

Law and Morality: The Case of the Nazi Wife

The Case of the Nazi Wife

Facts

In 1944 a German soldier paid a short visit to his wife while under travel orders on a reassignment. During the single day he was home, he conveyed privately to his wife something of his opinion of the Hitler government. He expressed disapproval of (sich so abfällig geäußert über) Hitler and other leading personalities of the Nazi party. He also said it was unfortunate that Hitler had not met his end in the assassination attempt that had occurred on July 20th of that year.

Shortly after his departure, the soldier's wife reported his remarks to the local leader of the Nazi party, observing that "a man who would say a thing like that does not deserve to live." He was arrested briefly, tried by a military tribunal and given a sentence of death. After a short period of imprisonment, instead of being executed, he was sent back to the front.

In 1950 after the collapse of the Nazi regime, the wife was brought to trial for having procured the false imprisonment of her husband under the German Criminal Code. Her defense rested on the ground that her husband's statements to her about Hitler and the Nazis constituted a crime under the laws then in force. Accordingly, when she informed on her husband she was simply bringing a criminal to justice.

You are the judge, what is your decision?

Key Statutes

1938 Statute

"The following persons are guilty of destroying the national power of resistance and shall be punished by death: Whoever publicly solicits or incites a refusal to fulfill the obligations of service in the armed forces of Germany, or in armed forces allied with Germany, or who otherwise publicly seeks to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies"

1934 Statute

"(i) Whoever publicly makes spiteful or provocative statements directed against, or statements which disclose a base disposition toward, the leading personalities of the nation or of the National Socialist German Workers' Party, or toward measures taken or institutions established by them, and of such a nature as to undermine the people's confidence in their political leadership, shall be punished by imprisonment.

(2) Malicious utterances not made in public shall be treated in the same manner as public utterances when the person making them realized or should have realized they would reach the public.

(3) Prosecution for such utterances shall be only on the order of the National Minister of Justice; in case the utterance was directed against a leading personality of the National Socialist German Workers' Party, the Minister of Justice shall order prosecution only with the advice and consent of the Representative of the Leader.

(4) The National Minister of Justice shall, with the advice and consent of the Representative of the Leader, determine who shall belong to the class of leading personalities for purposes of Section i above.”

Teaching Notes

This is a real case and one of several that came about in the 1950s in Germany. They became highly controversial (particularly this one). The reason for their controversy and their use in this exercise is because they revolve around the role of morality in law.

After a few minutes of discussion, you can drop this fact (which was omitted from the original story) into the mix: According to the court records, his wife, during the soldier’s long absence on military duty "had turned to other men". She thus has a motive for getting rid of him. Does this change anything?

To conclude the class, try and group the judgments into groups. Common reasons are below:

- Not Guilty Reasons
 1. She was just following the law at the time
 2. Applying the law of the future into the past is unfair
 3. Morality is relative
- Guilty Reasons
 4. Because the statutes are unclear and badly written and thus not proper “law”
 5. She was using the statute for a “wrong” purpose
 6. Because the statutes were immoral and thus not “law”

All of these can be challenged. There are no right answers. For example, the first three ‘not guilty reasons’ would have allowed the Nazi war criminals to escape prosecution and those who executed resistance fighters or Jewish people to claim to be following the law. Would we want this? We can also challenge the ‘guilty reasons’ as follows. Reason 4: Is this not just a cop out to find her guilty but not argue point 6 (below)? Reason 5: Why does purpose make a difference – the law is the law, isn’t it? Reason 6: See ‘guilty’ arguments 1 & 2.

The Real Judgment

The judges chose to find her guilty and discounted the Nazi statutes – stating that they were not law due to the immoral nature of them (Reason 6). Why did they do this? **The judges believed that rules must pass a moral test to be law.**

To quote the judgment:

The statutes were, “contrary to the sound conscience and sense of justice of all decent human beings.” It was this reasoning that led to the trials of the Nazi leaders at Nuremberg in 1946.

So the question is do rules need to have a degree of legitimacy or moral standard for them to be classed as “law” (natural law) or is law nothing more than a system of rules that performs a particular function or have a particular form? Is Nazi law as legitimate as the law of New Zealand (positive law)?

Legal theorists have argued over this for centuries and it remains a controversial topic. Put simply if you are asked to follow a law that is immoral, should you follow it? It depends upon your concept of law – the 1st subject we address at Law School (although you won’t get a clear answer there either!)