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MARC LINDER

The Supreme Labor Court
in Nazi Germany:
A Jurisprudential Analysis

For the University of Michigan Library

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Part III

Aggregate and Individual Control of Labor

Chapter 5

Macro-Social Control of the Labor Force: Class Immobilization and Individual Mobilization

Contemporary observers of the Nazi political-economic regime were impressed by its capacity, even before the advent of “total” war, to channel labor in accordance with priorities that no longer coincided with the profit-maximizing goals of individual entrepreneurs.¹ The obverse phenomenon – the undermining of the freedom of labor contract associated with capitalism – led more than one student of Nazi Germany to conclude that the feudal symbolism was to be taken seriously: “The position of the worker has been transformed from that of substantial independence to a subservience more complete than that which existed under the feudal system of the Middle Ages.”² Indeed, the German worker did “not enjoy the advantages of immobilization under feudal law,” for “[a]t any time the state . . . might provide the worker with a most unfeudal mobility” in the form of labor conscription.³

In his classic study of Nazi Germany Franz Neumann offered a more nuanced view. On the one hand he conceded that:

It is in the control of the labor market that National Socialism is most sharply distinguished from democratic society. The worker has no rights. The potential

¹ See Frederick Pollock, “Is National Socialism a New Order?” 9 *SPSS* 440-55 (1941).

² L. Hamburger, *How Nazi Germany has Mobilized and Controlled Labor* (Washington, D.C., 1940), p. 1.

³ *Ibid.*, p. 3; “advantages” is italicized in the original. On the unsuccessful legislative attempts in the late nineteenth century to re-introduce penalties for breach of employment contract by employees (and employers), see the debates on the proposed insertion of § 153a in the Industrial Code in: *Stenographische Berichte über die Verhandlungen des Deutschen Reichstages*, II. Legislatur-Periode – I. Session 1874, vol. 3, Anlagen zu den Verhandlungen des Reichstages (B., 1874), pp. 130-34, 287-304; *ibid.*, I. Legislatur-Periode – IV. Session 1873, vol. 4 (B., 1873), pp. 1000-1005. Cf. *Schriften des Vereins für Socialpolitik*, vol. 7: *Über Bestrafung des Arbeitsvertragsbruchs* (Leipzig, 1874); Gustav Schmoller, “Die Natur des Arbeitsvertrags und der Kontraktbruch,” 30 *ZfdgStw* 449-527 (1874); J. Landgraf, *Die Sicherung des Arbeits-Vertrags* (B., 1873); C. Dietz, *Vertragsbruch im Arbeits- und Dienstverhältnis* (B., 1890).

and actual power of the state over the labor market is as comprehensive as it can possibly be.⁴

From this state of supposed total control he did not, on the other hand, immediately conclude that capitalism, based as it is on the freedom of labor contract, itself had ceased to exist. Rather, Neumann delineated three components or concepts of freedom of labor. Two of these he found lacking: 1. the individual right of the worker to bargain with the employer on the basis of formal legal equality; and 2. "the material right of the laborer to determine the price of his labor power – by means of collective organization and bargaining."⁵ But a third type of freedom of labor contract Neumann saw as still present. This was the polemical meaning of free labor as opposed to servitude. This kind of freedom, upon which the other two rested, means

a clear distinction between labor and leisure time, which introduces the element of calculability and predictability into labor relations. It means that the worker sells his labor power for a time only, which is either agreed upon or fixed by legislative acts.⁶

More recent research has cast considerable doubt on the success of Nazi measures to overcome unemployment, increase the supply of labor in general, withdraw labor from certain industries and regions and direct it to others, and to effect all these transformations of the labor market without exerting upward pressure on wages. The system-immanent stumbling block has been located in the contradiction between military expansionism, which necessitated a declining standard of living for the working class as a result of the shift of resources from consumption to armaments, on the one hand, and the need to secure the loyalty of that class, on the other. Caught between these two irreconcilable aims, the Nazi leadership vacillated between force and concessions.⁷

It is not the purpose of this chapter to resolve this controversy.⁸ Rather, the court's decisions in litigation arising under the statutes that provided the legal framework for Nazi labor market policies are examined with a view to discovering to what extent RAG, basing itself

⁴ Franz Neumann, *Behemoth* (2nd ed.; NY, 1966 [1942]), p. 337. Cf. Otto Nathan, *The Nazi Economic System* (Durham, 1944), pp. 8-9, 170-213.

⁵ Neumann, *Behemoth*, pp. 337-38.

⁶ *Ibid.*, pp. 338-39.

⁷ See Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen, 1977).

⁸ These two positions are not necessarily mutually exclusive. Thus Hamburger, *How Nazi Germany has Mobilized*, p. 1, noted that regimentation had not been foreseen as a planned system; and Franz Neumann, "Labor Mobilization in the National Socialist New Order," 9 *Law and Contemporary Problems* 544-46 at 562 (1942), conceded that the number of conscripted workers was not very great.

on formalism or equity, acted to thwart the regime's intent to interfere with or abolish the freedom of worker and capitalist⁹ to create and terminate contractual obligations. As such, the decisional law here should be contrasted with the private law cases concerning dismissals and discipline arising under AOG that expressly conferred overarching paternalistic powers on employers (chs. 6 and 7).

I. Statutory Background

The volume of statutory material regulating the supply, distribution and mobility of labor was very great. Only the most important laws, ministerial decrees, etc., necessary to understand the case law can be outlined here.¹⁰

In 1934 and 1935 the government began to regulate the distribution of labor among regions and industries in order to avoid undersupply and oversupply. Thus it authorized the *Reich* Institute for Labor Exchange and Unemployment Insurance to stipulate that workers not residing in districts with high unemployment could be hired only with its consent. In order to combat flight from agriculture, the institute was also authorized to prohibit persons who had worked in agriculture during the previous three years from being hired in other industries, and to require non-agricultural employers to discharge such employees.¹¹ Skilled metal workers also needed the authorization of the employment office in their district to accept a job in another district.¹²

The transition to strict State control of the labor force was prepared by the introduction of a compulsory work-book in 1935 together with penalties for employing someone or being employed without such a doc-

⁹ See Mason, *Sozialpolitik*, p. 293, on the dissatisfaction of employers.

¹⁰ See Friedrich Syrup, *Hundert Jahre Staatliche Sozialpolitik 1839-1939* (Stuttgart, 1957), pp. 572-83; Hamburger, *How Nazi Germany has Mobilized*, pp. 60-62.

¹¹ Gesetz zur Regelung des Arbeitseinsatzes, 15 May 1934, RGBl I, 381; the period of three years was later amended to read: "within certain time"; see Gesetz zur Befriedigung des Bedarfs der Landwirtschaft an Arbeitskräften, 26 February 1935, RGBl I, 310. These provisions were repealed by AO zur Aufhebung der AO über die Beschränkung des Einsatzes landwirtschaftlicher Arbeitskräfte in nichtlandwirtschaftlichen Betrieben und Berufen vom 17. Mai 1934 sowie der AO zum G. zur Befriedigung des Bedarfs der Landwirtschaft an Arbeitskräften vom 29. März 1935, 27 November 1936, *Deutscher Reichs- und Preussischer Staatsanzeiger*, no. 278, 28. November 1936.

¹² AO über den Einsatz gelernter Metallarbeiter, 29 December 1934, RArbBl, 1935, I, 12. Cf. VO zur Verteilung von Arbeitskräften, 10 August 1934, RGBl I, 786. See also Mason, *Sozialpolitik*, pp. 162-63.

ument.¹³ Although originally designed to enable the employment offices to create an overview of the available labor force and its skill structure, the work-book later assumed greater significance.¹⁴ The exhaustion of "the so-called industrial reserve army," as one RAG judge phrased it, marked a turning point in the formulation and execution of the control of the labor supply.¹⁵ Although aggregate unemployment still exceeded one million in 1936,¹⁶ shortages of skilled workers in iron, metals and construction arising in connection with the four-year plan led to decrees imposing restrictions and affirmative actions on employers and employees in those industries or with those skills.¹⁷ In these industries as well as in agriculture, employers were authorized at the close of 1936 to withhold the work-book of any employee who unlawfully terminated his employment prematurely.¹⁸

Whereas until 1938 State intervention was paired with preservation of the private law rights of the employer not to hire a certain worker and of the worker not to work for a certain employer, the increasing militarization of the economy led the government to confer coercive powers on the employment office to assign workers to certain areas of employment.¹⁹ In 1938 Göring, in his capacity as commissioner of the four-year plan, issued a decree authorizing the *Reich* Institute for Labor Exchange to obligate German citizens to perform labor at assigned workplaces for a limited period of time.²⁰ Whereas this measure was designed to insure the supply of labor for tasks of particular importance

¹³ G.über die Einführung eines Arbeitsbuches, 26 February 1935, RGBI I, 311. Cf. Erste VO zur Durchführung des Gesetzes über die Einführung eines Arbeitsbuches, 16 May 1935, RGBI I, 602, especially § 5 para. 2 prohibiting the employer from retaining the book.

¹⁴ See VO über das Arbeitsbuch, 22 April 1939, RGBI I, 824. Cf. Mason, *Sozialpolitik*, p. 162.

¹⁵ [Johannes] Denecke, "Gestaltungsformen des Arbeitseinsatzes," 10 *DAR* 1-5 at 2 (1942).

¹⁶ *Statistisches Handbuch von Deutschland 1928-1944*, ed. Länderrat des Amerikanischen Besatzungsgebiets (Munich, 1949), p. 484.

¹⁷ See also the six Anordnungen zur Durchführung des Vierjahresplans, 7 November 1936, *Deutscher Reichs- und Preussischer Staatsanzeiger*, no. 262, 9 November 1936.

¹⁸ Siebente AO zur Durchführung des Vierjahresplans über die Verhinderung rechtswidriger Lösung von Arbeitsverhältnissen, 22 December 1936, *RArbBl*, 1937, I, 13. The employer could detain the book until the time at which the employment relationship could lawfully have been terminated. In case of disagreement regarding the justifiability of a premature termination, the labor court could issue a preliminary injunction ordering the employer to return the book immediately.

¹⁹ See Denecke, "Gestaltungsformen," pp. 2-3.

²⁰ VO zur Sicherstellung des Kräftebedarfs für Aufgaben von besonderer staatspolitischer Bedeutung, 22 June 1938, RGBI I, 652. The worker could not be dismissed by his previous employer during the duration of the obligation. Cf. Zweite VO zur Sicherstellung . . . , 30 June 1938, RGBI I, 710.

to the State (especially for the construction of the West Wall²¹), a further decree the same year extended the service obligation to combating public emergencies.²² By early 1939 Göring issued a new decree containing stricter and more comprehensive provisions relating to tasks of importance to the State. The employment office was authorized to require plants to part with (*abgeben*) workers, who could become obligated for an unlimited period of time; in the latter case the old employment contract expired. Where employees could not be compensated for the loss of entitlements arising under the old contract, the new employer could be required to make them whole in order to avoid great hardship. The consent of the employment office was required in order to terminate the new employment relation, but could also be required in other cases.²³ A month later the ministry of labor issued a decree that made a unilateral termination of an employment contract in agriculture, mining, chemicals, iron, metals and construction materials dependent on the consent of the employment office. Only in exceptional cases could the latter retroactively validate a dismissal. The consent of the employment office was not dispositive of the justification for the dismissal, only of its expediency in terms of the national economy. The consent of the employment office was, furthermore, necessary in order to hire persons under twenty-five years of age, metal workers, miners and others. The employment office could impose a consent requirement in other cases as well.²⁴

The advent of the war brought with it comprehensive controls over hiring and firing. The only exception to the former was agriculture; labor contracts could continue to be terminated according to private law provisions where both parties agreed, the plant was being closed or the worker was employed on a trial basis for less than one month.²⁵ By 1942,

²¹ See Mason, *Sozialpolitik*, pp. 289-90.

²² Dritte VO zur Sicherstellung . . . (NotdienstVO), 15 October 1938, RGBl I, 1441.

²³ VO zur Sicherstellung des Kräftebedarfs für Aufgaben von besonderer staatspolitischer Bedeutung, 13 February 1939, RGBl I, 206. Erste DurchführungsAO zur VO zur Sicherstellung . . . (Dienstpflicht-DurchführungsAO), 2 March 1939, RGBl I, 403, contains a number of procedural provisions that will be discussed below in connection with the cases.

²⁴ Zweite DurchführungsAO zur VO zur Sicherstellung . . . (Beschränkung des Arbeitsplatzwechsels), 10 March 1939, RGBl I, 444.

²⁵ VO über die Beschränkung des Arbeitsplatzwechsels, 1 September 1939, RGBl I, 1685. Erste Durchführungsbestimmungen zum Abschnitt III (Kriegslöhne) der KWVO (Erste KLDB), 16 December 1939, RGBl I, 1869, authorized the Reich trustee of labor to shorten termination notice periods in connection with plant closings. Cf. VO über die Stilllegung von Betrieben zur Freimachung von Arbeitskräften, 21 March 1940, RGBl I, 544, and its DurchführungsAO, 27 August 1940, RGBl I, 1190; Sicherung der Rechte nichtdienstverpflichteter Arbeitskräfte, die durch "Auskämmung" von Betrieben verfügbar gemacht worden sind, 26 June 1940, RArbBl, I, 336. Zweite DVO zur VO über die Beschränkung des

a ministerial order designed to combat breaches of labor contracts, enticement of workers from other employers and demands for wages above the prevailing rates prohibited both parties in the private sector from terminating an employment relation in an untimely and unauthorized fashion.²⁶ Later that year the consent of the employment office became necessary in order to terminate a labor contract in certain industries including mining, iron and steel, metals, machines and chemicals, even where employer and employee agreed.²⁷ Finally, in 1943, men between the ages of sixteen and sixty-five and women between seventeen and forty-five were, with a number of exceptions, required to register with the employment office as a national defense measure.²⁸

The cases will be examined under the following rubrics: freedom of mobility; work-book; assignment of labor; and consent of the employment office to discharges and quits.

II. Freedom of Mobility

Although virtually all of the cases arising under the aforementioned statutes and discussed in this chapter deal with the scope of the worker's freedom to terminate one labor contract and conclude another, a small number of cases focused on this issue directly rather than on other (for example, administrative) aspects of the government's policy to control the supply and distribution of labor. It needs to be emphasized that the following analysis does not purport to be a social history of the militarization of German labor from the litigational point of view. It is unknown, for example, whether the cases that reached RAG were representative of suits filed or of the universe of actionable events. What is politically significant is that many of these events were permitted by DAF and the *Gestapo* to crystallize into judicially cognizable issues. Although such a transformation process was implicit in the statutes themselves, the fact that the legislator intended that these conflicts be resolved piecemeal by judicial reasoning rather than more expeditiously and uniformly by officials of the ministry of labor (or more coer-

Arbeitsplatzwechsels, 7 March 1941, RGBl I, 126, exempted government agencies from the consent requirement.

²⁶ AO gegen Arbeitsvertragsbruch und Abwerbung sowie das Fordern unverhältnismäßig hoher Arbeitsentgelte in der privaten Wirtschaft, 20 July 1942, RArbBl I, 341.

²⁷ Sechste DVO über die Beschränkung des Arbeitsplatzwechsels, 29 September 1942, RGBl I, 565.

²⁸ VO über die Meldung von Männern und Frauen für Aufgaben der Reichsverteidigung, 27 January 1943, RGBl I, 67.

cive administrators) is in itself noteworthy. This relatively open mode of structuring outcomes will give rise to speculation as to whether the courts were viewed as serving other than a legitimizing function.

The first of these cases arose in a peripheral matter that was decided after the beginning of the war. Defendant was being trained by the post office; as a successful candidate he would eventually have become a tenured civil servant. The parties had agreed that if defendant left plaintiff's employ less than three years after the end of the training period, he would be required to reimburse plaintiff for all the compensation he had received during that period. RAG held that this clause did not constitute a penalty or contravene *bonos mores*. In dictum, however, it stated that a reprehensible limitation on the freedom of mobility and decision-making of dependent employees was conceivable, although it was not present in the case of one who aspired to become a tenured civil servant. (RAG 98/39, 38:203-209, No. 41, 19 December 1939.)

The court made good on its dictum five years later. In its penultimate reported decision, RAG held in favor of an apprentice who, in accordance with § 127e GewO, had informed defendant that he was going to change his occupation. The lower courts agreed with defendant that the consent of the employment office was required for such a unilateral move. RAG stated that an apprenticeship relation was only dissolved (*aufgelöst*) by the aforementioned provision whereas the relation ended pursuant to a declaration of change of occupation in accordance with § 77 HGB. The decree limiting a change of workplace spoke only of termination (*Kündigung*) of an apprenticeship or employment relation. Faced with what it perceived to be a gap in the decree, the court reasoned that the declaration of a change in occupation, which it characterized as a right to resign from an apprenticeship, occurred so rarely that the legislator did not consider it necessary to include it in the decree. On the other hand, the court claimed to divine the legislator's intent to place the channeling of young people into the best possible utilization of their abilities and talents in the general interest before the requirements of the planned deployment of labor (*Arbeitseinsatz*); the legislator therefore believed it should concede that utilization greater freedom of movement.²⁹ Although the court did not deny that a change in occupation was relevant for the deployment of labor, it stressed that it was of such importance for youth that it could not be classified with a simple change

²⁹ In the German text it is grammatically ambiguous what or who was being conceded greater mobility.

of workplace without a clear statutory determination. (RAG 11/44, 47:225-29, No. 41, 16 June 1944.)

This concern and imputation of concern on the part of "the legislator" for German youth appears grotesque on the eve of the hopeless and senseless mass deployment of youth to defend the Third *Reich* in its waning days. And yet it is the combination of formalism and sentiment at precisely this critical juncture in the Nazi effort to exhaust all human resources that in its liberal-individual refractoriness seems astounding. Hueck, in the last annotation to a RAG decision, found the court's reasoning basically wrong-headed, although he attributed a measure of plausibility to what he characterized as its pragmatic stance with regard to the lack of an authoritative statutory guideline.

The court engaged in a particularly detailed discussion of the progressive limitations on the worker's freedom of mobility in a case involving an employee in a cold-storage area who did not return to work after an illness because he claimed that the work was harmful to his health. Defendant-employer agreed to a termination of the contract on the condition that the employment office provide it with a replacement. Although that agency, not being able to accommodate defendant, did not consent to the termination, plaintiff still did not return to work; rather he sued for the return of his work-book, to which defendant finally agreed after two weeks. For these two weeks in 1940, then, plaintiff sued for lost wages. The trial court held for him, but LAG and RAG ruled against plaintiff.

Part of the opinion will be dealt with under other rubrics. Of relevance here is the court's analysis of the increasingly restrictive reach of the statutory authority of the employment office. Although the latter did not shape the private law relations between entrepreneur and Follower, its consent to a termination related only to its judgment of the effect on public interests such as the most efficient distribution of labor throughout the economy. Its focus, in other words, was not on legal relations but actual employment. From this it followed, in the court's view, that the Follower was not in a position, absent the consent of the entrepreneur, even to give up his employment "actually" let alone legally. To grant an employee a right to the return of his work-book under such circumstances would detract from the State's control of the labor force. (RAG 50/41, 42:321-33, No. 51, 5 August 1941.)

Werner Mansfeld spelled out the implications of this decision in his annotation. Referring to the working class as "soldiers of labor," he noted that they were subject to labor controls against their will; for their

brave conduct they were owed the greatest recognition. Not hesitating to think matters to their logical conclusion, Mansfeld conceded that sustaining the employee's right to the return of his work-book made no sense as long as he was not in a position to control himself freely (*frei über sich zu verfügen*) – that is, to give up his employment de facto. In a passage that reveals that by 1941 Neumann's analysis of the preservation of the "polemical" component of free labor had been overly optimistic, Mansfeld drastically portrayed the shrunken zone of freedom:

Even today he is not prevented from leaving the workplace. To be sure, by leaving he becomes liable to criminal prosecute and triggers no legal consequences with regard to the employment relation. But physically – that would be the only possibility for preventing this de facto act – he is not prevented from leaving the workplace. (RAG 42:333.)

Thus the last remnant of the classical freedom of mobility and choice of the wage laborer consisted in not being restrained at the factory gate by the *Gestapo* but being arrested later. Ironically, even before this case was decided, the *Gestapo*, in the course of arrogating to itself jurisdiction over such and lesser labor discipline offenses, had installed special units on a permanent basis in some plants.³⁰

Even later in the war, however, the court upheld an adult worker's claim to leave her position *de jure*. Plaintiff had been excluded from a Christmas bonus because she had given notice of quitting. Although defendant's action was theoretically consistent with the principle of equal treatment, the court disallowed the exclusion because defendant had, by refusing to agree to the termination, in effect held her in his employ (since the employment office ratified defendant's action). The court held that a Follower's duty of loyalty did not prevent her from leaving her job by legally permissible means. (RAG 79/42, 45:288-92, No. 59, 16 October 1942.)

A number of cases reached the court dealing with mobility of employees within an existing employing organization. Thus in the case of a construction worker covered by a TO that provided for additional compensation for those living more than a certain distance from the construction site, defendant-employer refused to increase the compensation when plaintiff moved still further away after having been hired. Overturning the lower courts, RAG characterized plaintiff's having considerably and arbitrarily altered the conditions of the employment relation prevailing at the outset as unfair. The court grounded the decision in the

³⁰ See Mason, *Sozialpolitik*, pp. 319-22; Führerinformationen des RJM, BA R 22/4089, no. 32 (5 June 1942), fol. 44, and no. 38 (12 June 1942), fol. 51.

priority of good faith and loyalty before the letter of the TO. (RAG 74/42, 45:266-69, No. 54, 2 October 1942.) As Nipperdey noted, a change of residence need not be arbitrary; moreover, the employer always had the option of discharging plaintiff (RAG 45:269).

In a case involving important elements relating to internal discipline, plaintiff was the manager of a branch office of a savings bank and as such a public employee. He sued defendant-employer in tort because the latter had denied him the higher civil service grade to which he was entitled. Defendant's action was based on plaintiff's lack of discipline in refusing to obey a decree of the ministry of the interior to become manager of another office in "the East." RAG held that withholding an otherwise legally founded promotion on account of deficient general good behavior was foreign to the TOs in the public sector. Absent stronger reasons, defendant had breached his welfare duty. (RAG 40/43, 47:13-19, No. 3, 31 August 1943.)

At a time when Germany was losing a life or death struggle with the Soviet army in "the East," it seems remarkable that the court was not willing to resort to the employee's duty of loyalty – as it had done a year earlier in the previous case – to aid the employer and the State in overcoming plaintiff's resistance to becoming mobile.³¹

III. The Work-Book

Most of the cases arising under this heading deal with the employer's alleged right of detention and tort claims by employees whose employers allegedly abused that right. The nature of the fact patterns changed over time as the statutory purpose of the work-book was modified in accordance with the increasingly restrictive control of the labor force exercised by the State. Since a worker could not enter new employment without presenting his work-book, in the event of a dispute with his old employer not only might he be deprived of all wages, but the State was concerned because the national economy was deprived of his labor for a period of time.

Thus it was common for the court to hold for plaintiff-employees where they were prevented from working elsewhere because their

³¹ In RAG 127/39, 40:274-78, No. 48, 9 April 1940, the court held that where a public employee needed certification from his employer to the effect that the latter had no misgivings concerning the former's taking another position within the public sector, the employer was under no obligation to issue the certification merely because the new position was more advantageous for the employee.

manager had negligently failed to return their workbooks in a timely manner. (RAG 265/37, 33:191-95, No. 32, 13 April 1938; RAG 128/39, 35:90-99, No. 17, 4 January 1939; RAG 25/41, 42:274-78, No. 42, 20 May 1941 [even grossest violation of duty of loyalty by employee does not justify employer in depriving employee of livelihood after discharge].) But as Hueck noted, the court's literalist statutory interpretation, which denied the employer the alternative of issuing the employee a certificate to the effect that his work-book would be returned shortly, was unsatisfactory from the aggregate economic point of view; for although the employer was required to make the employee financially whole, the national economy was deprived of his labor power (RAG 35:99).

A number of cases involved attempts by employers to detain the work-book where employees had unlawfully terminated their employment relationships. One of these arose under the decree of late 1936 that permitted employers in certain industries to withhold the book in such cases until the time at which the relationship could lawfully have been terminated. Plaintiff, an agricultural worker, provoked his employer into discharging him without notice so that he could take another job. Defendant withheld the work-book for a month (i.e., the normal notice period); plaintiff sued for his wages during this time. The lower courts ruled in his favor on the grounds that the decree did not cover this situation. RAG overturned the decision and remanded for further factual determinations. Criticizing the lower courts for their literalist interpretation, RAG held that the statutory language had to be understood in terms of the meaning and purpose of the decree. Since the latter consisted in preventing agricultural workers from ruthlessly exploiting the tight labor market in order to improve their wages by leaving their jobs in breach of contract, the plant-leader was authorized to withhold the work-book in order to reduce the incentive to other employers to entice workers away.³² Reasoning further in this vein, the court emphasized that the decree was not intended to punish the employee; therefore the employer was required to employ the worker during the notice period. (RAG 89/38, 34:98-107, No. 17, 21 September 1938.)

As Hueck, who welcomed the outcome in light of the unfortunately increasing frequency of breach of labor contract made possible by scarcity of labor, correctly observed, the holding was inconsistent. The employer should have been either permitted to discharge such an

³² RAG assumed that the enticing employer was interested in immediately employing the worker. Absent this immediacy, RAG's reasoning becomes implausible.

employee without notice, in which case he would have to return the work-book, or required to continue to employ him, withholding the book until the contract was terminated lawfully. The court, however, chose to combine discharge and continued employment (RAG 34:106-107).

It is none the less difficult to deny that RAG very likely divined the intent of the promulgator of the decree. What is interesting here is that, in spite of this clear public policy against permitting supply and demand in a tight labor market to push up wages, both lower courts were prepared to acquiesce in the attempt by agricultural workers (and DAF) to take advantage of a loophole in the decree. The case once again reveals that even during the Nazi period courts were presented with the possibility of falling back on the letter of the law and deferring to the power of the executive-legislature with the consequence of thwarting what must have been its obvious intent. Noteworthy here is that the government allowed the judicial process to run its course rather than close the loophole.

In the logically 'next' case, the court adhered to the rule established in the preceding case that in order to prevent the employer from taking arbitrary measures, it was required that he prove that the employee had provoked a discharge without notice precisely with the intention of taking another job. (RAG 234/38, 36:199-204, No. 36, 2 June 1939.) RAG thus in effect denied the employer the right to use the implied threat of withholding the work-book as a disciplinary tool to punish workers at a time when scarcity of labor had undermined the intimidating impact normally created by the loss of employment.

Although the court denied an employer the right of detention merely because he believed that he still had claims against the employee (RAG 264/38, 37:89-97, No. 11, 19 July 1939), it affirmed such a right in an industry subject to the decree of 22 December 1936 (RAG 268/39, 39:167-76, No. 31, 21 May 1940).

In the case of the cold-storage area worker discussed earlier (see § II above), the court explained that since originally the work-book had not been designed to provide the employer with a means of pressuring his employees, its return depended on the *de facto* – and not merely the *de jure* – termination of the employment relationship. But once the war-time decree made a unilateral termination contingent upon the consent of the employment office, the employee was not entitled to the return of his work-book until that consent was given. The court was careful to underscore that it was not extending the right of detention to employers in all industries – as LAG apparently had done – but was merely denying

the right of employees to immediate return of the work-book. This distinction appeared important to the court insofar as it regarded the exceptional right of detention as inconsistent with State control of the deployment of labor (RAG 42:321-33).

That the court took this latter issue seriously emerged from a decision handed down at the end of 1942 concerning a worker who had been a bricklayer in Vienna and was obligated for a definite period to work on the construction of an airport in the vicinity of Breslau (Wroclaw). When that period ended, but before the employment office granted the employer's application for a further period of obligation, the employee requested his work-book. In agreement with the lower courts, RAG held that plaintiff was entitled to recover for the loss of wages until he could start a new job because once the first obligation expired, the *de facto* employment relationship could be terminated without the consent of the employment office. (RAG 108/42, 46:18-24, No. 4, 18 December 1942.)³³

IV. Labor Service: Assignment and Obligation

These cases can be subsumed under three rubrics: 1. the treatment of the employee in the new plant; 2. the kind of work he could reasonably be expected to perform; and 3. the legal status of the obligation.

1. Generally the court gave an expansive interpretation to the statutory provisions designed to protect employees against the loss of entitlements associated with their assignment to new employers. RAG held, for example, that a provision³⁴ crediting an employee with the length of seniority that he had accumulated in his old employment also applied to Christmas bonuses. (RAG 89/42, 45:292-95, No. 60, 22 September 1942; RAG 86/42, 45:296-98, No. 61, 16 October 1942.) Where the new employer granted the obligated employee the same Christmas bonus that he would have received at his previous employment, whereas the permanent employee received a higher bonus, the court, overturning AG and

³³ The return of the work-book was distinct from the issuance of a certificate (*Zeugnis*) which, pursuant to § 113 GewO and § 630 BGB, the employee could require of the employer. It included a statement of the nature and duration of the employee's work and, if the employee so requested, a judgment on his performance and conduct. The court generally interpreted the provisions as protecting employees (RAG 272/35, 26:22-24, No. 9, 25 January 1936; RAG 68/37, 30:138-39, No. 26, 14 July 1937; RAG 62/38, 34:151-58, No. 27, 21 September 1938). But see RAG 164/35, 25:107-13, No. 19, 12 October 1935. Cf. RAG 222/32, 19:227-29, No. 54, 25 November 1933.

³⁴ § 13 Erste DurchführungsAO zur VO zur Sicherstellung . . . (Dienstpflicht-DurchführungsAO).

LAG, ruled that similarly situated employees had to be treated equally. Grounding its decision in a statutory provision that subjected the obligated worker to the TO/BO prevailing in the new plant,³⁵ the court ruled that obligated workers were entitled to such adventitious gains, although normally they would suffer losses. (RAG 74/43, 47:109-12, No. 20, 5 November 1943.)³⁶

Where plaintiff, upon appearing at the plant at which he was to perform his labor obligation, was found physically unfit, he sued the new employer for the wages he had lost in the interim. Overturning the lower courts, RAG held for plaintiff because the labor obligation system served employers in spite of the fact that the decree was formulated in terms of State interests. (RAG 198/40, 42:93-98, No. 14, 6 May 1941.) The court also found in favor of a woman who performed her labor obligation with a doctor who was himself serving an obligation. As soon as his own obligation came to an end, he moved away without giving plaintiff any notice period. RAG reasoned that plaintiff's knowledge of defendant's non-permanent position did not justify the assumption that the parties had tacitly agreed on a temporal limitation of the employment relationship. (RAG 81/43, 47:93-96, No. 17, 17 December 1943.)

2. The court was much less solicitous of plaintiffs' claims to protection where they pertained to the kind of work they were obligated to perform.³⁷ Five teenaged plaintiffs were assigned by the employment office to work at a mine where they were employed aboveground. When, pursuant to the BO, which obliged Followers occasionally to perform work other than that which they were employed to perform, plaintiffs refused to work underground, they were dismissed without notice. They sued for the wages for the last six shifts that they worked and for which the BO authorized the employer to withhold payment. Although the trial court agreed with plaintiffs that the BO impermissibly altered the conditions under which the employment office had obliged them, LAG and RAG held that the express or tacit agreement was lacking on which plaintiffs

³⁵ § 2 para. 3 VO zur Sicherstellung . . . , 13 February 1939.

³⁶ Cf. RAG 36/41, 42:418-24, No. 65, 22 July 1941; but see RAG 286/39, 40:23-28, No. 4, 29 May 1940 (if day set by employment office for obligated worker to travel to new job falls on holiday, he has claim to wages for that day even if he was prevented from actually travelling that day).

³⁷ In a case the outcome of which 'perversely' disadvantaged plaintiff-employee, the court held that an arrangement initiated by plaintiff by which he received half of his normal wages while not working in the winter and paid this sum back during the working months was not reprehensible merely because he wanted to avoid labor service since the maintenance of an employment relationship was irrelevant to the service obligation. (RAG 95 41, 43:134-42, No. 19, 29 October 1941.)

would have had to rest their claim. (RAG 241/39, 39:198-206, No. 36, 24 April 1940.)

3. One of the most remarkable cases of the entire Nazi period involved a fifteen year-old boy whom the employment office had obligated as a construction worker with the air force from May to October 1939. The air force in turn transferred him to a construction firm in the same town; after a few weeks he was dispatched to another town (in the district of another employment office) which was too far from his parents' home for him to return there nightly. After his father allegedly learned from the first employment office that the transfer to the more remote town was impermissible, and that his son was entitled to resume his work for the air force, plaintiff gave notice. But since his current employer refused to return his work-book, the air force rejected him. Plaintiff then sued the German *Reich* for the loss of wages for almost four months.

RAG held that although the TO permitted such a transfer, it represented a minimal condition which had to yield to a more favorable condition in an individual contract. If this was true in the context of voluntary agreements, it was a fortiori true in the context of compulsory agreements; in the latter case, the instructions from the employment office took the place of the individual contract. The court then interpreted the statutory provision³⁸ that required those instructions to specify the name and place of the plant in which one was obligated to work as being the only one to which the obligation extended. In a lengthy passage printed in spaced type the court emphasized that since the obligation itself constituted such a significant interference with one's personal freedom, the provision could not be interpreted expansively. (RAG 199/40, 42:215-22, No. 35, 25 March 1941.)

The court's defense of a minimalist Normative State against its blatant suppression by a Prerogative and War State becomes particularly intriguing in the light of the semi-official response by Mansfeld of the ministry of labor. Referring sarcastically to the court's overly strict interpretation of the aforementioned provision, he stated that in any event the formal declaration of the place of obligation had to yield to the right of the air force, as expressed in the TO, to deploy plaintiff where the national defense required him. Conceding that the decision would make management of the obligation system more difficult, Mansfeld

³⁸ § 5 para. 2(a) Erste DurchführungsAO zur VO zur Sicherstellung . . . (Dienstpflicht-DurchführungsAO).

alerted the court to the fact that its approach could not mitigate hardships because the employment office would merely adapt by not committing itself to a specific place or by de-obligating and re-obligating workers when they needed to be transferred. Since new roundabout ways would have to be found, all of which would be unpleasant for the affected persons, the value of the decision lay more in the theoretical than in the practical domain. (RAG 42:221-22.)

In a profound sense this case captures the contradictions inherent in the autonomy of the law under the Nazis more pointedly than any other RAG case. For in the person of Mansfeld as commentator the *Unrechtsstaat* was in effect publicly debating with the self-appointed defender of the rump Rechtsstaat. What was at stake in this debate in the judges' minds is difficult to divine. For the court in 1941 could be under no illusion that the State would permit adherence to the letter of the law to interfere with the construction of air bases; and indeed RAG itself suggested one of the lawful responses that Mansfeld proposed. This connection raises the hypothesis that the court was using the pretext of a fifteen year-old to legitimate the judicial process, knowing that administrative detours around its decision were waiting in the wings. But if the court was seeking legitimation in the eyes of the working class, the ministry of labor was manifestly unwilling to lend a helping hand. For instead of passing the decision over in silence (or praising the court and plaintiff for having uncovered a loophole) and then modifying administrative procedures, Mansfeld programmatically articulated the sham character of the force of any untoward judicial decision. But what is ultimately mystifying about this openly expressed contempt is why the Nazis tolerated, supported or perhaps even insisted on this charade of a separation of powers when they publicly undermined and repudiated what seems to have been its only possible function for them – namely, legitimation.

That the Nazis did in fact favor a traditional form of judicial review of administrative actions in the area of labor service obligation was revealed by another of Mansfeld's annotations. In this case the roles played by him and the court appear reversed. Plaintiff, a former entrepreneur, was obligated shortly after the beginning of the war to work at a branch of the *Reichsbank*. Several months later defendant-bank informed him that he would thenceforth be employed under the same conditions as its regular employees. When several months later the employee whose position he had been filling returned from the military, the bank informed the employment office that it no longer needed plain-

tiff and requested his immediate de-obligation (*Entpflichtung*). Plaintiff protested this discharge without notice, but the employment office informed him that he was relieved of his obligation and was to report to the office for a new assignment. Plaintiff then sued for his salary pursuant to the termination provisions of the TO. All three courts agreed with defendant that the de-obligation contained within it the employment office's consent to the dissolution of the employment relationship.

RAG's discussion centered on the interpretation of two statutory provisions governing the termination of temporally limited and unlimited obligations.³⁹ One of these terminated the employment relationship together with the obligation whereas the other permitted the parties to continue the relationship on private law grounds after the obligation was canceled. Since the purpose of the latter provision was to improve labor relations by stripping employment of its coercive character,⁴⁰ the court interpreted it as precluding cases in which the obligation had become unnecessary because the employee had become superfluous. The court found support for this view in the fact that the employment office had ordered plaintiff to report for new work. Having thus subsumed the facts under the other provision, the court found that the latter precluded judicial review of the dissolution of the employment relationship once the employment office had consented to it. (RAG 30/41, 42:333-39, No. 52, 29 July 1941.)

Mansfeld was critical of the court's failure to determine whether plaintiff was obligated for a limited or unlimited period of time. For in the former case the obligated worker was completely dependent on the employment office's control of his labor power, whereas in the latter case a dissolution of the employment relationship – like any other employment relationship – merely presupposed the office's consent. If plaintiff – as presumed by Mansfeld – was obligated for an unlimited period of time, then the employment office was not authorized to intervene in the private law employment relationship by means of simply consenting to the bank's termination of the relationship in violation of the termination provisions of the TO. Rather, the office could accomplish this end only by ordering a new obligation for plaintiff superseding the old one; but it did not follow this course. Moreover, judicial review was

³⁹ *Ibid.*, §§ 20-21.

⁴⁰ See Durchführungserlaß zu Abschnitt I und III der VO zur Sicherung ... [13 February 1939], 14 March 1939, RArbBl I, 236. Cf. *Entpflichtung bei zeitlich begrenzter Dienstleistung*, 17 September 1940, RArbBl I, 513; *Dienstverpflichtung*, 14 October 1940, RArbBl I, 547.

precluded only where the termination was covered by the office's consent; since the latter could have been lawfully applied only to a termination pursuant to the TO, the court was authorized to review the termination. (RAG 42:338-39.)

In this case, then, Mansfeld appears as the spokesman of formalistic legality, chiding the administrative agency for having overreached its authorization and the court for having deferred to it. What is significant here is that Mansfeld was insisting on judicial review of the administrative actions of an agency located within his own ministry of labor, whereas the court accorded priority to the unobstructed control of the labor force by the employment office.⁴¹ Although Mansfeld was troubled by the fact that the agency had relied on the bank's statement without making its own inquiries, he did declare programmatically that the contractually stipulated notice periods had to be observed in the case of persons obligated for unlimited periods of time. Here, then, Mansfeld defended the rights of individual obligated workers. Since Mansfeld's annotation to the earlier case had not appeared at the time the second case was decided, the court's decision cannot be ascribed to cautious overreaction to that rebuke. (It is to be sure possible that Mansfeld's criticism had been communicated to the court privately.)

The reversal of roles may, however, also have been a result of the fact that the right which Mansfeld perceived as having been conferred on unlimitedly obligated workers was one which the ministry of labor had incorporated into its own calculus of the degree of heteronomy that it was possible to impose on such workers without creating unacceptable passive resistance or unrest.⁴² Mansfeld can then be regarded as charging the agency and the court with having misjudged the balance that the ministry of labor wanted to strike. But this speculation still leaves open the question as to why the highest ministerial bureaucrats insisted on the courts as the appropriate reviewing body when they themselves could manifestly have interpreted their own statutory intentions more reliably.

This insistence thus once again raises the issue of the perceived desirability of legitimation. But this time it may be hypothesized that it was not so much the Nazi regime as a whole that was seeking legitimation in the eyes of the subordinated working class (and entrepreneurs), but,

⁴¹ See Denecke, "Gestaltungsformen," pp. 3-5, published after this decision was handed down but before Mansfeld's annotation was published.

⁴² See the ministerial executory orders cited in n. 40 above.

rather, more specifically the policy-formulating ministerial administrators who needed independent review in order to secure and consolidate the loyalty of the lower echelons of executory civil servants. For they had to deal not only with the social antagonisms that had existed during Weimar, but also with new conflicts that arose in connection with the fact that whereas the high-ranking political bureaucrats were by and large non-Nazi technocrats taken over from the Weimar period, the lower echelons were increasingly staffed by members of the Nazi party.⁴³

V. Consent of the Employment Office to Discharges and Quits

The cases involving the consent of the employment office to terminate an employment relationship deal with four broad questions: 1. when and under what conditions was consent required? 2. where should the line be drawn between a private law justification for termination (over which the office had no jurisdiction) and terminations based on State control of the labor force (which did constitute the office's statutory jurisdiction)? 3. under what conditions could the office retract consent or grant it after the fact? and 4. to what extent was judicial review of these administrative actions available to the parties?

1. The courts were called upon to interpret statutory provisions regarding a number of everyday events leading to a termination of an employment relationship that were not expressly regulated by legislation. Thus in a relatively straightforward case, the court ruled that where one party contested superannuation, the consent of the employment office was required. (RAG 101/40, 40:293-97, No. 51, 30 October 1940.) But where the sole prerequisite for pensioning an employee was permanent disability as determined by a procedure including the report of an expert, the court found that no consent was required. (RAG 152/42, 46:277-87, No. 55, 14 May 1943 [Mansfeld objected that consent should be required because of the relevance of the termination to labor deployment policy (RAG 46:286)].)

Similarly, the court held that consent was not required in the case of the termination of an employment relationship by the mere expiration of a probationary period. (RAG 214/40, 42:98-102, No. 15, 8 April 1941.)

⁴³ See Neumann, *Behemoth*, pp. 369-82, especially the characterization of Mansfeld at 372. Cf. Gerhard Schulz, *Die Anfänge des totalitären Maßnahmestaates* (F., 1974 [1960]), pp. 139-83. On the Weimar period, see Friedrich Dessauer, *Recht, Richtertum und Ministerialbürokratie* (Mannheim, 1928), pp. 93-113.

But where a contractual probationary period could be terminated with ten days' notice and the employment office denied its retroactive consent to the employer's notice of termination, the court held that the statutory provision⁴⁴ unambiguously conferred exclusive authority on the office to determine whether consent was required. (RAG 64/42, 46:254-57, No. 50, 16 October 1942.)

In a case involving the issue of the meeting of the minds, defendant-employer agreed at the time he concluded a contract with plaintiff-employee that she could terminate the contract by giving four weeks' notice, thereby dispensing with the consent requirement. But when she actually made use of this possibility, defendant contested it and the employment office confirmed that defendant's anticipatory agreement had been unlawful because it had constituted an attempt to circumvent the office. RAG, which became involved in the case following plaintiff's action for a declaratory judgment as to whether the employment relationship had been terminated as a result of her having given notice, held that although the parties could terminate a relationship where they had agreed on this course, this exceptional authorization did not apply to agreements in advance; for once the parties no longer agreed, it could no longer be presumed that they had the best overview of whether this employee had become superfluous and the normal situation of State control had reappeared. (RAG 15/42, 45:10-48, No. 28, 29 May 1942.) In another meeting of the minds case, however, the court held that although the prerequisites for the aforementioned exception were not fulfilled where both parties simultaneously gave notice but for different reasons, where they wanted to dissolve the relationship at all events, their 'agreement' would suffice. (RAG 52/43, 47:56-62, No. 10, 17 September 1943.)

2. In a factually interesting dispute, a construction worker sued for lost wages resulting from a spell of cold weather. Normally plaintiff was protected by a provision in the TO granting him the right to give notice to terminate so that he could seek employment elsewhere. But since defendant-employer refused to agree to the termination and plaintiff neglected to secure the consent of the employment office, he was without work or wages for seven weeks. The court held that the wartime decree was not intended to eliminate the protection afforded plaintiff by the TO but merely to subserve State control of the labor force; therefore,

⁴⁴ § 7 para. 2 VO Über die Beschränkung des Arbeitsplatzwechsels.

that protection had to assume a different form. Where defendant in effect forced plaintiff to wait idly to be recalled, it was irrelevant that the latter failed to seek the consent of the office; the financial risk created by inclement weather had to be borne by defendant. (RAG 89/41, 43:21-29, No. 4, 2 September 1941.)

3. In the first of several cases dealing with retractions, the court held that although it would be inconsistent with the demands of legal certainty if the employment office could revoke its consent at will, where consent was originally obtained by means of plaintiff's wilful deceit, retractions was permissible. (RAG 97/40, 40:261-67, No. 46, 11 September 1940.)⁴⁵ Whereas in this case both the granting and the retraction of consent occurred before the expiration of the notice to terminate period,⁴⁶ in the next case the office at first denied and then granted consent to plaintiff's discharge without notice (for having lied about the reason – drunkenness – for having absented himself from work). The court held that although consent could be revoked until the termination was announced, revocation of a denial was not so limited because it did not legally affect an existing employment relationship. (RAG 118/41, 44:82-90, No. 12, 16 January 1942.)

4. In a number of instances the court was called on to decide whether administrative acts were subject to judicial review in view of the broad grant of exclusive jurisdiction to the employment office concerning the issue as to whether its consent was necessary. Thus in the case of the advance agreement by the parties that the employee could terminate with notice without the office's consent (see § V.l. above), the court held that although the office in principle could decide only questions of expediency and not legal questions, it also had jurisdiction over the legal question as to whether its consent was required.⁴⁷ But where a party circumvented the office and invoked the jurisdiction of the labor courts over a matter to which consent was a preliminary issue, the court was not bound by the administrative determination. The court supported this ruling by reference to the untoward consequences for expedited proceedings concerning the prevention of undesirable changes of workplace that would ensue if the office's exclusive jurisdiction were extended outside the context of its own procedures. (RAG 45:140-48.) But

⁴⁵ Mansfeld was concerned that, because no expedited procedure had been used here, plaintiff had remained idle while defendant withheld her work-book (RAG 40:267).

⁴⁶ Cf. RAG 105/42, 46:226-32, No. 44, 8 January 1943.

⁴⁷ Cf. RAG 92/42, 46:257-64, No. 51, 8 January 1943; RAG 196/40, 42:16-28, No. 3, 22 April 1941.

the court was careful to remand a case for further determination where an appeals court gave a declaratory judgment for plaintiff-employee – namely, that a discharge without consent was void – only on the basis of the administrative law considerations relevant to the employment office without inquiring into the private law justification of the discharge. (RAG 180/39, 39:350-56, No. 63, 17 April 1940.)⁴⁸

In a later case of judicial deference, the court held that it was not authorized to determine whether the office had made a legal error in interpreting an employment contract with regard to the termination of a probationary relationship. (RAG 46:254-57.)⁴⁹ Mansfeld commented that the decision could have gone either way on purely legal grounds. But he sensed that the court had been swayed by the necessities of State labor control to set aside its legal doubts and to expand the exclusive jurisdiction of the employment office; and he found this shift of decision-making authority from the courts to administrative agencies unacceptable outside of the constraints brought on by the war. (RAG 46:257.)

VI. Conclusions

The foregoing survey of the decisional materials does not conduce to the formulation of broad generalizations such as: The court deferred to the clear intent of the legislator where certain vital State or capitalist interests were at stake, but it substituted equitable considerations for more traditional legal positivist reasoning where particularly deserving plaintiffs were litigating and/or the will of the legislator was unambiguously ambiguous.⁵⁰ Nor would such generalizations, if available, necessarily constitute the most interesting jurisprudential outcomes.

In spite of the absence of such convenient bright lines, the fact that court in numerous cases did, with varying degrees of blatancy and success, thwart State policy and/or State-sanctioned capitalist prerogatives, raises the issue of the systemic function of judicial review of administrative acts (and associated measures of employers) in the area of labor supply control.

⁴⁸ The employment office gave its consent after the discharge because it thought that the trial court would not render judgment until this question was resolved. RAG denied that this was a conditional consent, which would have detracted from legal certainty.

⁴⁹ Cf. RAG 74/40, 40:297-310, No. 52, 18 September 1940 (no judicial review permissible of question whether employment office should not have granted consent where employer used deficient care in ascertaining whether consent was required).

⁵⁰ For similarly sceptical conclusions, see Rudolf Echterhölter, *Das öffentliche Recht im nationalsozialistischen Staat* (Stuttgart, 1970).

In terms of the quantitative importance of the phenomena of labor market control that underlay the cases, it is crucial to observe that in relation to the size of the entire labor force as well as in absolute size the number of workers over whom the labor courts exercised jurisdiction shrank considerably during the war. Thus, for example, between July 1939 and July 1944 the number of Germans in the industrial labor force declined from about 10.4 million to 7.5 million, whereby the number of women in this category remained stationary.⁵¹ Since the Nazi regime found it politically inexpedient to compensate for the loss of German males to the military by inducing or forcing large numbers of German females into the labor force,⁵² it chose to rely on the mass introduction of foreign laborers in the form of civilians and prisoners of war. By May 1944 these two groups, many of whom worked under conditions of forced or virtual slave labor,⁵³ totaled more than seven million.⁵⁴ In spite of the continued disciplining of the German labor force by the *Gestapo*, the Nazis also made German workers conscious of the privileged treatment they enjoyed in relation to the foreign workers.⁵⁵ From this vantage court decisions protecting German employees against various legal

⁵¹ The United States Strategic Bombing Survey, *The Effects of Strategic Bombing on the German War Economy* (n.p., October 31, 1945), appendix table 8 at p. 209. From May 1939 to September 1944 the number of German males in the civilian labor force declined from ca. 24.5 million to 13.5 million while that of German females remained more or less unchanged. See *ibid.*, appendix table 6 at p. 207 and exhibit B-1 at p. 32.

⁵² See Dietrich Eichholtz, *Geschichte der deutschen Kriegswirtschaft 1939-1945*, vol. I: *1939-1941* (B. [GDR], 1969), pp. 79-86; Jill Stephenson, *Women in German Society 1930-1940* (L., 1975), pp. 75-115; Tim Mason, "Women in Germany, 1925-1940: Family, Welfare and Work," *History Workshop*, no. 1 (Spring 1976), pp. 74-113; *ibid.*, no. 2 (Fall 1976), pp. 5-32.

⁵³ Eichholtz, *Geschichte*, I, 82-102; Edward Homze, *Foreign Labor in Nazi Germany* (Princeton, 1967); Jürgen Kuczynski, *Die Geschichte der Lage der Arbeiter unter dem Kapitalismus*, vol. 6: *Darstellung der Lage der Arbeiter in Deutschland von 1933 bis 1945* (B. [GDR], 1964), pp. 217-320. The mass murder of Jews (and others) during the war who could have been forced to perform productive labor for the Nazis was an act of 'irrationality' that relativizes the claim that the Nazis could afford the ideological "luxury" of annihilating German Jewry; see ch. 11 § III below. On this destruction of an available pool of slave labor, see Raul Hilberg, *The Destruction of the European Jews* (Chicago, 1967 [1961]), pp. 284-89, 333-45 and *passim*.

⁵⁴ U.S. Strategic Bombing Survey, *Effects*, appendix tables 5-6, 10 and 12 at pp. 206-207, 212 and 214.

⁵⁵ See Karl Heinz Roth, *Die "andere" Arbeiterbewegung* (2nd ed.; Munich, 1977), pp. 145-55 [ch. written by Elisabeth Behrens]. It may be noted that the national labor service for youth, which was not subject to the jurisdiction of the labor courts, became increasingly integrated into the war effort. See Reichsarbeitsdienstgesetz, 26 June 1935, RGBI I, 769; VO zur Änderung des Reichsarbeitsdienstgesetzes, 8 September 1939, RGBI I, 1744; Bekanntmachung der neuen Fassung des Reichsarbeitsdienstgesetzes, 9 September 1939, RGBI I, 1747; Dritte VO zur Durchführung und Ergänzung des Reichsarbeitsdienstgesetzes (Strafverfolgung gegen Angehörige des Reichsarbeitsdienstes), 16 November 1940, RGBI I, 151.

abuses might to some degree be explicable as part of this overall effort to bifurcate the pan-European labor force assembled in Germany.⁵⁶

The substantive systemic significance of judicial review of administrative agency acts has been belittled by Otto Kirchheimer. He insisted that the ease with which statutes could be amended meant that the rare untoward judicial decision could not lay claim to the legal and social qualities traditionally associated with a precedent.⁵⁷ At best Kirchheimer was willing to concede that in certain border areas, in which the distribution of power among ruling groups had not yet been fixed, the courts could act independently insofar as they were not functioning as the executive organ of the ruling class.⁵⁸ In the normal case, however, an independent decision would retain "value only as an indication of the necessity of closing some legal loopholes."⁵⁹

The most that can be said in favor of Kirchheimer's approach is that some of the cases discussed in this chapter fit his model while others do not. Meaningful systemic analysis, however, is not consistent with so many exceptions. Yet, it must also be recognized that if the function of the judiciary even in the field of labor control cannot be reduced to that of competing with administrative services "as an organ to enforce discipline in the lower ranks of the bureaucracy . . . and among the population at large,"⁶⁰ Kirchheimer was surely correct in emphasizing that the courts' failure to ratify and execute the will of the regime no longer rose to a constitutional level, but rather assumed a mere nuisance character.

But many of these 'nuisances' did not, at least as far as subsequent legislation and adjudication indicate, turn out to be temporary loopholes that the government then closed. Unless the cases bear no representative relationship to the reality of State-capital-labor relations, some of the court's decisions did in fact carve out modest enclaves of protection and predictability for workers within a generalized system of

⁵⁶ Perhaps also as a result of the increased use of non-German laborers, labor requisitions in July 1941 accounted for only three per cent of all male workers; see [*Staatssekretär*] Beisiegel, "Aufgaben und Leistungen der Arbeitseinsatzverwaltung," *RArbBl*, 1941, V, 488-92.

⁵⁷ See ch. 1 § V.

⁵⁸ Otto Kirchheimer, "The Legal Order of National Socialism," 9 *SPSS* 456-75 (1941).

⁵⁹ Otto Kirchheimer, review of Ernst Fraenkel, *The Dual State*, 56 *Political Science Quarterly* 434, 436 (1941).

⁶⁰ Otto Kirchheimer, "Changes in the Structure of Political Compromise," 9 *SPSS* 264-89 (1941); cited here according to republication in Kirchheimer, *Politics, Law and Social Change* (NY, 1969), pp. 131-59 at 152.

degradation, subjugation, arbitrariness and terror.⁶¹ Moreover, many of the decisions involved modes of judicial reasoning squarely in the mainstream of pre-Nazi adjudication. Indeed, the decisions under review in this chapter were marked by infrequent reliance on general clauses let alone ones filled with express Nazi ideological content.

That the Nazis preserved some of the external forms of judicial independence in this area may well have been prudent – albeit useless – from their point of view. For it relieved high Nazi party officials of the onus of making unpopular judicial decisions⁶² and presumably enhanced the legitimation of the regime when such decisions were ratified or overturned by the courts. The untoward judicial outcomes constituted a reasonable price to pay for this moderating influence on possible sources of unrest. After all, if unprecedented Allied bombing failed to create a labor shortage that might have halted the Nazi economic-military effort,⁶³ it was very unlikely that RAG would bring about that result.

⁶¹ See, e.g., the following cases discussed in this chapter: RAG 11/44 (§ II); RAG 234/38 and RAG 108/42 (§ III); and RAG 199/40 (§ IV.2).

⁶² See [Otto] Koellreutter, "Recht und Richter in England und Deutschland," 47 *Verwaltungsarchiv* 208-46 at 240 (1942); cf. Kirchheimer, "Changes," pp. 156-57.

⁶³ See U.S. Strategic Bombing Survey, *Effects*, passim; Alan Milward, *The German Economy at War* (L., 1967 [1965]), passim.