally binding, regardless of whether individual regulations in national bodies of law seem to allow that they be disregarded" . . .

"Particularly strict requirements must be established when attacks against human life are involved. It is in keeping with jurisprudence such as it prevails among all cultured nations, later on also expressed in the Convention for the Protection of Human Rights, that the individual's right to life must be protected to a greater degree. Killings without a court verdict accordingly are permissible only if they result from an absolutely required use of force."

The Federal Constitutional Court also recognizes the basic principle that laws, which interfere in the described core area of the law, are null and void: . . .

"It was especially the time of the National Socialist regime in Germany that taught us that the legislator can also legislate injustice, in other words, if practical legal usage is not to stand defenseless against such historically thinkable developments, there must be a possibility, in extreme cases, to evaluate the basic principle of material justice more highly than the principle of legal certainty, such as it is expressed in the applicability of positive law for routine cases."

As a criterion for the existence of such a special case, the Federal Constitutional Court points to the formulation by Gustav Radbruch, . . . according to which such a case does exist when the contradiction between positive law and justice has reached such an unbearable degree that the law must yield to justice since it is "incorrect law." The rule of law includes not only certainty and safety under the law but also material justice. . . .

These legal principles, to be sure, were developed on the occasion of the crimes of the National Socialist regime of injustice in Germany which, in the monstrosity of their scope, cannot be compared to the situation under discussion here. Nevertheless, the court has no objection in following this jurisdiction also in the case at hand; this is because the protection of human life applies quite generally and cannot depend on the materialization of a certain number of killings. . . .

. . .

Defendant cannot claim Article 258, Criminal Code/GDR.

According to this regulation, a soldier was not liable under criminal law for an action which he carried out by way of execution of an order given by a superior, unless the execution of the order obviously clashed with recognized standards of international law or if it violated criminal laws.

. . .

[Even] if one were to construe—as "order" within the meaning of Article 258, Criminal Code/GDR—the generally stated requirement that none must be allowed to get through, the results still would not be any different. Such an order would be unlawful and would not have deserved any obedience because this would have been an invitation to commit crimes, that is to say, the unlawful and intentional killing of people, and the execution of the order would have violated criminal laws (Arts. 112, 113, Criminal Code/GDR). . . .

Shooting at people, which may lead to killing, that is to say, people who merely wanted to leave the territory of the then GDR, constitutes such a violation of the standards of ethics and human coexistence that—even considering indoctrination, education, and training in the former GDR—one really cannot visualize that the defendant, considering his origin, his schooling, and his personality, as regards the action against the escapees with which he is charged, was in a state of prohibition misinterpretation that would rule out any guilt on his part. In the case of the defendant, one cannot assume that he was unable to recognize the few basic principles that are indispensable for human coexistence and that belong to the untouchable basic assets and core of the law, such as it lives in the legal consciousness of all cultured nations—perhaps because he had not been educated in a knowledge of these principles. Justice and humanity were explained and pictured as ideals also in the then GDR. To that extent, generally adequate ideas as to the basis of natural justice were indeed disseminated. That this is so is pointed up also by the circumstance that a considerable multitude of inhabitants of the former GDR considered action against so-called border violators along the Berlin Wall and along the inner-German boundary to be unjust. The background of the accused, his schooling, and his comment on the motives and assessments of the conflicts, in which so-called border violators were enmeshed, show that he did have and could have available the fundamentals of a normal legal consciousness. He had every reason to think deeply as to whether it was permitted to happen that people may, if necessary, be shot down along the border only because they wanted to leave the GDR without official permission. He had sufficient references and if he had thought about them carefully, he could have figured out for himself that an event, such as it is to be judged here,

was not compatible with the set of values prevailing in his environment. In making this examination, one of course cannot consider as representatives of the environment—as the defense argues—those pillars of the system of justice of the then GDR, such as members of the State Security Ministry, judges, or prosecutors; instead, what is important here is to find out whether the "people of the State" of the GDR did or did not approve the procedures under discussion here.

The realization that deadly shots along the border were a crass injustice and that they were in crying contradiction to the generally recognized basic principles of law and justice should and could have been a matter of general knowledge and usage if the Border Guard soldiers and their superiors had developed the proper conscience.

. . .

Apportionment of Punishment

. . . It follows from the considerations given below that we are dealing here with an "otherwise less grave case" within the meaning of Art. 213, Criminal Code:

The acts carried out by the defendants must be viewed against the background of the inhuman system of compulsion prevailing in the then GDR which educated the defendants, with all means of mass psychology, to blind onesidedness and imparted a restricted image of the world which the defendants, in terms of their personality and education, had little to counter with.

Here again, one had to keep in mind that all those who contributed to the distortion of the legal consciousness of the Border Guard soldiers—be it in school, in the so-called mass organizations, or in political indoctrination sessions in the military—cannot be made liable for this under criminal law because the law does not know any criminal action facts in this context.

. . .

Weighing all of the circumstances that speak for and against the defendants, the administration of the following penalties was quite in keeping with the guilt but it was also required in order impressively to make them aware of the injustice of their actions:

In the case of Defendant H, a prison sentence of 3 years and 6 months.

Opening Address for the United States, Nuremberg Trials

ROBERT H. JACKSON

May it please Your Honors,

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.

This tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of seventeen more, to utilize International Law to meet the greatest menace of our times—aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a

From *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947–1949), Vol. 2, pp. 98–155.