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MARC LINDER

The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

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Vittorio Klostermann Frankfurt am Main
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Preface

This book deals with a number of subjects: labor law, class conflict, Nazi Germany, Jews, jurisdiction and judicial reasoning, among others. Yet none of these forms its centerpiece. Rather, at issue here is the autonomy of the judicial process. By that is meant not so much the extent to which other societal institutions and forces supervise and restrict the judiciary or whether the claim of legal reasoning to be essentially different from political discourse is sustained (although both of these areas are examined). The focus of this work embraces the following complex of questions: What kinds of societal conflicts are moulded into judicially cognizable disputes? What forces account for the exclusion/inclusion of certain conflicts from/in the judicial process? What principles – if any – underlie the process of transforming conflicts into disputes to be adjudicated by the courts? How does the process of attempted resolution of these disputes by judges differ from that applied by other societal agents? What are the material (including legitimation-generating) consequences of judicial – as opposed to non-judicial – dispute-resolution? Does the character of this judicial process change over time? Is its scope restricted or expanded over time in connection with shifts between its authority and that of other dispute-resolvers?

In short, this work deals with the position within the social division of labor occupied by (private, civil law) courts in capitalist societies. Among these it examines exclusively Nazi Germany. The latter is a test-case of judicial autonomy insofar as it might be expected that this society, given its anti-liberal posturing and partial revolution, would constitute one extreme of restrictes judicial autonomy.1 Moreover, Nazi Germany may operate as a methodological bridge to the study of liberal capitalist as well as anti-liberal non-capitalist societies.2 No attempt has been made to comprehend all of the court systems with jurisdiction over disputes arising under private law. In particular a comprehensive analysis of the decisions of the German Supreme Court in the areas of com-

mercial and corporations law remains a desideratum of legal research.
The present work deals only with labor law. This limitation derives primarily from considerations of manageability and not fungibility of subject matter. For in view of the overriding role that the suppression of the labor movement played throughout the course of Nazi rule, labor-capital conflicts and their juridical transformation into judicially cognizable disputes assumed a special significance.

Even within labor law not all jurisdictions could be taken into account. The sheer volume of adjudication and the inaccessibility of trial and intermediate appellate court decisions precluded the possibility of a representative sampling let alone an exhaustive investigation. Consequently, the primary source for this study is the corpus of published decisions of the Supreme Labor Court (*Reichsarbeitsgericht* [RAG]) between 1933 and 1945. Although all of the almost 2,000 decisions were digested, fewer than half of these have been cited. Largely cases fell by the wayside because they were too run-of-the-mill and/or did not present issues, problems or resolutions significantly different from those prevailing during the Weimar period. Chief among these were points of law relating to working hours, sick-leave benefits, other working conditions and wages as well as a large group of cases dealing with various aspects of social insurance. The fact that these cases proved to be jurisprudentially uninteresting during the Nazi period is interesting, but not in this context. In order, however, to provide the reader with some insight into the nature of such 'non-political' cases, an appendix has been included analyzing the jurisprudentially most important area (paid vacations). Also omitted are references to most cases involving disputes between employers on the one hand and independent agents (such as travelling salesmen) and very highly paid executives on the other except insofar as enemies of the regime (such as Jews) played a part or the decisions drew distinctions vis-a-vis labor-capital relations.

What remains, then, is hundreds of cases in which the court was forced, or forced itself, to wrestle or not to wrestle with the juridical consequences of attempts to restore an equilibrium between labor and capital that had existed before the rise of the labor movement – with the difference that now huge concentrations of capital confronted atomized

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3 Unpublished decisions from the years 1942 through 1944 were consulted in BA R 22/4024 and R 22/4025. The few relevant decisions have been cited.
masses of workers – on the basis of ideological formulae provided by the
Nazi movement. The choice of the expression “juridical consequences”
rather than, for example, “superstructural reflection,” is critical. For the
question as to whether the judicial process is merely a quasi-automatic
passive agent or capable of autonomous intervention and structuring of
social relations constitutes the overarching controversy of this book.

Reacting to what was unique about the Nazi legal system, postwar
authors long subscribed to an undifferentiated view of the role of the
courts. One of the most succinct expressions of this tendency is to be
found in a small book published immediately after the collapse of the
Nazi regime. After discussing the unprecedented legal machinations
surrounding the murder of Ernst Röhm and other members of the SA in
1934, the author concluded:

The end of the German system of justice had come. That which still existed
later on no longer deserved this name and was a grotesque. For it had to be
grotesque when one litigated for hours on end before a trial court and an
appeals court concerning an insult to one’s honor or 300 marks while at the
same time it was lawful to knock off dozens of people like pheasants without
judicial inquiry or proceedings.4

The present work may be regarded as an extended coming-to-grips
with such a line of argument.

Following upon a lengthy introduction to the problematic of the Nazi
legal system in general and the mechanics of the Supreme Labor Court
in particular (Part I) are grouped the three main segments devoted to
analysis of the cases: the impact of the Nazi resurrection of conserva-
tive-paternalistic ideologies of community on key doctrines of labor law
(Part II); the control of labor (Part III); and the treatment accorded var-
ious enemies of the regime (Part IV).

Nipperdey, Lehrbuch des Arbeitsrechts ([West] B., 1963 [1927]), pp. 20-21, the two leading
academic figures in labor law from Weimar to Bonn, represent the other extreme –
undifferentiated praise of the Supreme Labor Court in the form of self-exculpation. Cf.
Arthur Nikisch, Arbeitsrecht (Tübingen, 1951), pp. 18-19. On these authors and their
colleagues, see Roderich Wahsner, “Das Arbeitsrechts-Kartell – Die Restauration des
kapitalistischen Arbeitsrechts in Westdeutschland nach 1945,” 1974 KJ 369-86. For a
useful discussion of some aspects of RAG adjudication during the Nazi period – based,
unfortunately, to a large extent on commentaries rather than on the reported decisions
themselves – see Andreas Kranig, Lockung und Zwang. Zur Arbeitsverfassung im Dritten
The major jurisprudential concern in these chapters lies in confronting the latitude which the statutes, precedents and fact patterns allowed the judges with that of which they actually availed themselves. To determine whether some measure of analytical or political coherence or uniformity attaches to the limits which these three sets of structuring elements imposed on the decisions (or which the court imposed on itself) constitutes the primary task of the case-review. The further-reaching questions relating to the out-of-court consequences flowing from the court’s expansion, constriction or acceptance of the existing perimeter of its autonomy and, even more speculatively, to why the court chose (or did not choose) to test its status within the social division of labor (or, alternatively, whether instead less conscious, quasi-spontaneous mechanisms were at work) are explored, but less rigorously.

Although this work is primarily jurisprudential in character and not prima facie a contribution to social history, the struggles that slumbered, simmered or raged during the period under review are not merely so much indifferent social grist for its jurisprudential mill. They count; and so do outcomes. Indeed, as far as the history of class struggle in Nazi Germany is concerned, the stories told in the cases may rise above the level of the anecdotal and constitute an important source of a still largely untold story. But more generally and methodologically: this study tests the claim – largely ignored by continental legal scholars and denied by latter-day legal realists – that not merely the styles or modes of judicial reasoning but also the outcomes of the cases exhibit coherence.

The bulk of the research for this book was done at the International Law Library of the Harvard Law School. Among its staff, Rich Greenfield, Fred Chapman and Jack Tobin were particularly helpful (Rich Greenfield continuing to provide otherwise unavailable materials after his return to the Library of Congress). Annette Meiburg at the Bundesarchiv in Koblenz pointed the way to materials that would have otherwise gone unnoticed. Rainer Erd of the Institut für Sozialforschung in Frankfurt/Main originally suggested Nazi labor law as an undercultivated field of study. Larry Zacharias of the University of Massachusetts at Amherst shared his knowledge of how to approach decisional output historically and his sixth sense for obscure points of law. Manfred Weiss and Spiros Simitis of the Institut für Arbeitsrecht of the Johann Wolfgang Goethe University and Dieter Simon of the Max-Planck-Institut
Für europäische Rechtsgeschichte (both of Frankfurt/Main) all read the manuscript and offered critical insights and encouragement. Wolfgang Hoffmann-Riem of the University of Hamburg and Udo Reifner of the Hochschule für Wirtschaft und Politik in Hamburg commented on parts of the manuscript. Though untutored in German law, Morton Horwitz, Henry Steiner, Martha Minow and Duncan Kennedy of the faculty of the Harvard Law School were willing to engage in provocative dialog concerning the limits to the usefulness of contextual case analysis. Charles Donahue of the same faculty made helpful suggestions about the medieval roots of German law.
### Abbreviations and Glossary of German Legal Terms

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AcP</td>
<td>Archiv für die civilistische Praxis</td>
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<tr>
<td>AfbR</td>
<td>Archiv für bürgerliches Recht</td>
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<tr>
<td>AfS</td>
<td>Archiv für Sozialgeschichte</td>
</tr>
<tr>
<td>AfSwSp</td>
<td>Archiv für Sozialwissenschaft und Sozialpolitik</td>
</tr>
<tr>
<td>AG*</td>
<td>Arbeitsgericht ([trial] labor court)</td>
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<tr>
<td>AO</td>
<td>Anordnung (order; directive; regulation)</td>
</tr>
<tr>
<td>AOG</td>
<td>Arbeitsordnungsgesetz/Gesetz zur Ordnung der nationalen Arbeit (Labor Code; National Labor Regulation Law)</td>
</tr>
<tr>
<td>AOGÖ</td>
<td>Gesetz zur Ordnung der nationalen Arbeit in öffentlichen Verwaltungen und Betrieben (Labor Code in the Public Sector)</td>
</tr>
<tr>
<td>AOER</td>
<td>Archiv des öffentlichen Rechts</td>
</tr>
<tr>
<td>ArbGG</td>
<td>Arbeitsgerichtsgesetz (Statute establishing the Labor Courts)</td>
</tr>
<tr>
<td>ARSP</td>
<td>Archiv für Rechts- und Sozialphilosophie</td>
</tr>
<tr>
<td>AuR</td>
<td>Arbeit und Recht</td>
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<td>AV</td>
<td>Ausführungsverordnung (executive decree)</td>
</tr>
<tr>
<td>B.</td>
<td>Berlin</td>
</tr>
<tr>
<td>BA</td>
<td>Bundesarchiv Koblenz</td>
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<tr>
<td>BBG</td>
<td>Gesetz zur Wiederherstellung des Berufsbeamten- tums (Law pertaining to the Restoration of the Professional Civil Service)</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (Civil Code)</td>
</tr>
<tr>
<td>BO</td>
<td>Betriebsordnung (plant rules and policies)</td>
</tr>
<tr>
<td>BRG</td>
<td>Betriebsrätegesetz (Plant Council Statute)</td>
</tr>
<tr>
<td>CLR</td>
<td>Columbia Law Review</td>
</tr>
<tr>
<td>DAF</td>
<td>Deutsche Arbeitsfront (German Labor Front)</td>
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<td>DAR</td>
<td>Deutsches Arbeitsrecht</td>
</tr>
<tr>
<td>DBG</td>
<td>Deutsches Beamengesetz (German Civil Service Statute)</td>
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<td>Abbreviation</td>
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<tr>
<td>DJ</td>
<td>Deutsche Justiz</td>
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<td>DJZ</td>
<td>Deutsche Juristenzeitung</td>
</tr>
<tr>
<td>DNVP</td>
<td>Deutschnational Volkspartei (German National People's Party)</td>
</tr>
<tr>
<td>DR</td>
<td>Deutsches Recht</td>
</tr>
<tr>
<td>DRW</td>
<td>Deutsche Rechtswissenschaft</td>
</tr>
<tr>
<td>DRZ</td>
<td>Deutsche Richterzeitung</td>
</tr>
<tr>
<td>DVO</td>
<td>Durchführungsverordnung (implementing order)</td>
</tr>
<tr>
<td>EG*</td>
<td>Ehrengericht ([trial] honor court)</td>
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<tr>
<td>Erlass</td>
<td>decree</td>
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<tr>
<td>F.</td>
<td>Frankfurt/Main</td>
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<tr>
<td>fol.</td>
<td>folio</td>
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<tr>
<td>Following</td>
<td>Gefolgschaft (Nazi-feudal term designating as a collectivity the employees of a plant)</td>
</tr>
<tr>
<td>G.</td>
<td>Gesetz (statute; law)</td>
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<tr>
<td>Gefolgschaft</td>
<td>Following</td>
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<tr>
<td>GewO</td>
<td>Gewerbeordnung (Industrial Code)</td>
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<tr>
<td>GVG</td>
<td>Gerichtsverfassungsgesetz (Statute regulating the Constitution of the Courts)</td>
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<td>H.</td>
<td>Hamburg</td>
</tr>
<tr>
<td>HGB</td>
<td>Handelsgesetzbuch (Commercial Code)</td>
</tr>
<tr>
<td>HLR</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>JhJ</td>
<td>[Iherings] Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts</td>
</tr>
<tr>
<td>JfGWVw</td>
<td>Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft</td>
</tr>
<tr>
<td>JfNuS</td>
<td>Jahrbücher für Nationalökonomie und Statistik</td>
</tr>
<tr>
<td>JLH</td>
<td>Journal of Legal History</td>
</tr>
<tr>
<td>JW</td>
<td>Juristische Wochenschrift</td>
</tr>
<tr>
<td>JZ</td>
<td>Juristenzeitung</td>
</tr>
<tr>
<td>KJ</td>
<td>Kritische Justiz</td>
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<tr>
<td>KWVO</td>
<td>Kriegswirtschaftsverordnung (War Economy Ordinance)</td>
</tr>
<tr>
<td>L.</td>
<td>London</td>
</tr>
<tr>
<td>LAG*</td>
<td>Landesarbeitsgericht (appellate labor court)</td>
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<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
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<tr>
<td>NSBO</td>
<td>Nationalsozialistische Betriebszellenorganisation (Nazi Plant-Cell Organization)</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>NSDAP</td>
<td>Nationalsozialistische Deutsche Arbeiterpartei (Nazi Party)</td>
</tr>
<tr>
<td>NY</td>
<td>New York</td>
</tr>
<tr>
<td>PrOVG</td>
<td>Preussisches Oberverwaltungsgericht (Prussian Supreme Administrative Court)</td>
</tr>
<tr>
<td>PSQ</td>
<td>Political Science Quarterly</td>
</tr>
<tr>
<td>RAG*</td>
<td>Reichsarbeitsgericht (Supreme Labor Court)</td>
</tr>
<tr>
<td>RAGE</td>
<td>Entscheidungen des Reichsarbeitsgerichts. 27 vols. 1928-1944.</td>
</tr>
<tr>
<td>RAarbBl or RABI</td>
<td>Reichsarbeitsblatt</td>
</tr>
<tr>
<td>RdA</td>
<td>Recht der Arbeit</td>
</tr>
<tr>
<td>REG*</td>
<td>Reichsehrengerichtshof (Supreme Honor Court)</td>
</tr>
<tr>
<td>RFM</td>
<td>Reichsfinanzministerium (ministry of finance)</td>
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<tr>
<td>RG</td>
<td>Reichsgericht (Supreme Court)</td>
</tr>
<tr>
<td>RGBI</td>
<td>Reichsgesetzblatt</td>
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<tr>
<td>RGSt</td>
<td>Entscheidungen des Reichsgerichts in Strafsachen</td>
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<tr>
<td>RGZ</td>
<td>Entscheidungen des Reichsgerichts in Zivilsachen</td>
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<tr>
<td>RJM</td>
<td>Reichsjustizministerium (ministry of justice)</td>
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<tr>
<td>SDR</td>
<td>Statistik des Deutschen Reiches</td>
</tr>
<tr>
<td>SEG*</td>
<td>Soziales Ehrengericht (social honor court)</td>
</tr>
<tr>
<td>SP</td>
<td>Soziale Praxis</td>
</tr>
<tr>
<td>SPD</td>
<td>Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)</td>
</tr>
<tr>
<td>SPSS</td>
<td>Studies in Philosophy and Social Science</td>
</tr>
<tr>
<td>StGB</td>
<td>Strafgesetzbuch (Penal Code)</td>
</tr>
<tr>
<td>TO</td>
<td>Tarifordnung (schedule of wages and regulations concerning working conditions issued and enforced by the trustees of labor; replaced the collective bargaining agreements of Weimar)</td>
</tr>
<tr>
<td>VdVdDS</td>
<td>Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer</td>
</tr>
<tr>
<td>VfZ</td>
<td>Viertelsjahrshefte für Zeitgeschichte</td>
</tr>
</tbody>
</table>
Abbreviations

VO Verordnung (ordinance; executive or ministerial decree)
Volksempfinden popular feeling
Volksgemeinschaft people's community
Yale Law Journal
ZdAfDR Zeitschrift der Akademie für Deutsches Recht
ZfS Zeitschrift für Sozialforschung
ZfdgStw Zeitschrift für die gesamte Staatswissenschaft
ZPO Zivilprozessordnung (Code of Civil Procedure)

*Unless otherwise noted, all decisions of the labor courts are cited according to ARS. Citations to RAG cases contain four items: docket number; volume and page number (indicating the first and last pages of the case); the number given to the case within the volume; and the date of the decision. E.g.: RAG 220/33, 19:207-10, No. 49, 28 October 1933, means that the docket number is 220/33; the decision is located at pages 207-10 of volume 19 of ARS; the case appears as no. 49 in that part of vol. 19 devoted to RAG cases; and the decision was handed down on 28 October 1933. Citations to lower court cases include, in addition, the location of the court. Generally these citations have been included in the text and constitute a system of references independent of the footnotes. Therefore a parenthetical "ibid." in the text refers only to the immediately preceding text citation and not to the preceding note.
A Note on Terminology

Throughout this work the word “Nazi” is used uniformly in place of the official term, “National Socialist.” This deviation requires justification. Hitler and his followers did not call themselves Nazis. The latter epithet was used by their opponents, apparently in imitation of the disparaging term, “Sozis,” which referred to Social Democrats. No serious scholar would, of course, ever characterize Social Democrats as “Sozis.” Why then “Nazis”?

Almost four decades after the defeat of the Nazis it is still the received wisdom of political-economic, sociological and historical research that the Nazis’ adoption of the word and some of the symbols of “socialism” constituted a world-historical fraud. Perhaps this is winners’ history. Perhaps a day will come when the short biographical entry for Hitler will read simply, “European statesman.” But as long as the world at large continues to regard the twelve years of Nazi rule as a phenomenon sui generis, it does not seem outlandish to put some distance between a work of scholarship and its object.

Besides: there is good precedential authority for this linguistic practice. In the first proclamation issued to the people of Germany by Supreme Commander, Allied Expeditionary Forces, General Eisenhower declared in English that “we shall obliterate Nazi-ism and . . . overthrow the Nazi rule, dissolve the Nazi Party,” whereas the German half

5 But see Joseph Goebbels, Der Nazi-Sozi (Elberfeld, n.d. [1927]).
6 Cf. the English expression, “Commiss.”
8 As Herbert Marcuse noted, “An essential part of . . . [scholarship] is recognition of the frightening extent to which history was made and recorded by and for the victors, that is, the extent to which history was the development of oppression.” Herbert Marcuse, “Repressive Tolerance,” in Herbert Marcuse et al., Repressive Tolerance (Boston, 1966), p.13.
of the bilingual proclamation spoke of “Nationalsozialismus,” „Nationalsozialistischen Deutschen Arbeiterpartei” and “NSDAP.”

In West Germany it has become vogue to deal with this issue by recourse to the abbreviation “NS.” Herbert Marcuse’s strictures on abbreviations are particularly apt here:

Most of these abbreviations are perfectly reasonable and justified by the length of the unabbreviated designata. However, one might venture to see in some of them a “cunning of reason” – the abbreviation may help to repress undesired questions. . . . The abbreviations denote that and only that which is institutionalized in such a way that the transcending connotation is cut off. The meaning is fixed, doctored, loaded. Once it has become an official vocable, constantly repeated in general usage, “sanctioned” by the intellectuals, it has lost all cognitive value and serves merely for recognition of an unquestionable fact.

In an age of instant knowledge and the latter’s virtually as rapid consignment to oblivion, when, for example, the Vietnam War has become “ancient history” to many university students, use of a fighting word like “Nazi” may even serve an educational purpose by keeping alive some small part of the passion and suffering that it once evoked.

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10 Herbert Marcuse, One-Dimensional Man (Boston, 1967 [1964]), p. 94.
Part I
Chapter 1
Subject-Object in the Nazi Legal System

I. Dilemmas and Strategies

Like all societies before it, Nazi Germany was confronted with the issue of interpreting general rules in order to apply them to individual social events. If the authors of the Prussian Code of 1794 (Allgemeines Landrecht) had failed in their attempt to subsume all of justiciable reality unambiguously under its almost 20,000 paragraphs, then the Nazi legislator, with its typical reliance on the form of vague and hence capacious general clauses, manifestly did not succeed in creating a seamless web of self-executing laws that could have dispensed with the need for an army of authoritative interpreters. In spite of Hitler's bottomless contempt for jurists and their science of law, the need for societal self-reflectivity and self-reflexivity asserted itself sufficiently to preclude any attempt to eliminate the system of judge-made law.

The preservation of the formal trappings and some of the substance of case law was a product of several overlapping forces: 1. the need for legitimation of Nazi rule overall; 2. the particular need for legitimation on the part of the traditional corps of judicial officers whose self-ident-
ity required assurances that their role and function could be distinguished from those obtaining under the "Bolshevik" system of justice; and 3. a continuing need for a modicum of legal certainty in the resolution of the common disputes inevitably spawned by the accumulation of capital and the competition of capitals. But whatever the reasons for the preservation of the traditional system of private-law adjudication, once the latter was kept intact, both Nazis and jurists (overlapping groups) understood that some mechanisms were required in order to prevent decisions from being handed down that would have tended to destabilize Nazi rule.

The more sophisticated Nazi jurists (such as Carl Schmitt) conceded that laws qua general norms had become impossible in the Weimar Republic\textsuperscript{15}; as a result, it was no longer clear in what sense judges were bound by positive law. Many jurists naively hoped that Nazi ideology would provide the absolute standard of value that Weimar had lacked.\textsuperscript{16} Although many jurists regarded general clauses as an optimal tool for incorporating Nazi ideology into laws pre-dating the Nazi regime and to insure Nazi-infused equity in new legislation,\textsuperscript{17} others believed that the only viable solution lay in the appointment and/or training of judges totally (in particular, biologically) committed to and in tune with Nazi ideology.\textsuperscript{18} Still others were less confident that an independent judiciary could reproduce the results required by an incoherent ideology without becoming indistinguishable from the “Bolshevik” system.\textsuperscript{19}

\textsuperscript{15} For Schmitt's earliest insight in this area, see his \textit{Gesetz und Urteil} (B., 1912), pp. 43-44.
\textsuperscript{16} E.g., Manfred Pauser, “Das Gesetz im Fuhrerstaat,” 25 (N.S.) \textit{Archiv des offentlichen Rechts} 129-54 at 143 (1935); Roland Freisler, “… noch keine vollwertigen Mitarbeiter … Gedanken zu einer Uberheblichen Kritik und zu Gemeinschadigenden Vorschlagen,” 103 \textit{DJ} 998-1002 at 1000 (1941). That Freisler could sustain this hope as late as 1941 constituted one facet of his infamous fanaticism. See Gert Buchheit, \textit{Richter in roter Robe} (Munich, 1968).
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The remainder of this section surveys the inevitable failure of the various jurisprudential, administrative and social strategies that were developed in order to reconcile the preservation of at least certain elements of the traditional system of the Rule of Law with the need to preclude the systemic permissibility of the creation of judge-made law that might have disrupted the realization of the fundamental political-economic imperatives of the Nazi modification of capitalism.

Many Nazi jurists welcomed the proliferation of general clauses within the new Nazi legislation as well as the opportunity to infuse the pre-Nazi equitable general clauses with Nazi content. Whereas, in their view, general clauses of the liberal state, i.e., Weimar, had been value-neutral and had merely directed judges to such empty formulas as “good faith” without more and without laying down the value-standard of an absolute world-view, it was claimed that judges were now in possession of an absolute standard in the form of such notions as German morals (Sitte), the commonweal, the spirit of honor and comradeship.20 No less an authority than Justus Hedemann, who in a book published shortly after the Nazi take-over had issued his famous warning against the softening, uncertainty and arbitrariness associated with the advance of general clauses during the Weimar period,21 put forward in the first installment of the People’s Code the preservation of the purity of German blood, German honor and genetic soundness as the basic elements of Nazi private law.22

But the Nazi flight into the general clauses merely shifted the question from the judicial interpretation of allegedly unambiguous statutes to that of the general clauses themselves. Carl Schmitt,23 by the end of 1933 a privy councillor and leader of the Reichsfachgruppe, University Professors of the Federation of Nazi German Jurists, included among his “New Guiding Principles for Legal Practice” the rule of thumb that

21 Hedemann, Flucht, pp. 66-73.
22 Justus Hedemann, Heinrich Lammers and Wolfgang Siebert, Volksgesetzbuch. Grundregeln und Buch I (Munich-B., 1942), Grundregel 2 at p. 11. Cf. Justus Hedemann, Das Volksgesetzbuch der Deutschen (Munich-B., 1941), and idem, Bürgerliches Recht im Dritten Reich (B., 1938).
23 Among the growing number of books on Schmitt, Joseph Bendersky, Carl Schmitt (Princeton, 1983), offers the most detailed biographical account although it is semi-apologetic. For theoretical treatment, see Peter Schneider, Ausnahmezustand und Norm (Stuttgart, 1957); Hasso Hofmann, Legitimität gegen Legalität (Neuwied, 1964); George Schwab, The Challenge of the Exception ([West] Berlin, 1970); Lutz Bentin, Johann Popitz und Carl Schmitt (Munich, 1972); Ingeborg Maus, Bürgerliche Rechtsstheorie und Faschismus (Munich, 1976).
Nazi principles were directly and exclusively controlling with regard to the application of general clauses. Not the judge's subjective discretion, but rather an objective standard was required. Although Schmitt and others had undertaken to demonstrate that in the liberal (in contradistinction to the pre- and post-liberal German) state no societal consensus could be attained concerning the norms constituting the general clauses, he now tried to facilitate the transition to a Nazi judicial system by maintaining that since the standard BGB commentaries had always referred to the dominant value-notions in discussing the general clauses, one was justified in locating such views in a certain leading or controlling group or movement. The syllogism inexorably led to the conclusion that in Nazi Germany Nazi principles were controlling. To be sure, three months later Schmitt cautioned that no judge could, at his own discretion, carry out the principles of the Nazi party program as positive legal norms. Almost a decade later, Curt Rothenberger, who for a time was the second-highest ranking official in the RJM, gave Schmitt's rule a paradoxical twist by stating that, "The more subjectively and exclusively the judge is bound to the ideas of Nazism, the more objective and just his adjudications will be."

The point then became to bind the judicial corps to these "ideas." Two components of such an undertaking must be distinguished. One referred to the legal and extra-legal measures necessary to insure substantive judicial dependence while preserving formal rechtsstaatlich independence (see sect. II infra). The other – which proved much more intractable – consisted in insuring that the judges were able and willing to be imbued with the correct party line. The threshold issue here consisted in the awkward fact that the informal decision-making processes and the structure and modes of ruling-group compromises characteristic of the Nazi period made a mockery of the notion that the legislator issued monolithic, unambiguous, authoritative and uniform ideological principles.

27 For the notion, see Rothenberger, Richter, p. 23. On compromises, see Otto Kirchheimer, "Changes in the Structure of Political Compromise," 9 SPSS 264-89 (1941).
Indeed, it has become a commonplace of historical research that Nazi rule was characterized by “systemlessness, improvisation and non-uniformity.”\(^{28}\) Although the authoritarian *Ordnungsstaat* was able to prevent the “legal vacuum and irregularity from assuming proportions that would have endangered the regime,”\(^ {29}\) the fiction of a unified Nazi Weltanschauung\(^ {30}\) combined with the fact that Hitler – increasingly, as he turned towards foreign affairs and militarization – exercised no regular control over ministerial legislation and regulations meant that there was no guarantee “that that which the *Führer* let run its course was legally and politically irrelevant and was only the ‘administrative-technical’ execution of the will of the *Führer*.”\(^ {31}\) Under these circumstances the glorification of the expanded role of the judiciary was tantamount to making a virtue of a necessity.\(^ {32}\)

The domestic intelligence service of the *Gestapo* reported in 1942 on the judicial reverberations of this contradiction. In connection with the increasingly forceful efforts by the RJM under secretary of state Franz Schlegelberger to guide the courts, the Sicherheitsdienst noted: “Even Nazi judges have found this guidance to be of doubtful value; for the authorities and officials charged with the guidance did not themselves act in accordance with a uniform Nazi view. Therefore the guidance did not guarantee the elimination of mistaken judicial opinions.”\(^ {33}\) If such


\(^{29}\) Broszat, *Staat Hitlers*, p. 171.


\(^{32}\) Rothenberger wrote that whereas before 1933 the legislator had degraded the judge by making him into a logic machine (*Subsumtionsapparat*), the *Führer* qua legislator knew that a living Volks-law could be created only by means of elastic legislation combined with extensive judicial discretion: “Therefore motley and multifarious life is fettered as little as possible today by the law [*Gesetz*]. Every Reichsgesetzblatt is teeming with such general clauses . . . .” “Die ersten Gedanken,” p. 566; cf. also Rothenberger, “Richterliche Unabhängigkeit und Dienstaufsicht,” 4 *ZfdtR* 637-40 (1937); idem, “Die ersten sachlichen Massnahmen zum Aufbau einer nationalsozialistischen Rechtspflege,” 105 [11] *DJ* 66-70 (1943); idem, “Der Richter im nationalsozialistischen Staat,” 105 [11] *DJ* 257-61 (1943).

\(^{33}\) *Meldungen aus dem Reich – Amt III RSHA – SD*, 3 September 1942, Nuremberg Doc. NG-071, cited by Hermann Weinkauff, “Die deutsche Justiz und der Nationalsozialismus,” in *Die deutsche Justiz und der Nationalsozialismus* (Stuttgart, 1968), p. 149. This passage is cited here according to Weinkauff in order to underscore the weakness of his claim that blind positivism undermined the German judiciary. See § III. W.W. Buckland, *Some Reflections on Jurisprudence* (Cambridge, 1945), p. 35, n. 1, offers an anecdotal parallel from fascist Italy: “In the early days of the regime it was fairly simple. In any litigation the decision had to be in favor of any party to the suit who was a Fascist, but now that
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confusion prevailed in the political and criminal areas of greatest concern to Hitler's regime, how would it be possible to "bind" judges ideologically in the private-law areas where there was no doubt that a definitive party line did not exist?

For Carl Schmitt the solution to this problem mirrored that contained in his analysis of the manner in which the Nazi Total State had transcended the parliamentary crisis of Weimar. Implicitly adopting a neo-Rousseauian approach Schmitt maintained that a democracy presupposed the existence of an "in sich homogenes Volk," which possessed all the properties that contained a guarantee of the justice and reasonableness of the will. Fulfillment of this condition insured that majority rule did not constitute a violation of the minority. For by virtue of an identical belonging to the identical Volk, all members of a democratic society in the same way wanted essentially the same thing. Once, however, this notion of homogeneity is abandoned as a fiction, and Weimar is seen as pluralist, the principle of the arithmetic majority becomes senseless. Whereas Weimar would inevitably collapse as a result of the insuperable antithesis between the liberal consciousness of the individual and democratic homogeneity, the Nazi Total State recreated the homogeneous Volk within the framework of absolute values authoritatively issued and enforced by the Führer.
Schmitt saw a similar process evolving within the judicial sphere. With the collapse of the absolutist-monarchist Rechtsstaat and the advent of the direct and unmediated confrontation between working-class and capitalist-class interests in the law-making body, the fiction of the judge's being normatively bound by statute law had become practically and theoretically untenable over wide areas of the law. Statute law could no longer muster the calculability and certainty which was part and parcel of its rechtsstaatlich definition: "The certainty and calculability do not lie in the creation of the norm but rather in the situation presumed to be 'normal'." Schmitt was here merely drawing the conclusion to which he had been driven even before 1933 and which he viewed as valid for all developed industrialist capitalist societies riven by class struggle: the traditional notion of the Rule of Law was no longer applicable. This conclusion marked a caesura in Schmitt's thinking, for in his influential text on constitutional theory Schmitt was one of the last on the political right in Weimar to insist on the absolute indispensability of laws as general norms if the Rechtsstaat was to be preserved. For Schmitt the rechtsstaatlich concept of a law had to retain its connection with the Rechtsstaat and the traditional bourgeois freedoms.

Since the Rule of Law meant the rejection of the rule of human beings, "whether it be of an individual or of an assembly . . . whose will takes the place of a general norm, which is the same for everyone and is determined in advance," it meant above all that the lawmaker himself was bound by his laws and precluded from engaging in arbitrary rule. Within a liberal-bourgeois order laws with such qualities again presupposed that the laws constituted general norms:

A legislator whose individual measures, special directions, dispensations and exceptions are just as valid as laws as are his creations of general norms is in no conceivable way bound by his statute; "being bound by the statute" is a meaningless phrase for those who can make "statutes" as they please.

39 Carl Schmitt, Staat, Bewegung, Volk (H., 1933), p. 43.
40 See also Ernst Rudolf Huber, "Die Einheit der Staatsgewalt," 39 DJZ 950-60 at 953 (1934); Heinrich Henkel, Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt (H., 1934), pp. 29-31.
42 Ibid., p. 139.
43 Ibid. See Ingeborg Maus, "Zur 'Zasur' von 1933 in der Theorie Carl Schmitts," 1969 KJ 113-24, on the transfer of this principle after 1918 from judges and civil servants to a parliament that was no longer monopolized by bourgeois-oriented interests.
44 Schmitt, Verfassungslehre, p. 135. Unlike a number of other Nazi constitutional jurists, Schmitt was realistic, cynical and consistent enough to wish to abjure the rechtsstaatlich status of the Third Reich because it no longer fulfilled the requirements set forth in the quotation. For the debate, see Schmitt, Staatsgefüge und Zusammenbruch
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But once the liberal-capitalist parliamentary order had lost the capacity to generate universally held values, that is, once the natural-law foundations had been deprived of their plausibility, the aforementioned qualities of the justness and reasonableness of statutes became “problematic.” At that point the general-norm character of laws not only became indispensable, it also constituted “the last safeguard of the old rechtsstaatlich distinction between statute and command . . . and thus, the last remnant of the ideal basis of the bourgeois Rechtsstaat in general.”

In this connection it is not of central importance that Schmitt’s critical analysis of the contradictions of the Weimar order were ultimately motivated by a desire to undermine the effectiveness of anti-capitalist political movements, whereas legal positivists such as Kelsen were associated with an abstracted and socially disembodied conception of laws that led them to accept and hence promote the expansion of the power of a no longer exclusively bourgeois parliament. Relevant here are the consequences of the collapse of the traditional foundations of the Rechtsstaat for the interpretation and application of laws by judges. In this regard Schmitt’s position can be seen as part of a larger trend of conservative, monarchical, absolutist or Nazi groups or individuals whose faith, insofar as they gained adherents within the Weimar judiciary, in the judicial executability of the letter of the law diminished in proportion as the procedures leading to the election of parliament and the legislative outcomes themselves were democratized. Even after the victory of the Nazis, Schmitt recognized, “the fiction and illusion of a
statute that covers and can subsume all cases and all situations in ad-
ance in terms of fact patterns cannot be resuscitated."48 Schmitt then
formulated the dilemma confronting the Nazis49:

Thus the entire system of adjudication stands between Scylla and Charybdis.
The way forward seems to be without limits and to stray farther and farther
away from the firm ground of legal certainty and of being bound by statute law,
which, however, is at the same time also the basis of judicial independence; the
way back – into a formalistic statute-superstition, which has been recognized as
senseless and historically long since obsolete – is just as much out of the ques-
tion.50

The only solution lay in reforming not the system of justice but rather
the jurists themselves. Specifically, Schmitt argued that since all law
was the law of a certain Volk, and since it was, further, "an epistemologi-
cal truth that only he was in a position to see facts correctly, to hear
statements correctly, to understand words correctly and to evaluate cor-
rectly impressions of people and things who in an ontological way, in
accordance with his species participated in the law-creating community
and belonged to it existentially," "organic, biological and völkisch differ-
ences" became crucial.51 By seeking an answer to the question, Quis judi-
cabit?, in the Volksgebundenheit (being tied to the Volk) and Artgleich-
heit (identity of species) of the judicial corps,52 Schmitt was reproducing
the conditions that he had posited as the implied foundation of every
democracy based on majority rule – namely, völkisch homogeneity.

Schmitt was not alone in offering this “biological”53 resolution of the
subject-object relation in law. A somewhat more moderate version was
sketched by one of the leading methodologists of the pre- and post-
World War II periods, Karl Larenz. Attempting to allay fears concerning
the consequences of the proliferation of general clauses, Larenz noted
resignedly that absolute predictability in adjudication was
a utopian thought anyway. The legal certainty for which we must strive can, qua
certainty of the law, not mean the external conformity of the decision with the
letter of a law that dispenses with all concrete standards, but rather only its
inner conformity with the meaning and purpose of the laws and, beyond that,
with the leading, fundamental ideas of völkisch life and of our idea of law. This
legal certainty is guaranteed only by a bench that is imbued with the living fund-
mental values of our community and that also knows how to express them in its

48 Schmitt, Staat, Bewegung, Volk, p. 44. Cf. idem, “Kodifikation oder Novelle?,” 40 DJZ
49 Or any advanced capitalist society in the post-legal realist period; see Wolfgang
Friedmann, Legal Theory (2nd ed.; London, 1953 [1944]).
50 Schmitt, Staat, Bewegung, Volk, p. 44.
51 Ibid., p. 45.
52 Ibid., p. 44.
adjudications. If we have such a bench, then those standards do not constitute any danger to legal certainty; if we do not have such a bench, then legal certainty cannot be realized in any other way either.\(^\text{54}\)

This watered-down version of Schmitt's position could be interpreted to mean nothing more than that a judge must be in tune with the values underlying current 'public policy' choices in order to be able to bring them to bear intelligently in his decisions.\(^\text{55}\) That something more was intended was made clear by ministerial director August Jäger:

If it is only the constructive thinking of a judge that is filled with Nazi thoughts, then nothing is gained except that this judge, who in Weimar received the guiding policy corresponding to this period and carried it out true to his duty, now has received a new, different kind of rule of interpretation which he proceeds on just as dutifully. A connectedness (Verbundenheit) with the Volk is not achieved in that manner.\(^\text{56}\)

In other words, Nazi judges were not to be mere time-servers syllogistically executing the will of the legislator. The reason for the need for a judicial corps ideologically committed to Nazism lay presumably in the fact that the widespread use of general clauses as well as the enormous volume of pre-Nazi statutes still in force rendered useless a judge who was unable to transcend logic and to proceed to intuition. The presence on the bench of judges who had not made the Nazi Weltanschauung their own undermined the confidence of the Nazi leadership in the necessity for the maintenance of traditional adjudicatory tribunals.\(^\text{57}\) From the point of view of Nazi party jurists (e.g., Frank, Freisler, Thierack and Rothenberger) and ministerial officials (e.g., Gürtnner and Schlegelberger),\(^\text{58}\) who aspired to induce the judicial corps, of whom only very few had joined the Nazi party before 1933,\(^\text{59}\) to avoid handing down decisions that would provoke Hitler into carrying out his threat to decimate the bench,\(^\text{60}\) it was necessary to provide sitting judges with object lessons.\(^\text{61}\)


\(^\text{55}\) In which case it might be closely related to the approach developed by Henry Hart and Albert Sacks, \textit{The Legal Process} (tentative ed.; Cambridge, Mass., 1958).


\(^\text{57}\) See "Rechtssicherheit und richterliche Unabhängigkeit aus der Sicht des SD," \textit{4 VfZ} 399-422 at 415 (1956).

\(^\text{58}\) Weinkauff, "Die deutsche Justiz," pp. 39-95, provides this categorization.

\(^\text{59}\) See \textit{ibid.}, pp. 107-108, indicating that only thirty of 7,000 judges in Prussia were members of the Nazi party as of 30 January 1933. Weinkauff was unable to corroborate these data.

\(^\text{60}\) In 1942 Hitler threatened to eliminate ninety percent of the judicial corps; see \textit{Hitlers Tischgespräche}, p. 223.

\(^\text{61}\) On the so-called Judges' Letters, see below. Alternatively, the new minister of justice, Thierack, sent Martin Bormann, the head of the Nazi party chancery, a telegram on 3
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This strategy was personified, for example, in Curt Rothenberger. In a book published after the military turning point of the war he confirmed that, "It is no secret that the German judicial system and the German judge had not succeeded to the present day in gaining the confidence of the Führer and that of the Nazi party." In a remarkable transformation of the subject-object question Rothenberger reformulated the problem as follows:

In theory only the Führer has the authority to hand down decisions after the unity of the Reich has replaced the separation of powers. If the Führer could in his own person practically exercise his judicial function, there would be no judge problem. But he can't. For that reason he has transferred his authority to the individual judge. On account of this immediate relation of enfeoffment [Lehensverhältnisse] and because the judge must find the law "like the Führer" . . . the German judges must be furnished with the attributes that are to be regarded as the judicial attributes of the Führer.

Rothenberger was, at bottom, proposing nothing less than a return to conditions approximating those characteristic of the German absolutist state in which the monarch could pass sentence as supreme judge in a judicial proceeding or ex plenitudine potestatis as sovereign. Rothenberger sought to mitigate the monumentality of the program he was proposing by allowing that, "it goes without saying that it is neither possible nor required that every judge be a personality of the magical power of the Führer." Yet even he implicitly recognized that where the Führer himself had not made up his mind, thousands of judicial mini-Führer vassals would be in jeopardy: "In the period of a complete transvaluation and new creation of legal thinking, however, this question of the real law is not always easy to answer . . . . What litigant does not assert that sound popular feeling [Volksempfinden] or the interests of the nation are not on his side!" In this regard Rothenberger was echoing the doubts voiced in the early years of the regime, thus indicating that no effective solution was ever

November 1942 requesting that Hitler appoint him, Thierack, chief judge of Germany in order that he be able to decide any pending case; BA R 22/4720. The file contains no response. In a reversal of his earlier position, Otto Kirchheimer asserted late in life that "jurists trained in the tradition of discursive logic and deductive argumentation . . . were generally not overwhelmed by a dogma which taught that the charisma-endowed Führer was the incarnation of the will . . . of the people." Political Justice (Princeton, 1961), p. 301.

62 See ibid. for an interpretation of Rothenberger's ultimate failure to acquire a special power basis for high-ranking jurists.

63 Rothenberger, Der deutsche Richter, p. 51.
64 Ibid., pp. 50-51.
66 Rothenberger, Der deutsche Richter, p. 51.
67 Ibid., p. 23.
developed. In an implicit critique of Schmitt's naive thesis of homogeneity – which also underlay Rothenberger's strategy – one author characterized as one-sided and dubious the claim that the species-homogeneity \[\text{Artgleichheit}\] of the German \textit{Volk} led to a homogeneous and uniform position of the legal conscience in every individual case, so that it would render the law in its momentary significance superfluous. If, this author continued, such a fundamental \textit{weltanschaulich} question as the punishment of dueling was controversial, "how contradictory will be the position of the legal conscience in questions of expediency!"\(^68\)

More principled objections were raised concerning the use of general clauses as a vehicle for transferring the responsibility for formulating societal norms from the legislator to the judicial corps.\(^69\) Using the opportunity of a Festschrift for Hedemann, Alfred Hueck, one of the leading labor law scholars from Weimar through Bonn, maintained that increased reliance on general clauses in private law undermined legal certainty because members of society could in many instances no longer predict the outcomes of their actions. Attacking in particular the general clause contained in § 2 para. 2 AOG, which imposed an undefined welfare duty on employers, Hueck asserted that under such elastic clauses even correctly decided cases were socially destabilizing:

> It is impermissible to leave the field of law and to decide every labor law dispute only according to general considerations of equity. Otherwise the dangers which Hedemann ... delineated will come true: softening in thinking and deciding, legal uncertainty and arbitrariness. Especially the work-world demands absolutely clear, certain relations. Especially here it is crucial to avoid disputes from the outset if possible in order to preclude a disturbance of trusting cooperation. But if the decision is tailored to considerations of equity, then in only all too many cases it cannot be calculated ahead of time; each party believes that the decision favorable to it corresponds to equity, and numerous unpleasant disputes and suits come about which poison the work-world; and even if they are, in the individual case, decided correctly, they nevertheless leave in their wake embitterment, mistrust and disturbance of cooperation.\(^70\)

Apart from the dubious empirical implication that employers and employees in the Weimar period (or in any legal system) were in a better position to predict the outcomes of potential litigation so as to have been able to conform their behavior to what they believed courts would determine the law to be, Hueck's position implies that it would have

\(^68\) Franzen, \textit{Gesetz}, p. 22.

\(^69\) Peter Thoss, \textit{Das subjektive Recht in der gliedschaftlichen Bindung} (F., 1968), distorts the role of general clauses because he neglects decisional law.

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been preferable had the legislator promulgated binding guidelines regulating various aspects of the master-servant relationship.\textsuperscript{71} A comprehensive labor contract draft-code was published in 1938 but the legislator never enacted it. That the regime preferred not to promulgate binding rules concerning vacations, private pension rights, etc., but rather to place the regulation of such arrangements in the discretion of individual employers, fit in to its program of de-centralized class control. By subjecting individual capitalists' discretion to a general welfare clause to be authoritatively interpreted by RAG, the regime achieved three goals: 1. it atomized class conflict; 2. it made possible not insignificant working-class victories within a pacified process of litigation that, nevertheless, associated the Third Reich with the achievement by the working class of a separate labor court system during Weimar; and 3. it enhanced the neutrality and hence legitimacy of the court system, which in turn redounded to the credit of the regime.\textsuperscript{72}

As the example of AOG demonstrates, the use of general clauses may not, without more, be equated with the political (let alone legal-juridical) impossibility of formulating coherent directives for judges. For the author of the statute (Werner Mansfeld) succeeded in formulating in an unambiguous fashion the overriding goal of Nazi policy in this area, which was the restoration of the power of individual capitals as it existed in the period before the rise of trade unions. Within the framework of this radical disempowerment of individual workers and the working class as a whole, AOG fashioned a narrow and strictly controlled sphere within which atomized workers were permitted to contest their employers' power. In other words, AOG created a rebuttable presumption that employers always exercised their authority rightfully - it was then placed in the discretion of the worker as an autonomous legal actor whether to undertake to rebut that presumption judicially. In this way a milieu was fostered in which workers might be persuaded that it continued to be individually and socially meaningful to file suit in the labor courts from which they had come to expect a modicum of fairness during Weimar.

\textsuperscript{71} Indeed, soon after the defeat of Nazi Germany Hueck reiterated this charge of "unclear emotional jurisprudence." See Alfred Hueck, \textit{Der Treugedanke im modernen Privatrecht} (Munich, 1947), p. 3. Still later Hueck indicated that he preferred having his cake and eating it too in the sense that he also referred to RAG's decisions as the primary source of progressive social outcomes for the German working class during the Nazi period. See A. Hueck and H.C. Nipperdey, \textit{Lehrbuch des Arbeitsrechts} (7th ed.; [West] B., 1963), p.21.

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According significant discretion to these courts in the form of the general clauses of AOG could plausibly have been regarded as a way of enhancing the workers' trust in the courts – to the extent that the workers' suits were successful; where, however, the courts rejected workers' claims, the Nazi rulers could shift the onus onto inexorable judicial logic. Of course, with even greater plausibility workers could have asked why the Nazi legislator did not intervene with positive statutes in order to rectify social injustices. But, with the exception of certain issues such as a guaranteed minimum annual vacation, most matters brought before the labor courts did not lend themselves to global statutory treatment because they were detailed and situational in character.

But as Mansfeld himself recognized, the formlessness of the general clauses contained within itself the danger of instrumentalization for ends other than those intended by the legislator. In connection with his efforts to avoid what he perceived as the undermining of legal certainty by the doctrine of the plant-community (see ch. 3), Mansfeld informed another official of the RJM in 1936:

The intention of DAF, which was expressed to me in an unveiled manner, to educate the employers in communitarian thinking on the basis of § 2 AOG, that is, by referring to a socialist communitarian attitude expressed in that clause, to achieve substantial improvements in social policy, which, absent positive statutory rules, cannot be provided with a direction or a goal, forces us, in my view, on the other hand to accelerate passage of a Law pertaining to the Labor Relationship in spite of the resistance of DAF fortified, as I assume with certainty, by Prof. Siebert.73

But even where the Nazi legislator could have issued detailed protective labor regulations, it was often stymied by an inability to compromise conflicting political-economic interests.74

73 Mansfeld to Volkmar, 28 January 1936, Generalakten des Justizministeriums betreffend Arbeitsvertragsrecht, 22 October 1934 – 31 December 1937, BA R 22/2063, fol. 181-82. See also the letter from Mende, the head of DAF's social office, to the minister of labor, dated 22 January 1936; ibid., fol. 219.

74 See, for example, the controversy surrounding the attempt by Rudolf Hess (deputy of the Führer) and DAF to extend the coverage of § 56 AOG to plants with fewer than ten employees. Ibid., fol. 19-22, 59-60. On the origins of the statute, see Timothy Mason, "Zur Entstehung des Gesetzes der nationalen Arbeit, vom 20. Januar 1934," in Industrielles System und politische Entwicklung in der Weimarer Republik (Düsseldorf, 1974), pp. 322-51; Andreas Kranig, "Zur Wirkungsgeschichte des Gesetzes zur Ordnung der nationalen Arbeit vom 20. 1. 1934," Jus commune (forthcoming); Ingeborg Maus, "Juristische Methodik und Justizfunktion im Nationalsozialismus," in Recht, Rechtsphilosophie und Nationalsozialismus ARSP, Beihet 18 (1983), pp. 176-96 at 181.
II. Judicial Independence

The question of general clauses and judicial discretion was bound up with that of judicial independence. Here, too, facially binding guidelines reveal themselves upon closer inspection not to have closed the gap between legislator and judge any more successfully than liberal principles of the separation of powers. To be sure, certain writers conceded, particularly in the early years of the regime, that a "tension" could arise between "the volkisch and the authoritarian principle" as a result of the fact that the former rested on the rather inertial, conservative Volks­-empfinden, whereas the latter was a product of the dynamic state leadership. But the claim that a potential conflict could (and had to) be resolved in favor of the latter forces was hardly helpful in the case of many private-law issues on which the leadership had taken no stand at all.

A great deal was made in Nazi Germany of the independence of the judiciary. No less a figure than Hans Frank, the head of the Nazi lawyers' organization (and later governor-general of Poland), confided to his diary while awaiting execution at Nuremberg that the very existence of "our bourgeois culture" depended on the independence of the judge. The preservation of judicial independence was held up as one of the central features distinguishing Nazi Germany from "Bolshevism." As early as 1935, Hans Tigges, in one of the most 'objective' scholarly juridical studies of a subject of central concern to the Nazis to appear during the period, contended that judicial independence was impossible under

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77 Cf. Karl Kümmerling, "Der Sinnwandel des Gesetzesbegriffes im nationalsozialistischen Staat" (Diss., Münster, 1938), p. 47: "The fact that a statute in the Nazi State is generally characterized by the principledness of its arrangement [Grundsätzlichkeit seiner Regelung] has as a consequence that the concrete application is left to the bench and bar [Rechtswahrern] which applies the statute." See generally on Nazi laws Dietrich Kirschenmann, "Gesetz" im Staatsrecht und in der Staatslehre des NS ([West] B., 1970).

78 For a historical overview, see Dieter Simon, Die Unabhängigkeit des Richters (Darmstadt, 1975).

79 Hans Frank, Im Angesicht des Galgens (Munich, 1953), pp. 135-36. At one point during the war the Gestapo took umbrage at a series of lectures Frank delivered in support of the Rechtsstaat; see "Rechtssicherheit und richterliche Unabhängigkeit," pp. 408-409.
“Bolshevism” in light of the appropriation of adjudication as a political instrument of power by the ruling proletariat; for Tigges the Soviet secret police (GPU) demonstrated the instrumental character of the Bolshevik system of justice. In Tigges’s own presentation it was, however, difficult to discern how “Bolshevism” and the Nazi system differed in principle. For as he explained, general norms no longer existed as a necessary property of laws but only as an “expedient form of mediation of the völkisch order of life”; general laws retained only a purely instrumental character. What distinguished the Nazi system was, instead, “the authoritarian decision of the Führer, who embodied the Volk-order to the highest power.” Although individual laws (i.e., bills of attainder) remained the exception as a result of the complexity of modern society and the limited amount of time available to the legislator-Führer, in principle the possibility existed of binding a judge in an individual case. Indeed, Tigges stated that with the collapse of the constitutional distinction between statutes and administrative acts and its transformation into one of state-organizational expediency, one could imagine conferring on the government even the right to issue extra-legal commands to judges.

In contrast to the ruthlessly realistic conceptualization of judicial independence as a residual category of the Führer’s absolute will, Otto Koellreutter, a right-wing constitutional law scholar in Weimar who made a timely entry into the Nazi camp but whose insistence on the maintenance of certain traditional forms of the Rechtsstaat incurred the enmity of Carl Schmitt and his increasingly influential school, early on not only drew a bright line between Nazism and “Bolshevism,” but held that those who rejected the Rechtsstaat were guilty of propagating permanent revolution in the Bolshevik sense. In this context he conceded that concentration camps, for example, were not an “emphatically rechtsstaatlich institution,” and that they were justified only as long as the foundations of the völkisch State were threatened.

Koellreutter returned to the same theme in 1942. Lamenting the possibility that German judges would be relegated to the role of mere polit-
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cal functionaries – as he supposed they were under the Bolsheviks – in whom people would lose all confidence, he at the same time implied that the Nazi political leadership could afford such independence as it did only on the condition that the judges operated within the framework of the communitarian arrangement (\textit{Gemeinschaftsregelung}) – that is, presumably by achieving the outcomes desired by the regime.\textsuperscript{87} Just how circumscribed this independence was became clear when Koellreutter defined the scope of formal judicial review\textsuperscript{88} as limited to examining whether a statute had been promulgated in the \textit{Reichsgesetzblatt}, even the inquiry into whether the appropriate minister had countersigned the statute Koellreutter deemed to have become senseless.\textsuperscript{89}

Ultimately the function of such judicial independence as was permitted reduced to relieving the Nazi party of any untoward political consequences of unpopular decisions. It was, Koellreutter argued, therefore in the Nazi party's own interest not to place its high-ranking officials in judicial roles where they would unnecessarily expose themselves to the affected parts of the population and thereby possibly disturb the indispensable relationship of confidence and comradeship between Volk and political leadership.\textsuperscript{90}

Rothenberger expressed similar views\textsuperscript{91} on the importance of preserving the distinction between judicial and administrative decisions:

Every wrong judicial decision or even any exceptionable attendant circumstance during legal proceedings or any incorrect expression of a judge in the ratio decidendi outweighs an incorrect administrative decision . . . . Why? Because the German people are particularly sensitive when the law is at issue. And the judge happens to be the interpreter of the laws for the people. . . . This decision is indeed – when the court of last resort has spoken – irrevocable and unalterable, whereas an administrative decision can be changed at any time . . . . It is much harder to eliminate mistakes, which can occur everywhere in life, in a judicial decision than in an administrative decision.\textsuperscript{92}

And Ernst Rudolf Huber, author of the most comprehensive Nazi constitutional law treatise, declared that judicial independence – which he

\textsuperscript{87} Koellreutter, "Recht und Richter," p. 209.
\textsuperscript{88} In contradistinction to material review of laws as direct acts of the Führer issued in certain forms of which no review was possible; see Huber, \textit{Verfassungsrecht}, p. 285; Georg Dahm et al., "Leitsätze über Stellung und Aufgaben des Richters," \textit{1 Deutsche Rechtswissenschaft} 123-24 (1936); [Roland] Freisler, "Richter, Recht und Gesetz," \textit{96 DJ} 1333-35 (1934).
\textsuperscript{91} Cf. Rothenberger, \textit{Der deutsche Richter}, p. 49.
\textsuperscript{92} \textit{Ibid.}, p. 21.
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understood as freedom from interference by political agencies with the
decisional process (Urteilsfindung) in individual cases – was “not a pos-
tulate of liberalism, but rather the necessary foundation of any genuine
adjudication”; the latter, which was conceptually impossible without
independence, would be deprived of all the prestige and confidence
which it enjoyed within the Volk.93

In spite of the testimonials to the legitimating qualities attaching to
an independent judiciary,94 reality was more complicated. Thus the new
Civil Service Law (DBG), promulgated in 1937, conferred upon Hitler
the authority to pension off any tenured civil servant who no longer
“vouche[d] for the fact that he will at all times espouse the cause of the
Nazi State.”95 A further section provided, however, that, “The superan-
nuation of a judicial officer pursuant to § 71 may not be bottomed on the
material substance of a decision made in the exercise of judicial
office.”96

93 Huber, Verfassungsrecht, p. 279. Cf. Henkel, Unabhängigkeit, p. 34.
94 Lon Fuller, “American Legal Philosophy at Mid-Century,” 6 Journal of Legal
Education 457, 466 (1954), cites a comment purportedly made by Hitler to the effect that
whereas the nation could forget a large loss of life resulting from his allowing the SA a
free hand in street fighting, “a miscarriage of justice, a cold and considered judgment... is
something that the nation will not forget or forgive.” (Citing Rauschning, Hitler Speaks
[1939], pp. 24-25.) Fuller adduces this remark as an example of Hitler’s strategy of opting to
execute travesties of justice through the streets rather than the courts in an effort not to
alienate a legalistic population:
The German people were notoriously deferential toward authority, but even for them, as
Hitler shrewdly saw, the habit of law observance was not a blind conditioned reaction
toward orders coming from above, but was associated with a faith in certain fundamental
processes of government, in particular with adjudication by disinterested judges and with
statutes emerging from deliberative procedures participated in by elected representatives.
Hitler therefore strove to preserve as a screen for his manipulations the familiar outer
appearance of due process, realizing that law observance (and consequently the practical
efficacy of his regime) was dependent on keeping that appearance as close as possible to
reality. When he could without sacrifice, he conformed to the demands of legality. (Fuller,
“American Legal Philosophy,” p. 466.)
It is ironic that Fuller in misunderstanding the historical references overlooked the fact
that Hitler was alluding to the brutal murder in Potempa in 1932 by five Nazis of a
Communist – that is, to an event that occurred before he assumed power. Hitler’s
sensitivity to the needs of due process was revealed by his expression of solidarity with the
murderers before he took office and the amnesty he granted them promptly after
becoming chancellor. (See Konrad Heiden, Der Führer [Boston, 1944], pp. 479, 485, 727.)
Moreover, once the regime was established, Hitler displayed no desire to preserve a veneer
of due process in the increasing politicization of criminal laws and trials. Finally, the
transformation of the Reichstag into the “best paid male chorus in the world” makes a
mockery of the notion of “statutes emerging from deliberative procedures participated in
by elected representatives.”
95 § 71 para. (1) DBG, 26 January 1937, RGBl I, 39. Cf. Orlow, History of the Nazi Party:
96 § 171 para. (1) DBG.
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Unpublished internal correspondence between the ministers of justice (Franz Gürtner) and the interior (Wilhelm Frick) on the one hand and the head of the chancery (Hans Heinrich Lammers) on the other hand in the course of 1938 shed some revealing light on the extent to which Hitler became personally involved in this area as well as on the nature of the resistance which his intervention encountered in the relevant ministeries. Without indicating the concrete occasion which triggered Hitler's interest in the issue of judicial independence at this particular juncture, the files of the Reichkanzlei show that on 27 April 1938 Lammers wrote to Gürtner that “§ 71 DBG does not suffice for practical purposes” because a judge of whom it could be said that he supported the Nazi State “must however be left in office even if his intellectual and political attitude [Einstellung] is so far removed from the Nazi world-view that he is not in a position to perform his duties as a judge . . . as the Nazi Volk-community is entitled to expect him to do them.” On 9 May Frick informed Gürtner that he was at a loss to understand how a judge who could not meet the second of the two aforementioned conditions could still be said to meet the first. Acknowledging no difference between the two criteria, Frick saw no need to amend the statute.

On the same day that Lammers wrote Gürtner that Hitler had in essence accepted Gürtner’s (and Frick’s) suggestion not to amend the law insofar as § 71 was concerned, Gürtner underscored in a letter to Lammers that elimination of § 171 would mean “the abolition of judicial office.” The same day Lammers reported to Gürtner that in Hitler’s opinion, even absent immaterialities or irrelevancies (Unsachlichkeit), a judicial decision could in itself suffice to provide proof that a judge did not support the Nazi State and thus justify his removal according to § 71. Moreover, wrote Lammers, new measures in this area were indispensable. Ten days later Lammers restated this view in a confidential letter sent to a number of ministers.

The internal correspondence peters out in a final confidential letter of 12 July 1938 to the ministers in which Lammers set forth Hitler’s view that a judge need not consciously reject Nazism in order to be removed

97 BA R 43 II/1507, fol. 83. The latter part of this passage incorporates a handwritten emendation of the typewritten letter.
98 Ibid., fol. 84.
99 Ibid., fol. 94.
100 Ibid., fol. 88.
101 Ibid., fol. 101.
102 Ibid., fol. 93-94.
from office.103 Research into other areas of the formulation and execution of Nazi policy indicates that this sort of apparently inconclusive and directionless back-and-forth was typical of the mode of operation of the transmission belt between Hitler and his ministers.104

With great alacrity ministerial officials urged interpretations of § 171 that would have been consistent with Hitler's superannuating any judge according to whim. Thus August Jäger contended that it was not the substance per se of a decision that was protected by § 171 but rather only that content which was permitted by the Nazi legal and world-view; it was such content that the statutory term "material" (sachlich) was meant to elucidate.105 But since it was also Hitler who ultimately determined what constituted the Nazi legal and world-view, the statutory protection became meaningless.106

Rothenberger was even blunter: A judge who rejected Nazism in words or conduct in effect discharged himself; but such a case, namely one in which a judicial opinion consciously rejected the Nazi world-view or endangered the State, remained mere "theory in the Third Reich."107 In retrospect Rothenberger may have been right. One postwar study claimed that no decisions had come to light that had been openly "against Nazi laws."108 Although no court struck down a Nazi law as unconstitutional,109 this also occurred only very rarely in Weimar.110 And although it may also be true that such open opposition might have led to incarceration in a concentration camp,111 or that the subservience of some judges may have been motivated by fear of not being promoted,112

103 Ibid., fol. 113.
106 Thus Jäger stated that a judge could be pensioned off for issuing an eviction order based on the reasoning that one tenant could not reasonably be expected to have his comfort disturbed by a neighboring family with many children. Roland Freisler, Nationalsozialistisches Recht und Rechtsdenken (B., 1938), purported to take this statutory provision seriously.
110 See § IV B below.
111 Evers, Richter, p. 37.
112 Norman Marsh, "Some Aspects of the German Legal System under National
individual cases of notable resistance indicate that execution was not
the alternative to servility by sitting judges.

Thus even in the highly supervised area of criminal law, when a judge
of the Supreme Court refused as late as May 1944 to comply with an
instruction of the minister of justice to refuse to hear an appeal (whereby
all the other judges in that penal senate and the president of the
Supreme Court supported him), the minister called on him to request
retirement. When the judge refused on the grounds that it was time to
show who bore responsibility for the loss of judicial independence, the
only consequence for him was superannuation.\textsuperscript{113}

An even more revealing case involved a decision favoring Jews that
was handed down in November 1941 – that is, on the eve of the imple­
mentation of the Final Solution. When, in the fall of the previous year,
special rations of coffee beans were being distributed in Berlin, Jews
also tried to register but were denied rations. When the food office fined
them for violation of the \textit{Verordnung über Strafen und Strafverfahren
bei Zuwiderhandlungen gegen Vorschriften auf dem Gebiet der Bewirt­
schaftung bezugsberechtigter Erzeugnisse},\textsuperscript{114} several hundred Jews
sought judicial review of the administrative action. After the judge
informed the food office that in his opinion the statute of limitations
barred the fine, the food office declined to retract the fine but submitted
that if the court chose to set aside the fine, it should mention only the
statute of limitations issue. Instead the court issued a twenty-page order
which acquitted the Jews of all criminal acts and of the alleged attempt
to induce the food office to retract the fine. In reviewing this decision by
Amtsgerichtsrat Dr. Seidel, the minister of justice\textsuperscript{115} noted that the
order bordered on compromising a German administrative agency vis-a-
vis Jewry:

The judge should have asked himself with what feeling the Jew no doubt will
receive this decision of the court which certifies for him and his 500 racial com­
rades his rights and his victory over a German agency [\textit{Behörde}] in a twenty­
page decision without even wasting a word on how sound \textit{Volksempfinden}
judges that impudent and insolent behavior of the Jews. Even if the judge was
convinced that the food office had judged the legal situation incorrectly \ldots, he

\textsuperscript{113} On this incident involving Paul Vogt, see Eberhard Schmidt, \textit{Einführung in die
Geschichte der deutschen Strafrechtspflege} (Göttingen, 1947), pp. 412-13, who, however,
cites no sources.

\textsuperscript{114} 6 April 1940, RGBI I, 610.

\textsuperscript{115} See below on the Judges’ Letters.

ought to have chosen a form that in all events avoided undermining the prestige of the food office and expressly vindicating the Jew vis-a-vis the latter.\textsuperscript{116}

What is significant here is that despite the strong rebuke, the judge was not forced to retire; instead, he was transferred to a civil division, his scheduled promotion to director of an appellate division did not materialize and he was expelled from the Nazi party.\textsuperscript{117} Under these circumstances the assertion seems plausible that a jurist needed to summon only a minimum of courage in order to distance himself from the Nazi system: "no one was persecuted for it or died of hunger."\textsuperscript{118} Even in the wake of Hitler's speech before the (last session of the) \textit{Reichstag} on 26 April 1942, in which he requested that that body confirm "that I possess the legal right . . . either to subject to ordinary dismissal or to remove from his office and position without regard to who he is or what vested rights he possesses anyone who in my view does not fulfill his duties with scrupulous discernment,”\textsuperscript{119} and which contemporaries agreed eliminated judicial independence,\textsuperscript{120} no judge on the Supreme Court appears to have been disciplined let alone dismissed. Although it is plausible that the propagandistic circumstances surrounding the threat served to induce self-censorship among judges who chose to remain on the bench at that late date, neither the evidence of the present study of the decisions of RAG nor studies of any other areas of the private law reveal any caesura in the outcomes or modes of argumentation of the civil courts.

In this context it is relevant to examine to what extent measures were adopted to appoint to the Supreme Court judges whose political background met the external criteria of reliability which the \textit{Volk}-community was "entitled to expect." That the executive in Nazi Germany sought

\textsuperscript{116} Richterbriefe, ed. Heinz Boberach (Boppard am Rhein, 1975), pp. 14-16 (Letter No. 1 of 1 October 1942).

\textsuperscript{117} \textit{Ibid.}, p. 16 n. 24. The Jews, however, were deported. See Hans Lamm, "Über die innere und äußere Entwicklung des deutschen Judentums im Dritten Reich," (Diss.Erlangen, 1951), p.312.


to appoint politically sympathetic judges to the Supreme Court was manifestly not unique to this political system.121 Less orthodox was the applause which the court publicly offered Hitler's regime immediately after it legislatively dismantled the Republic on 28 February and 23 March 1933. In a plenary session on 29 March 1933 the Supreme Court enthusiastically supported122 Hitler's appeal to the second session of the new Reichstag that:

The basis of the existence of the system of justice can be none other than the basis of the existence of the nation. May the latter therefore always take into consideration the seriousness of the decision of those whose responsibility it is to shape the life of the nation under the harsh compulsion of reality.123

Two weeks later, Karl Linz, a president of a civil senate of the Supreme Court who had been sitting on the court since 1919 and was not a member of the Nazi party,124 announced his personal support for the outlawing of the Republican Judges' Association:

It was in the legal life of the German people of the past years a disagreeable and unveracious phenomenon which, with its tendency to shape adjudication in a one-sidedly political manner, did not fit into the German judicial corps and, with few exceptions, was decisively rejected by it. Its disappearance will be universally received with satisfaction.125

As a result of intimidation, removals and the compliance of the bench, within a few weeks Hans Frank, the head of the Nazi Jurists' Association, the Reichsjustizkommissar and "Generalgleichschalter for the entire bench and bar,"126 was able to boast that the government could now preserve the independence of the judiciary because it knew that it could never again operate "against the ultimate values of Germanity": "the disintegrators [Zersetzer], they have long since been removed from the bench as pests."127

How did the executive proceed in order to insure itself against the reintroduction of Zersetzer in the form of new appointees? At first the bureaucratic formalities, as reflected in the suggestions for nominations made by the ministries of justice and finance to the Reichskanz-

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121 On the political orientation of the German judiciary before and after the Nazi period, see Rainer Schroder, "Die Richterschaft am Ende des Zweiten Kaiserreiches unter dem Druck polarer sozialer und politischer Anforderungen," Pestschrift für Rudolf Gmur (Gieseking, 1983), pp. 201-53; Rudolf Wassermann, Der politische Richter (Munich, 1972).
122 As reported by Karl Linz, "Zeitspiegel," 25 DRZ 123 (15 April 1933).
123 Wolff's Telegrafisches Büro, vol. 84, no. 669, as filed at RJM and preserved in BA R 22/4085.
124 See ch. 2.
126 Schulz, Anfänge, p. 124.
lei, do not appear to have deviated from those prevailing during Weimar. Thus, just as in 1931 the letter from secretary of state Joel in RJM to the chancery suggesting that Richard Loss be appointed to the Supreme Court contained no reference to the latter's political affiliations,\textsuperscript{128} so, too, in his letters of 27 July 1933 and 28 July 1933, Schlegelberger made no mention of political allegiances when he nominated six judges.\textsuperscript{129} As late as 22 December 1934, Gürtner, in a submission to the cabinet recommending three more judges, still made no reference to party membership. But for the first time the following bio-political seal of approval was appended:

The candidates have authenticated for themselves and their wives their aryan descent. Their personality absolutely guarantees that they will at all times unre­servedly espouse the cause of the Nazi State.\textsuperscript{130}

In January 1935 RJM informed RFM that Heinrich Burmeister “has to be taken on for political reasons.”\textsuperscript{131} The nature of these political reasons was not revealed; and since Burmeister did not join the Nazi party until 1941,\textsuperscript{132} it is unclear what these reasons were.\textsuperscript{133} Since much of this kind of correspondence in the files of RFM was motivated by the latter's policy of limiting budgetary expenditures by reducing the number of judges on the Supreme Court, it is not out of the question that RJM adduced reasons of state in order to trump RFM.\textsuperscript{134}

The first appearance in the files of RFM of an explicit reference to membership in the Nazi (or any) party occurred in a letter of 11 December 1935 from Gürtner to the interior and finance ministries, the Deputy of the Führer and the head of the Reichskanzlei concerning the nomination of Kurt Siehr, who had joined the Nazi party on 1 May 1933 without ever having belonged to any other political party.\textsuperscript{135} From this point onward data concerning party affiliation became the rule.\textsuperscript{136} None the

\textsuperscript{128} Letter of 9 June 1931, BA R 2/23925; cf. Gürtner’s letter of of 17 March 1930 proposing Johannes Wunderlich (whose party affiliation to be sure was no secret since he was a member of parliament).

\textsuperscript{129} \textit{Ibid.}

\textsuperscript{130} \textit{Ibid.} The personnel forms contained rubrics for proof of aryan descent and party membership. See ch. 2.

\textsuperscript{131} BA R 2/23926, fol. 26 (memorandum of conference with minister of finance on 12 January 1935); cf. letter of 18 January 1935 from Wagner to Mahnke, fol. 25/1.

\textsuperscript{132} BA FB 4320 N.

\textsuperscript{133} Burmeister had been a member of the DNVP in 1919-20; \textit{ibid.}

\textsuperscript{134} Cf. for example the long letter from Bumke to Gürtner of 13 October 1934 in which the former sought to explain why it would be imprudent to reduce the number of judges on the court; BA R 2/23926.

\textsuperscript{135} \textit{Ibid.}, fol. 88.

\textsuperscript{136} See \textit{ibid.}, fol. 90-92, 98-100, 149-51, 154-58, 211-12, 229-31, 253-54, 270-72, on nomination
less, by 1939 the highest-ranking Nazi party officials were expressing their concern about the political commitment of new Supreme Court appointees. Thus, for example, beginning on 27 June 1939 a correspondence unfolded between Martin Bormann, the head of the Nazi party chancery, and Gürtnert concerning the appointment of Karl Schäfer as an assistant judge. Bormann noted that Schäfer, together with a Jew, had written a book in 1930 on the Defense of the Republic. Although Bormann had no political reservations about Schäfer, he stressed that the Supreme Court should be an exclusive preserve for those who had always been politically reliable in every respect. Only after Gürtnert went to great lengths to convince Bormann of Schäfer's political reliability did Bormann relent.137 On 1 February 1940 Hans Frank complained in a letter to Lammers that of the nine people who had been appointed assistant judges since January 1939 four were not members of the Nazi party whereas the others had not joined until 1933.138 Finally, on 19 March 1940 Bormann wrote Lammers that only Nazi party members should be appointed to the Supreme Court.139

Once again, then, the ministerial files point to a familiar pattern: sharp, blustery warnings by high Nazi party officials followed by long-winded attempts by RJM to meet these demands in substance while preserving a veneer of traditional autonomy or, alternatively, as Gürtnert may have imagined, attempts to meet the demands of the Nazi party only formally while retaining substantive autonomy.140 To whatever extent form and substance, imagination and reality deviated from each other, that is, to whatever extent Gürtnert's decision to negotiate with Bormann and Lammers rather than to accede immediately to every demand constituted (ever so slight an) interference with Hitler's goals, it does not appear to have been significant enough to have warranted concerted action. Nor is it clear, at least with respect to RAG, that more stringent selection of judges would have been outcome-determinative of the court's decisions. Certainly the majorization of the court by Nazis in 1938141 did not coincide with any turning point in labor law adjudication.

of the following candidates: Richter, Besta, (Ernst) Brandis, Stange, (Gottfried) Seibertz, Weinkauf, Hagemann, Schrader, Schwegmann and Bechmann.
137 BA R 43 II/1511, fol. 2-18.
138 Ibid., fol. 24.
141 See ch. 2.
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None of the foregoing, however, is meant to deny the possibility that the appointment in 1933 of (say) ten Roland Freislers to RAG would have resulted in substantially different trends in labor law. The point, rather, is first, whether a close identification of the Nazi party with the highest labor court would have enhanced the stability of Nazi rule, and, second, whether systematically and ruthlessly pro-employer decisions would have redounded to the benefit of the overriding goal of holding the working class in check.

To pose these (only semi-rhetorical) questions is to answer them in the negative. The purpose in formulating them is to underscore the predicament that confronted those who might have wished to steer the course of labor law adjudication more directly: the trade-off between legitimation (process) and political-economic control and profitability (outcome). A significant shift toward the latter would have made a charade of the system of labor courts and tendentially have been equivalent to pre-liberal forms of justice in which the immediate employers of labor were granted jurisdiction over disputes with their workers. AOG took great strides in this direction by conferring virtually unlimited authority on employers to create Betriebsordnungen and to discipline workers for infractions. Given the relatively limited framework within which workers were permitted to contest employers' control, even slight shifts toward open control of the judiciary by the executive would have completely undermined whatever legitimating authority RAG was able to sustain.

The leading social historian of labor relations during the Nazi period has written that from 1934 onward it was (retrospectively) clear “that the Nazi system of labor legislation with all its excrescences of precedents, decrees, special courts and ideological rituals decidedly depended on the Gestapo.” The Gestapo as the ultimate expression of the Prerogative State enforced the basic social conditions within which the reproduction of the routine relations of capitalist domination could be

142 In fact Freisler wrote on labor law before 1933; see his Grundsätzliches über die Betriebsorganisation (Jena, 1922).
144 See Wolfgang Hromadka, Die Arbeitsordnung im Wandel der Zeit am Beispiel Höchst AG (Cologne, 1979), pp. 115-49, for the text of two Betriebsordnungen. For the nineteenth century, see Friedrich Bitzer, Der freie Arbeitsvertrag und die Arbeitsordnungen (Stuttgart, 1872).
carried on within the Normative State. But it is also important to recognize that workplaces were not concentration camps and that it was neither the presence of the Gestapo nor the permanent threat of their deployment that structured daily work-life for most of the Nazi period. For most workers most of the time the kinds of disputes that came before the labor courts were more representative of the social phenomenology that seeped into ordinary consciousness than the occasions that triggered the intervention of the Gestapo even though the latter may have illuminated the essence of Nazi rule more precisely.

Once the stability of the Nazi political regime had been secured through the physical intimidation and elimination of socially relevant oppositional groupings; once the passive acceptance of Nazi rule by the mass of the working class had been secured by full employment; and once the profitability of investment and the control over the process of production had been restored by the destruction of the trade unions and the depression of the real-wage level in spite of the rearmament boom – once these political-economic desiderata had been fulfilled, those aspects of class conflict that were permitted a public existence in the form of legal issues justiciable before the labor courts could afford to be resolved by a court that as early as 1 October 1933 saw its way to announcing its undivided allegiance to the “national legal movement [Rechtsbewegung].”

The foregoing observations do not imply that Nazi officials in charge of administering the judicial system were indifferent to the decisions handed down by RAG. On the contrary, the files of RJM are replete with squibs concerning cases decided by RAG and entire decisions including the names of the judges who wrote them. To be sure, RJM appears

146 The intervention of the Gestapo was expressly provided for during the last years of World War II in connection with measures to combat breaches of employment contracts; see Anordnung Nr. 13 zur Sicherung der Ordnung in den Betrieben, 1 November 1943, RABI I. 543; Sturm, “Der Betriebsfuehrer bei der Bekampfung von Arbeitsvertragbruechen,” 12 DAR 33-36 (1944). For a case study of a plant, see Stefan Karner, “Arbeitsvertragsbrueche als Verletzung der Arbeitspflicht im Dritten Reich,” 21 AfS 269-328 (1981).

147 Statement by Friedrich Oegg, president of RAG, who was taking the place of Erwin Bumke, president of the Supreme Court, at an official ceremony attended by Hans Frank, as reported in Das Deutsche Reich von 1918 bis Heute, ed. Cuno Horkenbach (Berlin, 1935), p. 436.

148 See BA R 22/2063, fol. 233-39, containing a newspaper account of RAG 11/36 decided 13 May 1936, with a note that Freisler had been told about the case (involving anti-Nazi behavior) and wanted to see the decision, which was appended as signed by Linz, Obladen and Lersch.

to have been chiefly interested in the more politically explicit cases involving expressions of resistance to the regime or Jews. And, presumably as in any code-country, the ministry of justice routinely monitored the decisions of the highest courts with a view toward the need for new legislation. But the fact remains that for the run-of-the-mill case before RAG, direct supervision was not only unnecessary but would perhaps have created untenable tensions among members of the court who were visibly struggling to preserve the fiction of their political independence. As even Hitler implicitly acknowledged to Lammers, Thierack and Rothenberger, in order for the judiciary to be convinced that it had not become the "whore of the rulers," it was necessary for judges to believe that "the ruler is indeed himself bound" by his own laws.150

That this judicial independence was politically a fiction was nicely revealed in 1944 by a high-ranking judicial official (Bergmann) whose unpublished typescripts are preserved in the archives of RJM. In discussing the consequences of Hitler's aforementioned speech of 26 April 1942, Bergmann noted that § 71 DBG contained two possible interpretations: either the Führer bound himself by statutory limitations until he altered the statute or

one distinguishes two regimes, an ordinary, normal one and an extraordinary, unwritten one flowing merely from the Führerpower [Führergerwalt] by virtue of which the Führer, free of any statutory self-limitation [Selbstbindung], can act and decide at any time as he deems correct.151

Bergmann is here articulating a variant of the thesis of the Dual State. The rechtstaatlich component of this Dual State has, however, been reduced to its barest positivistic core, stripped of all reference to the quality of the content of the statute; for in the form offered by Bergmann, the Rechtsstaat is compatible with absolutist autocracy and – of course – Nazi dictatorship on the condition that the dictator promulgates the expression of his will as often as he changes it so that the ruled know what is in store for them.152 Bergmann argued this thesis ad absurdum by conceding that general clauses did not constitute norms for the

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150 BA R 22/4720, entry of 20 August 1942, p. 6. The statement is part of the so-called Führer monologues.
152 To the extent that the principle of nulla poena sine lege was abolished, not even this contentless Rechtsstaat survived in criminal law. See Otto Kirchheimer, "Criminal Law in National-Socialist Germany," 8 SPSS 444-64 (1939); Schulz, Anfänge, pp. 194-204.
Volk-comrades, but rather an authorization for the administrative agencies managing them; hence the importance of the personality of the agents.\textsuperscript{153}

In Bergmann’s (but not only his) fantasy-world, however, “As soon as . . . it becomes evident that the statutes are not being understood as they were meant to be, the Führer himself will intervene.”\textsuperscript{154} This vision of instantaneous and self-correcting two-way communication between the legislator and his classical mouthpieces was, to be sure, a necessary and convenient fiction for true-believers among Nazi adherents of the Rechtsstaat; but it remained as far from realization as it had while the Allgemeines Landrecht was in effect.\textsuperscript{155} Consequently, in the core areas of private law judges faced the same intellectual issues in formulating their decisions as had the judges in the Republic and the Empire\textsuperscript{156} even though their formal political independence had been suspended.\textsuperscript{157}

Of the methods devised by RJM to supervise the judicial corps two deserve special attention as being particularly innovative. The first measure, Gesetz über die Mitwirkung des Staatsanwalts in bürgerlichen Rechtssachen,\textsuperscript{158} authorized the state prosecutor to participate in all civil litigation before ordinary courts in order to represent the viewpoint of the Volk-community. Similarly, within a year after a judgment became final, the solicitor-general at the Supreme Court could request that the case be reopened.\textsuperscript{159} In one of its few programmatically serious, radically anti-liberal interventions into the private-law system, the Nazi regime in effect struck at one of the firmest pillars of civil litigation: the autonomy of the parties. Had this principle been comprehensively and rigorously enforced, it would have brought about an unprecedented advance in the social control of private dispute-resolution.

\textsuperscript{153} Bergmann, “Recht und Richter im Führerstaat,” BA R 22/240, pp. 15-16.
\textsuperscript{154} Ibid., p. 6.
\textsuperscript{155} §§ 46-50 Allgemeines Landrecht.
\textsuperscript{156} See the literature in n. 2 above.
\textsuperscript{157} It is therefore inaccurate to generalize on the basis of the judicial treatment of Jews and other “racial” enemies of the regime that Nazi rule confronted the courts with “completely new tasks . . . because precisely the latter’s unbounded irrationalism was diametrically opposed to the mode of operation of the judicial system, which was oriented toward the rigorously case-related doctrine of each substantive area of law.” Diemut Majer, “Rechtstheoretische Funktionsbestimmung der Justiz im Nationalsozialismus am Beispiel der Völkischen Ungleichheit,” in Recht, Rechtsphilosophie und Nationalsozialismus : ARSP, Beiheft 18, pp. 163-75 at 164 (1983).
\textsuperscript{158} 15 July 1941, RGBI I, 383.
\textsuperscript{159} §§ 1-2.
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It is unclear whether such a radical step was ever contemplated by RJM.160 Also uncertain is the extent to which the statute was ever applied.161 It is plausible that the sheer volume of litigation and the lack of personnel during the war years made the application of the statute largely illusory.162 The published decisions of the Supreme Court include only five relating to this statute, only one of which had come up through the labor courts.163

The second innovation came in the wake of Hitler's renewed threats against the judiciary. On 7 September 1942 the new (and last) minister of justice, Otto Thierack, announced in a confidential circular to Germany's highest jurists the impending inauguration of a series of confidential Judges' Letters in which he would comment on various judicial decisions; although the judges would not be named, they would of course be able to recognize a case they had decided. Stressing that he neither would, nor could nor was permitted to instruct a judge as to how to decide in an individual case, Thierack formulated his task rather modestly as an attempt to persuade judges how to help the Volks-community order disorder by means of law.164 From 1 October 1942 to 1 December 1944 twenty-one numbers of the Judges' Letters were issued, reaching a circulation of some 11,000 copies.165

Many of the commentaries referred to penal cases, none to labor court cases. In a number of criminal cases – e.g., those involving rape or harsh sentences for minor offenses, but not those involving Jews – Thierack's position would presumably have been considered more 'progressive' by non-Nazis than the decisions themselves.166 What is significant about

160 See BA R 22/207 for the period 4 March 1941 to 26 July 1941. Schlegelberger wrote to the presidents of the Oberlandesgerichte on 22 July 1941 that his permission would be necessary in legal matters "that, because of the person of the participants, are of special political significance." By this he meant among other things whether the Nazi party or a State agency was involved. Ibid.
161 Even an internal document of RJM, undated but written probably in 1943 or 1944, reveals that the author did not know whether the Supreme Court had rejected any requests by the solicitor-general to reopen cases. See "Von der 'integrum restitutio' zum Gesetz über die Mitwirkung des Staatsanwalts in bürgerlichen Rechtssachen vom 15.7.41," ibid., p. 67.
163 This last case involved interpretation of the customs pertaining to the rights of farmworkers in Mecklenburg; RGZ 170: 28-36, Grosser Senat für Zivilsachen, 12 September 1942. The other cases may be consulted at ibid., 169: 129-33, 140-45, 145-47, 341-45.
164 Richterbriefe, p. 1. On the persons to whom the Richterbriefe were distributed, see BA R 22/4160; among these persons was Bormann in the Führerhauptquartier.
165 Richterbriefe, p. xx.
166 E.g., Letter no. 6 of 1 March 1943, ibid., pp. 82-89 (female agricultural worker who was sentenced to one month in prison because out of pity she asked a German guard why he...
the Judges’ Letters in the present context is that they disconfirm the post-war claim that “a positivistic submission to statute-law” (Gesetzesunterworfenheit) constitutes the primary vehicle for the accommodation of the German judiciary to Nazi ends. For by and large Thierack criticized judges because they had prematurely (except in the case of Jews) engaged in expansive statutory interpretation; ironically, they were also – albeit subsidiarily – criticized for being too positivistic and too little in tune with the Nazi Weltanschauung.

III. Legal Positivism

This theme is worth investigating if only because leading West German jurists and scholars have sought to place the blame for the complicity of the German judicial corps with the Nazi regime on the tradition of legal positivism. This view, which received an important impetus from the conversion of one of the leading legal philosophers, Gustav Radbruch, from legal positivism to a natural-right approach immediately after World War II, maintained that, “It was positivism heightened to the point of laying claim to be the totality [of legal methodology] that undermined our system of justice internally....” This position received its most influential elaboration in the overview volume of the aborted multi-volume study of the Nazi judicial system published under the auspices of the Institut für Zeitgeschichte. The author, Hermann Wein-
kauff, at one time president of the West German Bundesgerichtshof and himself a judge on the Supreme Court from 1937 to 1945, perceives the judicial corps as having in part been misused and in part having allowed itself to be misused. Within the framework of a postwar tradition of apologia Weinkauff contends that had notions of natural right been predominant among jurists and the population at large, "a large part of Nazi legislation [Rechtssetzung] would have met with a unified, common resistance, which would not have been easy to overcome."

In the form presented by Weinkauff, this claim appears naive at best. It is either tautological in the sense that a society with a radically different political history and class structure from Germany's would/might not have given rise to Nazi rule in the first place or it is the case that, had such a regime none the less come to power, moral resistance by a judiciary motivated by pre-Nazi natural right would have been dealt with 'administratively.' The point is that such resistance is a political and not a juridical question. The ahistorical approach adopted by Weinkauff is reflected in his claim that the common law steels the Anglo-Saxon judge against totalitarian inroads more than was the case in Germany. Yet during Weimar a social-conservative judiciary had few compunctions about asserting a right of judicial review vis-a-vis, and in general undermining the authority of, Germany's first democratically elected legislature.

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170 See the biographical entries in Wolfgang Koppel, Justiz im Zwielicht (Karlsruhe, 1963); Friedrich Kaul, Geschichte des Reichsgerichts, vol. 4: 1933-1945 (Glashütten i.T., 1971), passim.
172 In his review of the publication Richard Schmid, 1969 /G/102-106, ironically subtitles it "J'excuse." Cf. the similarly apologetic works by Hubert Schorn, Der Richter im Dritten Reich (F., 1959); and Wolfgang Schier, Rechtsschein und Rechtswirklichkeit unter der nationalsozialistischen Herrschaft (Würzburg, 1961).
174 See Franssen, "Positivismus."
175 On the "perversion" of the notion of natural right by Nazi jurists, see Albrecht Langner, Der Gedanke des Naturrechts seit Weimar und in der Rechtsprechung der Bundesrepublik (Bonn, 1959), pp. 59-89. Cf. Ernst v. Hippel, Die Perversion von Rechtsordnungen (Tübingen, 1955); idem, Die nationalsozialistische Herrschaftsordnung als Warnung und Lehre (Tübingen, 1946); Wilhelm Püschel, Der Niedergang des Rechts im Dritten Reich (2nd ed.; Reutlingen, 1947).
178 On Weimar, see Franssen, "Positivismus"; Kübler, "Der deutsche Richter"; idem, "Kodifikation und Demokratie," 24 JZ 645-51 (1969); Hempfer, Die nationalsozialistische
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Moreover, the enormous leeway which the Nazi State accorded judges in the form of general clauses and the positive command to judges to exercise discretion make a mockery of any claim that legal positivism led to the downfall of the judiciary.179 Weinkauff himself is constrained to admit that judges continued to create common law in the areas of private and commercial law under the Nazis much as they had done earlier.180 It was this continuity that was important because it contributed to “maintaining in the bourgeoisie the fiction of a legal certainty that was indispensable for the consolidation of Nazi rule and especially for overcoming the economic crisis.”181

Weinkauff’s intermediate position becomes more evident in connection with his disputed claim that, in relation to the overwhelmingly accommodative impact of legal positivism, it was of little comfort that the latter at times also operated as a kind of protective shield against unwritten Nazi law.182 To be sure, this tempered view stands up against the naive glorification of positivism as “the real main enemy of all Nazi legal doctrines”; this hostile attitude is said to result from the alleged fact that the positivist closes himself off to all meta-juridical considerations and therefore opposes a völkisch science of law which is open to such considerations.183 Yet detailed studies of the adjudication of individual courts have led to more differentiated conclusions. Thus a student of the Prussian Supreme Administrative Law Court (PrOVG) has noted that although the court accepted any Nazi statute, it resisted attempts to apply statutes beyond their rechtsstaatlich narrow terms (e.g., the denial of a trade license to a Jewish applicant prior to the promulgation of a statute specifically providing for such denial). In direct contradiction of Weinkauff’s underestimation of the force of legal posi-


179 See Rothenberger, Der deutsche Richter, p. 23; and Alfred Rosenberg, “Lebensrecht, nicht Formalrecht,” 4 DR 233-34 (1934): “Recht ist das, was arische Menschen für recht befinden . . .” (citing Indian philosophy).


181 Noam and Kropat, Juden vor Gericht, p. 14. Alternatively Jürgen Meinck, Staatslehre und Nationalsozialismus (F., 1978), pp. 168-69, concludes that the Nazi leadership’s espousal of legality was designed to discipline its own mass-base insofar as the latter desired the realization of the social-revolutionary points of the Nazi party program. Cf. H. Rheinstrom, L’influence du régime nationaIsocialiste sur le droit prive allemand (Montreal, n.d. [ca. 1943-45]).


tivism, the author concludes that “PrOVG eluded the demand that it judicially create law in accordance with Nazism by virtue of its rigorously positivistic obedience to statute law [Gesetzesgehorsam].”\textsuperscript{184} He maintains that the court’s attitude is surprising inasmuch as it contradicted its lack of respect for the Weimar legislator.\textsuperscript{185} From this the author infers that the court’s statute-positivism did not derive from political indifference but rather from the circumstance that it consciously desired to brake the Nazi renewal of law. If this analysis is correct, then political indifference was not implicated in the case of Weimar or Nazi Germany.\textsuperscript{186}

But as the author is constrained to concede with regard to the court’s adjudications concerning the police general clause, PrOVG was the more vulnerable to Nazi ideology “the greater the share of judicial valuation in applying the laws was; to put it another way: the less the statute provided the judge guidance by means of the use of indefinite normative concepts, the more he had to have recourse to the extra-statutory Nazi value-notions.”\textsuperscript{187} In other terms: this particular court was ideologically incapacitated from transcending the purely negative judicial strategy of refusing to interpret laws expansively. Although this approach may have been ‘progressive’ in the area of administrative law where the Nazis most transparently dismantled the Rechtsstaat,\textsuperscript{188} the present study of RAG shows that the general clauses provided a formally still independent judiciary with an opportunity to use its discretion against the intention of the Nazi legislator (e.g., with respect to Jews). Where interstitial judicial law-making was self-consciously instrumentalized to further the goals of the regime, the Nazis harvested the fruits of having permitted the rechtsstaatlich anchored mechanism of the separation of powers to decentralize and atomize the formulation of unpopular decisions.\textsuperscript{189} On the other hand, this legitimating aspect should not be overdrawn; for given the fact – trumpeted by the Nazis – that Hitler had arrogated to himself the authority to create new statutes as he pleased,

\begin{footnotes}
\footnotetext[184]{Hempfer, \textit{Die nationalsozialistische Staatsauflassung}, p. 110 and p. 110 n. 56.}
\footnotetext[185]{\textit{Ibid.}, pp. 110-11.}
\footnotetext[186]{Cf. Kul, “Verwaltungskontrolle.”}
\footnotetext[187]{Hempfer, \textit{Die nationalsozialistische Staatsauflassung}, p. 176.}
\footnotetext[188]{As Hempfer, \textit{ibid.}, p. 177, points out, where the Nazi legislator realized its goals – e.g., with regard to Jews or the Gestapo – “the PrDVG had, on account of its stance of faithfulness to statutes [gesetzstreuen Haltung], no other choice but to execute the legislative will.”}
\footnotetext[189]{This has been exemplified with regard to RAG’s steadfast refusal to recognize a general right of workers to a paid annual vacation; see the appendix to ch. 4 below. Ruthers, \textit{Die unbegrenzte Auslegung}, pp. 232-36, generalizes for all of private law.}
\end{footnotes}
his failure to enact certain progressive social legislation and/or to act on
the courts' cue that they did not possess the authority to enact what
were in fact macro-social policy decisions unambiguously in the discre-
tion of the legislator could not have redounded to the benefit of the
Nazis.\footnote{190}

In summary: since legal change in private law was implemented over-
whelmingly by means of judicial interpretation rather than new legisla-
tion,\footnote{191} empirically the use of judicial discretion was of considerably
greater significance than the so-called positivist refusal of judges to
give an expansive interpretation to exceptional laws and laws pre-dating
the Nazi regime. Indeed, Nazi jurists never articulated a uniform posi-
tion on the desirability of judicial anticipation of legislative action.\footnote{192}
Freisler, for example, even while upholding the natural law background
of the judicial decision-making process in Nazi Germany, implicitly con-
ceded its inherent aporia:

Whether the judge has found the correct law or not – he must not examine
this only in the light of a natural-lawfulness \[Naturrechtlichkeit\] of Nazi aims .
. Rather, that also requires the knowledge of whether the time is ripe for the
attainment of this or that goal of the Nazi Weltanschauung or not. And that in
turn is determined in principle not by the judge but by the \textit{Führer}.\footnote{193}

\footnote{190} The force of these mutually exclusive interpretations rests in good part on the extent to
which workers were at all aware of RAG-decisions. Although DAF did publish its own
extensive collection of labor court decisions (DAF \textit{Arbeitsrechtssammlung}), whether
large numbers of members pored over its closely printed columns is another matter. This
empirical issue was of less significance during Weimar because a litigious trade union
movement with a vast legal apparatus followed the decisions closely in the context of what
were in effect permanent class action suits flowing from collective bargaining disputes. On
the trade union movement and labor law in Weimar, see Franz Neumann, \textit{Tarifrecht auf
der Grundlage der Rechtsprechung des Reichsarbeitsgerichts} (B., 1931); idem,
\textit{Koalitionsfreiheit und Rechtsverfassung} (B., 1932); Nathan Reich, \textit{Labour Relations in
Weimar Republic} (Princeton, 1981), pp. 229-80. It is unclear whether DAF, in the course of
exercising its monopoly over legal representation of the working class, articulated overall
litigational strategies. Even if it did establish priorities, educating its members about
adjudicational trends would have contradicted its function of pacifying and rendering
passive the working class by acting in its place. Whatever informal lobbying was
conducted by the leader of DAF, Ley, or the minister of labor, Seldte, suffered from the
disability of not representing one of the ruling groups among which political-economic
compromises were concluded. On DAF, see Hans-Gerd Schumann, \textit{Nationalsozialismus
und Gewerkschaftsbewegung} (Hannover, 1958); Mason, \textit{Sozialpolitik}; Gerhard Beier,
\textit{Dokumentation: Gesetzentwürfe zur Ausschaltung der Deutschen Arbeitsfront 1938.} 17

\footnote{191} See Less, \textit{Vom Wesen und Wert des Richterrechts}, pp. 43-46; Rüthers, \textit{Die unbegrenzte
Auslegung}, p. 99.

\footnote{192} For a detailed discussion of the Nazi literature, see \textit{ibid.}, pp. 136-74. Cf. Hans Frank
(ed.), \textit{Nationalsozialistisches Handbuch für Recht und Gesetzgebung} (Münch. 1935);

\footnote{193} Freisler, \textit{“... noch keine vollwertigen Mitarbeiter...”}, p. 1000.
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Since neither Hitler nor any other authoritative source issued directives regarding a whole series of social conflicts which at some point required some kind of authoritative resolution, and which then by default or intention devolved on the judiciary, it was self-contradictory to remit the judge to the legislator where the presumption had been undermined according to which the latter's silence constituted a command of inaction to the former. The fact that RAG, for example, working in the very loose interstices and at the hazy edges of unambiguous anti-Semitic legislation, was able both to anticipate and hence accelerate the Final Solution and to divert the fury of public and private anti-Semitism at the workplace indicates that the court neither could nor (apparently) wanted to take comfort in the opportunity allegedly available to codesystem judges of avoiding self-delegitimation by pointing a guilty finger at the legislator.194

As early as 1934, the chairman of RAG, Friedrich Oegg, stated in an internal letter to the president of the Supreme Court, Erwin Bumke, that in comparison with the Weimar period, when the bulk of RAG's docket was occupied by cases involving the interpretation of collective bargaining agreements, which presented no major jurisprudential difficulties, the advent of Nazi control had brought to the fore questions that are connected to the upheaval brought about by the national awakening and that confront the judge with the task of harmonizing the de facto conditions created by this upheaval with existing law and fitting them into the existing legal order until new legal foundations are created by statute.195

The court's self-image, in other words, constituted a prima facie refutation of the postwar claim of positivism as the Achilles' heel of the German judiciary.196

194 This unmediated contradiction is reflected in the articles of Freisler who oscillated between extreme deference to the allegedly crystal-clear expression of the will of the Führer and praise for creative judicial anti-Semitism during the later years of the regime. Compare Freisler, "Ein arbeitsrechtlicher Einzelfall als Prüfstein der Frage: Wie weit ist unser Rechtsdenken heute gelautert?" 5 (N.S.) Deutsches Gemein und Wirtschaftsrecht 265-72 (1940) with the above-cited writings of Freisler.
195 BA R 2/23296, fol. 47 (letter dated 12 October 1934). To be sure, this letter must be taken cum grano salis since the court was seeking to persuade the budgetary authorities that an increased intellectual work-load was inconsistent with proposals to reduce the number of sitting judges.
196 To this extent, then, Weinkauff can be followed in his de-emphasis of the positive by-products of legal positivism.
IV. The Rechtsstaat and the Rule of Law

Relatively early on German emigrant legal scholars concluded that the Rule of Law had ceased to exist in Nazi Germany. Writing in 1936, both Franz Neumann and Karl Loewenstein articulated this viewpoint. Publishing one of the first detailed accounts of legal developments in Nazi Germany to appear in a prestigious American legal periodical, Loewenstein suggested that the nature of law had been fundamentally transformed:

As law under National Socialism is a purely political conception intended for the promotion of the interests of the state or the community, any norms enacted by the political authorities are "right" in the sense of "just." It is naked positivism without regard to the actual content of the law, in spite of invocations of superpositivist sources, from which the norms allegedly emanate. This identification of justice and positive law is perhaps less an identification of "right" and "might" ... and more a blunt denial of the individual claim to calculability of legal relations, which is the ultimate goal of any positive order of law in a community.¹⁹⁷

In his second dissertation, written in London under the auspices of Harold Laski, Neumann, too, concluded that law no longer existed in Nazi Germany because it had become exclusively a technique of transforming the political will of the Führer into constitutional reality. Law had been reduced to a mere arcandum dominationis.¹⁹⁸

Before these analyses can be examined, it is necessary to inquire into the nature of the Rechtsstaat and the Rule of Law in Germany and the underlying conception of (the) law common to them.

A. The Origins of the Rechtsstaat and its Relationship to the Rule of Law

At the outset it is worth sorting out the differences between the Anglo-American notion of the Rule of Law and the German tradition of the Rechtsstaat. The contrast between the two corresponds to fundamental differences in the historical development of political structures in Germany and Britain, to which will be recurred below. Schematically and contrapuntally the two regimes can be juxtaposed as follows:

**Rule of Law**

1. Oriented toward the dialectic of the judicial process.

2. Law evolves procedurally.

3. Law is a process taking place in history continuously and is never completed.

4. Law arises out of the people’s experiences in concrete situations.

5. Experience with the inadequacy of already existing law, i.e., the experience of injustice, provides the impulse for the development of law. This orientation toward injustice fills the Rule of Law with concreteness and life.

**Rechtsstaat**

1. Appeals to a sovereign who decides unilaterally.

2. Law is posited in a sovereign manner.

3. To the extent that the Rechtsstaat is conceived of in terms of natural law, the latter is considered a universal and timeless complex of norms.

4. The underlying natural law assumes the form of a system in which deductions are inferred from premises.

5. The point of departure for the underlying idea of natural law is the ideal of positive justice. This orientation toward justice alienates natural law from reality.\(^\text{199}\)

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Although the focus of these remarks is not on the Anglo-American tradition of the Rule of Law, it is worth noting that this particular conception of the Rule of Law underlies the theorizing, for example, of Lon Fuller. Rejecting the possibility “that evil aims may have as much coherence and inner logic as good ones,” Fuller could also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are. I find a considerable incongruity in any conception that envisages a possible future in which the common law would “work itself pure from case to case” toward a more perfect realization of iniquity.

It is part of the received learning that the German tradition of the Rechtsstaat did not embody a system of morality that could or had to constitute elaborated reason in the way in which Fuller and others have claimed that the rule of common law operates. The socio-historical specificity of the Rechtsstaat can be understood more clearly against the background of the sequential evolution of hierarchically ordered stages of constitutionalism:

1. Formal Gesetzesstaat: The State is bound by general and abstract regulations which are formulated in accordance with certain procedures and promulgated; Administration in conformity with law.

2. Material Rechtsstaat: Guarantee of material justice, securing of freedom and Sozialstaatlichkeit of formal legal norms; Legislator is bound by civil and human rights; Interpretation of formal laws from point of view of equity; Conditions of legitimacy of equity.

3. Rechtswegestaat (Jurisdictional State): Judicial control of formal and material Rechtsstaatlichkeit; Principles of fair procedure, in particular of right to hearing before judge as provided by statute, and presumption of innocence.


5. Parliamentary Constitutional State: Prerogatives of parliament, which originates in regularly recurring elections; Right to pass budget.

Within the context of this schema of increasingly inclusive protection, the German Rechtsstaat did not transcend stages 1. and 3. as supplemented by certain elements of the separation of powers – in particular, the independence of the judiciary. The Rechtsstaat corresponded to that part of the comprehensive schema of constitutionalism which was consistent with monarchical sovereignty; the failure of the bourgeois revo-

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201 Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” 71 HLR 630, 636 (1958).
202 After Kriele, Staatslehre, p. 104.
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The revolution of 1848 meant that the Rule of Law as enacted by a parliament elected by the people at large was postponed until Weimar.\(^\text{203}\)

An earlier – to be sure, theoretical – tradition of the German Rechtsstaat existed which was rooted in processes that affirmed the democratic genesis of laws. This conception was associated with important components of the idea of a material Rechtsstaat based on reason. It was formulated by Kant\(^\text{204}\) and retained its intellectual vitality until the mid-nineteenth century in the works of Robert von Mohl.\(^\text{205}\) But even this older tradition can be distinguished from the Rule of Law, which “not only signifies the recognition of the pursuit of happiness in the sense that it can take place in freedom, exempt from statutory interference, but also opens the legislative process itself to this pursuit of happiness.”\(^\text{206}\) Whereas the English Rule of Law ultimately signaled the defeat of absolutism and the ascendancy of the People in the form of parliamentary sovereignty, the Rechtsstaat increasingly developed an intention that lost its association with Kant’s democratic idea and turned “not only against the empirical interests of individuals, but also against the democratic legislator as the functional bearer of these interests.”\(^\text{207}\)

In the Rechtsstaat, then, which was the creation of the German bourgeoisie as an economically rising but politically stagnant class, the political organization of the State was divorced from its legal organization, which alone was designed to guarantee freedom and security.\(^\text{208}\) As a result, the content of the Rechtsstaat was confined to the legality of administration – that is, to the government’s being bound by its own general laws as supervised by independent judges.\(^\text{209}\)

\(^{203}\) Cf. Denninger, *Staatsrecht*, vol. 1, pp. 91-134.


\(^{208}\) The classical expositions of the Rechtsstaat in post-1848 Germany are: Otto Bähr, *Der Rechtsstaat* (Kassel Göttingen, 1864); and Rudolf Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (2nd ed.; reprint: Darmstadt, 1958 [1879 1st ed.: 1872]).

\(^{209}\) Neumann, “Governance,” pp. 342-52. The following works represent a useful sampling of the very large historical-analytical literature on the Rechtsstaat: Friedrich Darmstädter, *Die Grenzen der Wirksamkeit des Rechtsstaates* (Heidelberg, 1930); Reimund Asanger, “Beiträge zur Lehre vom Rechtsstaat im 19. Jahrhundert” (Diss., Münster, 1938); Ulrich Scheuner, “Die neuere Entwicklung des Rechtsstaats in
B. The Undermining of the Rechtsstaat in Weimar

The texture of the Rechtsstaat was transformed by the full integration of the working class into the political system after 1918. The newly institutionalized class polarization manifested itself clearly in the relationship between the legislature and the judiciary as well as in the attitude of the bourgeoisie to both. Thus, for example, between 1848 and 1918 the bourgeoisie considered the independence of the judiciary unproblematic insofar as the judges in their class origins and interests approximated the bourgeoisie rather than the classes below or above it; the long and expensive period of training preliminary to judicial appointment operated to reinforce this identity of interests. With the decimation of the traditional bourgeoisie — caused in large part by the transformation of previously 'independent' strata into employees of large corporations or of the State — and the recruitment of judges from a broader spectrum of class backgrounds, the ideological support of the bourgeoisie for an independent judiciary dwindled. If, on the other hand, it was true in the nineteenth century that the bourgeoisie focused its political attention on the judiciary because the former did not control the process of legislation, the advent of parliamentary pluralism during Weimar meant that it never attained that control. But whereas the bourgeoisie in the nineteenth century expressed its political weakness by adhering to a modified version of the Rule of Law, once the working class was enfranchised, the bourgeoisie's reliance on parliamentary rule abated.

This new attitude toward the legislature revealed itself in a new conception of the notion of equality before the law. Whereas before 1918 the latter (as embodied, for example, in art. 4 of the Prussian constitution of 1850) did not act as a prohibition on arbitrariness vis-à-vis the legislature but only vis-à-vis judicial officers applying statute-law — i.e., it was...
merely an administrative maxim unrelated to the justness of the law – after 1918 right-wing jurists, confronted with what they perceived as a threat to the bourgeois order, began to demand that the principle of equality (art. 109 of the Weimar constitution) also apply to the legislature.\textsuperscript{214}

Not only did judges begin sporadically to assert the right of judicial review of legislation enacted by the first democratically elected parliament in Germany with a view to its conformity with the constitution,\textsuperscript{215} but the judiciary also began programmatically and extra-judicially to appeal to values and norms transcending positive law.\textsuperscript{216} Thus two months after the Supreme Court handed down a decision prohibiting debtors from paying off mortgage debts in deflated currency in the wake of hyperinflation,\textsuperscript{217} the Judges’ Association at the Supreme Court (\textit{Richterverein beim Reichsgericht}) published a notice in the leading legal newspaper protesting a proposed step by the government to overrule this decision. Invoking an image from the era of absolutism, the judges articulated the expectation that a reasoned decision of the highest court of the country would not be overturned by “fiat [\textit{Machtspruch}] of the legislator.”\textsuperscript{218} Underscoring the fact that the court’s decision had been based on the notion of good faith, the “great thought that dominates our legal life,”\textsuperscript{219} the Association proceeded to remove good faith from the sphere of positive law\textsuperscript{220} by ascribing natural-law character to it:

This notion of good faith stands outside of the individual statute, outside of an individual positive-legal provision. No legal system that deserves this honorable name can endure without that principle. Therefore the legislator must not, by means of his absolute command, thwart a result that good faith imperatively requires.\textsuperscript{221}

It is worth noting that whereas the judges publicly announced the possibility of the Supreme Court’s declaring such a statute to be an unconstitutional expropriation inconsistent with the Rechtsstaat,\textsuperscript{222} no

\textsuperscript{215} RGZ 102:161 (28 April 1921) (dictum).
\textsuperscript{216} See Küber, “Der deutsche Richter”; Franssen, “Positivismus.”
\textsuperscript{218} 53 JW 90 (15 January 1924). On \textit{Machtspruch}, see Conrad, \textit{Richter und Gesetz}.
\textsuperscript{220} It was enshrined in § 242 BGB.
\textsuperscript{221} 53 JW 90.
\textsuperscript{222} \textit{Ibid.}
such warnings were issued in anticipation of Nazi rule even before such criticism became dangerous.\textsuperscript{223}

No more trenchant analysis of the \textit{aporia} of the Weimar Rechtsstaat was offered than by its contemporary, Carl Schmitt. Establishing a correspondence between the principles of "[t]he modern bourgeois-rechtsstaatlich constitution" and the constitutional ideal of bourgeois individualism, Schmitt saw this constitution as containing above all a decision in favor of bourgeois freedom: personal freedom, private property, freedom of contract, trade and business.\textsuperscript{224} In a polemical sense the bourgeois Rechtsstaat could be understood in social-historical opposition to the \textit{Machtstaat} of absolutism and the traditional paternalistic-authoritarian Police or Welfare State,\textsuperscript{225} which did not restrict itself merely to preserving a legal order.\textsuperscript{226}

Such a Rechtsstaat also contains the fiction that its constitution is nothing but a system of legal creations of norms (\textit{Normierungen}) that is closed and sovereign — that is, a system the seamless web of which can at no place be punctured or even influenced for reasons and necessities of political existence.\textsuperscript{227}

Historically the ideal of the bourgeois Rechtsstaat culminated in a general judicialization (\textit{Justizförmigkeit}) of political life so that potentially all disputes were subject to an adjudicatory procedure. The accompanying elevation of independent judges to the pivotal role within the Rechtsstaat was, Schmitt reasoned, crucially dependent on the existence of general norms:

\begin{quote}
For the judge is "independent" only so long as a norm applies on which he is so much the more absolutely dependent, whereby by norm is to be understood only a rule which is determined ahead of time . . . . Where such norms are absent, at best a process of mediation is possible, the practical success of which depends on the authority of the mediator. If the significance of the mediation proposal depends on the power of the mediator, then this is no longer a matter of genuine mediation but rather of a more or less equitable political decision . . . . A mediator or an arbitrator can enjoy more or less great personal prestige even without political power but only if two prerequisites are met: first, that certain notions of
\end{quote}

\textsuperscript{223} But see the articles in "Justiz im Dritten Reich" in the journal of the Republican Judges' Association, \textit{Die Justiz}.
\textsuperscript{224} Schmitt, \textit{Verfassungslehre}, p. 125.
\textsuperscript{225} Schmitt, \textit{Verfassungslehre}, p. 125.
\textsuperscript{226} For an idealized exposition of the latter, see R. Mohl, "Über die Nachtheile, welche sowohl den Arbeitern selbst, als dem Wohlstande und der Sicherheit der gesammten burgerlichen Gesellschaft von dem fabrikmassigen Betriebe der Industrie zugehen, und über die Nothwendigkeit gründlicher Vorbeugungsmittel," \textit{Archiv der politischen Ökonomie und Polizeiwissenschaft} 141-203 (1835).
\textsuperscript{227} Ibid., p. 131.
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equity, decency or certain moral premises are common to the litigating parties, and second, that the antagonisms not have reached the most extreme degree of their intensity.228

Here, then, Schmitt formulated two fundamental aspects of the rule of law: 1. the character of laws as general norms; and 2. the socio-political and cultural prerequisites of the stability of a legal system in which dispute resolution is reduced to a form of quasi qadi-justice.

C. The Generality of Laws

Rejecting the view229 according to which anything commanded by a person or an assembly constitutes law – for such a criterion would lead to the classification of absolute monarchies and the dictatorship of the proletariat as Rechtsstaaten – Schmitt insisted that, if the “Rule of Law” is to retain its connection with the concept of the Rechtsstaat, it is necessary to incorporate into the concept of law certain qualities by virtue of which the distinction between a legal norm and a merely volitional command or a prerogative [Massnahme] becomes possible230

This conception of the generality of laws received further specification in connection with the notion that the Rule of Law in the first instance means that the legislator is himself bound by his own laws; but, Schmitt continued, such self-binding presupposed that the law was a norm possessing certain qualities such as correctness, reasonableness, justness, etc.231

With the decline of the plausibility of natural law, however, such qualities became problematic whereas others – such as the aforementioned good faith – could “not replace these natural-law convictions in politically and economically difficult situations.”232 Thus in a period of relativism233 there remained one last indispensable constituent element – the general character of the legal norm – without which the rechtstaat-lich distinction between law and command, ratio and voluntas, would disappear.234 Schmitt sensed that the bourgeois Rechtsstaat itself hung in the balance: without at least this de-substantialized version of

228 Ibid., pp. 133-34.
229 Associated with Austin and Kelsen.
231 Ibid., p. 139.
232 Ibid., p. 142.
234 Schmitt, Verfassungslehre, p. 142.
abstract generality the Rechtsstaat would be dissolved into “the absolutism of changing parliamentary majorities.”

Although the evolution of the German legal system and not that of Carl Schmitt’s analysis is at issue here, the fact that his thinking was so closely bound up with and/or reflected “the felt necessities” of the preservation of capitalism in Germany at critical junctures in the pre-World War II period singles it out for special treatment. Such an excursus is so much the more called for in the light of attempts from liberal and Marxist standpoints to undermine the force of Schmitt’s critique of Weimar. Thus an extended argument has been presented to demonstrate that Schmitt’s critique of pluralist parliamentary democracy turned on absolutizing certain key elements of that system; a less ambitious model of representative rule, however, it has been contended, continued to be tenable. More interesting was the contemporaneous analysis by Franz Neumann.

Neumann recognized that the generality of laws served three different functions each of which was “of decisive importance”: 1. obscuring the domination of the bourgeoisie; 2. rendering the economic system calculable; and 3. guaranteeing a minimum of liberty and equality. But with the transformation of the German economy into a cartelized and monopolized one and the political formalization of polarized class struggle in the pluralist system of Weimar, Neumann saw the function of the demand for general laws change:

In a monopolistically organized system the general law cannot be supreme. If the state is confronted only by a monopoly it is pointless to regulate this monopoly by a general law. In such a case the individual measure is the only appropriate expression of the sovereign power. Such an individual measure neither violates the principle of equality before the law nor runs counter to the general idea of law, as the legislator is confronted only with an individual situation.

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235 Ibid., p. 156.
236 Jürgen Fijalkowski, Die Wendung zum Führerstaat (Cologne, 1958).
237 Cf. Maus, Bürgerliche Rechtstheorie und Faschismus.
239 Following the Prussian constitutional conflict of 1862-1866 the concept of the general law was, under the leadership of the constitutional scholar Paul Laband, replaced by the distinction between material and formal law. On the appropriateness of this distinction to the relaxation/dissolution of the functional linkage between state power and capitalist socialization in an era when the monarchy and the Junkers – and not the bourgeoisie-dominated political life, see Ulrich Preuss, Legalität und Pluralismus (F., 1973), pp. 64-68.
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Noting that general laws were adequate only to a society comprised of relatively equal competitors, Neumann interpreted Schmitt’s revival of the notion of the generality of laws “as a device to restrict the power of the Parliament which no longer represented exclusively the interests of the big landowners, of the capitalists, of the army, and of the bureaucracy.” Rather, it was used to protect these groups against a laborist legislature.241

The rule of general laws represented a two-edged sword in Neumann’s view: “The limited, formal and negative generality of law under liberalism not only makes possible capitalistic calculability but also guarantees a minimum of liberty, since formal liberty has two aspects and makes available at least legal chances to the weak.”242 Conversely, the disappearance of general laws brought in its wake “individual measures on the part of the sovereign”243 that could be used benevolently or malevolently.244

The core of Schmitt’s critique of parliamentarism245 was the fictitious democratic presupposition of the existence of an internally homogeneous people. His reasoning ran as follows. It was only trust in the legislator that made the Rechtsstaat possible, for once the concept of law was deprived of all substantive relation to reason and justice, any command of the sovereign would be legal by virtue of the Rule of Law. Democratic theory presupposed that a homogeneous people246 united all the qualities guaranteeing that expressions of legislative will embodied justice and reason.247 Such a people made possible majority rule: by virtue of belonging to the same people, everyone in the same way wanted essen-

241 Ibid., pp. 52-53.
243 Neumann “Change,” p. 66.
244 To be sure, the aforementioned great divide must not be exaggerated. Not even with regard to the existence of a general norm did the theory or practice of the nineteenth century produce a uniform rechtstaatlich concept of law. See Karl Zeidler, Massnahmegesetz und “klassisches” Gesetz (Karlsruhe, 1961), pp. 104-44. Cf. Ernst-Wolfgang Bockenförde, “Entstehung und Wandel des Rechtsstaatsbegriffs,” Festschrift für Adolf Arndt (F., 1965), pp. 53-76 esp. n. 28 at pp. 58-59.
245 Whereas Neumann understood Schmitt’s contribution to the renaissance of the concept of general laws as a transparent instrumental manipulation of doctrine in order to protect a class interest, Ingeborg Maus sees a liberal dialectic inexorably leading to the abolition of liberalism; see Maus, “Zur ‘Zasur’ von 1933,” p. 118.
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Initially the same thing. If this prerequisite proved to be fictitious, majority rule became coercion rather than neutrality. The replacement of homogeneity by the consolidation of two permanently hostile classes in a pluralist system constituted the extreme renunciation of this fiction. If earlier in Weimar Schmitt had focused on the insuperable contradiction between liberal individual consciousness and democratic homogeneity, towards its end he shifted his attention to the contradictions engendered by pluralistically defined class warfare.

That Schmitt’s analysis of pluralist parliamentarism did not, as an argument ad absurdum, serve exclusively to justify the introduction of an authoritarian capitalist regime in the mode of General von Schliecher is revealed by the self-conscious use which Otto Kirchheimer, a left-wing Social Democrat and student of Schmitt, made of part of the latter’s theories. The renunciation of supra-positive sources of law by leading socialist legal thinkers in Weimar should be juxtaposed to the contemporaneous renunciation of legal positivism by significant bourgeois theoreticians in favor of a higher law that served to thwart the will of Germany’s first democratic legislature. Neither of these shifts in position was one of principle; rather, both were clearly motivated by the political transformation that integrated the working class into the legislative process. Yet the cross-over was hardly a historical contingency: for within the context of German development, the Rechtsstaat no longer represented a stable framework within which class struggle could be contained. Whereas the socialist positivists abandoned claims

250 Schmitt, *Der Hüter der Verfassung*, pp. 71-94.
253 It is not appropriate to discuss Kirchheimer’s views here. His relevant works are: “Legalität und Legitimität,” *Die Gesellschaft*, vol. 9, no. 7 (July, 1932), pp. 8-26; *Weimar – und was dann?* (B., 1930); *Die Grenzen der Enteignung* (B., 1930); Kirchheimer and N. Leites, “Bemerkungen zu Carl Schmitts “Legalität und Legitimität,” 68 *AfSwSp* 457-87 (January, 1933).
256 Preuss, *Legalität*, p. 88, offers an idealized and misleading historical description when he characterizes Weimar as a class-riven society in which the parliamentary form no longer guaranteed that all parliamentary acts could, without contradiction, be subsumed under the necessities of self-expanding capital. Such a guarantee has never existed in any society.
of allegiance to general laws, the conservative-bourgeois advocates of a
higher law recognized that a highly monopolized economy could no
longer be effectively regulated in the interests of its major owners and
managers by a democratically elected parliament. This insight led to
increased reliance on an autonomous and autocratic executive and min­
isterial bureaucracy on the one hand and flexible, equitable, situation-
appropriate general clauses on the other. The legal positivism that
prevailed during Weimar was both transformed in relation to its socio-
political adherents and consequences and more differentiated and ambi­
guous than it had been under Bismarck when, in the form of constitu­
tional positivism, it had recreated Hegel's glorification of the German
State. By reducing constitutional law to a specific juristic construction
shorn of all historical, political and philosophical considerations, this
combination of scientific positivism and unreflective legal positivism
stabilized Bismarck-Germany in accord with the ideological needs of
the German bourgeoisie.

In Weimar two different groups of constitutional positivists can be
discerned, neither of which can be identified with the aforementioned
nineteenth-century tradition. On the one hand, bourgeois-democratic
theorists adhered to the then flourishing value-relativism qua welt-
anschaulich positivism. On the other hand, many of those jurists who
recurred to higher-law notions in order to undermine the authority of
the democratic parliament retreated to pseudo-positivistic positions
where openly anti-positivistic attacks would inevitably have raised the
question of State power.

When transferred to the sphere of non-constitutional, in particular
private-law, adjudication, the contest between positivistic and non-

257 See in general Abraham, Collapse.
258 Maus, Bürgerliche Rechtstheorie und Faschismus, p. 31, provides a trenchant partisan
analysis of this polar transformation.
259 See von Oertzen, Die soziale Funktion des staatsrechtlichen Positivismus.
261 E.g., Gustav Radbruch, Richard Thoma and Gerhard Anschütz; Anschütz was the
author of the standard commentary on the Weimar constitution: Die Verfassung des
Deutschen Reiches v. 11. August 1919 (14th ed.; reprint: Darmstadt 1960 [1933]). These
constitutional law theorists should in turn be distinguished from Hermann Heller who
espoused a socialist program. See, for example, Heller, "Der Begriff des Gesetzes in der
Reichsverfassung," VdVdDS, fasc. 4 (B., 1928), pp. 98-135, 201-204; idem, Europa und der
Bauer, Wertrelativismus.
79-114, on the political background of this debate.
positivistic approaches assumed a distinct character. This conflict emerged most clearly in the debate over general clauses.

D. General Clauses

The supplanting of the nineteenth-century model of judicial rule-formalism by open-ended standards during the Weimar period has often been singled out as illustrative of the doctrinal and general intellectual transformation that prepared the way for the "perversion" of the legal system in Nazi Germany. The most ambitious attempt to provide a theoretical explanation of this shift as rooted in socio-economic change was undertaken by Franz Neumann although his research on the period before 1933 did not work up empirical socio-economic or case-law data broad or detailed enough to constitute persuasive support. Put starkly and crudely: Neumann, attempting to synthesize Marx and Weber, maintained that:

The Rule of Law is necessary to satisfy the needs of a competitive capitalist system which seeks to create profit through continuous rational capitalist undertaking. Free competition requires general law because that represents the highest degree of formal rationality. Free competition rests upon the existence of a large number of more or less equal competitors who meet on a free market.... The primary task of the state is to create a legal system that will guarantee the fulfillment of contracts. The expectation that contracts will be fulfilled must be calculable. When there are many competitors of equal strength, general laws are necessary for predictability. These laws must be sufficiently specific within their abstraction to limit the discretion of the judge as much as possible. The judge must not fall back upon general principles.

But, argues Neumann, with the advent of monopoly capitalism in Weimar, "The postulate that the state should rule only by general laws becomes absurd in the economic sphere if the legislator is dealing not with equally strong competitors but with monopolies which reverse the principle of the free market." Under the circumstances of a bifurcated economy, general clauses

265 As Neumann himself put it. Neumann did not refine this thesis over the years as its virtual verbatim reproduction in various writings indicates. Compare "Governance," pp. 535-53; "Change": Behemoth (2nd ed.; NY, 1966 [1942]), pp. 440-58. Neumann did append a note to "Changes," which appeared posthumously, to the effect that the article no longer represented the views he held; ibid., p. 22. But the article which he cites as substantiation of the modification of his views did not deal with this issue; see Neumann, "The Concept of Political Freedom," 53 CLR 901-35 (1953).
266 Neumann, Behemoth, pp. 442-43; "general principles" is Neumann's translation of the term "general clauses.
are always invoked when the state is confronted by powerful private groups. Whenever parties which do not have the same rights engage in the exchange of goods and where one powerful party faces other less powerful private parties or the state, rational law ceases to obtain and 'general principles' are resorted to. The decision of the judge then takes the form of a political or an administrative order by which antagonistic interests are adjusted. This political order employs, however, the form of a court decision.\footnote{Ibid., p. 56. Although Neumann appears to have believed in the existence of a golden age of the Rechtsstaat in the nineteenth century when the judge "applied the laws literally" and "[d]iscretion play[ed] no role," ibid., p. 44, towards the end of his life he did offer a less ideal-typical and more realistic account of classical liberal legalism: It is clear ... that our political, social, and economic life does not consist solely of rational—that is, calculable—relationships. Power cannot be dissolved in legal relationships. The dream of the liberal period was precisely that it could. From the end of the eighteenth century to the first half of the nineteenth this view of a rational society assumed ... utopian characteristics. All relevant relationships were deemed to be legal; ... the judge was merely "the mouthpiece of the law," applying it through a logical process of subsumption. Legal positivism is not only ... the acceptance of political power as it is, but also the attempt to transform political and social power relationships into legal ones. But this, of course, does not work. It never did and never could. If our social, economic and political life were merely a system of rational, calculable relationships, the Rule of Law would of course cover everything. While power can at times be restrained, it cannot be dissolved. The nonrational element, power, and the rational element, law, are often in conflict. The conflict may be resolved in two ways: the general law may, in its very formulation, contain an escape clause permitting purely discretionary decisions which are not the product of the subsumption of a concrete case under an abstract rule; or, if power so desires, the general law may be suspended altogether. "The Concept of Political Power," cited according to republication in Neumann, Democratic and Authoritarian State, pp. 170-71. Neumann, "Governance," p. 545. \footnote{Ibid.}} It would seem to flow from Neumann's premises that the Weimar legal system moved inexorably toward the complete destruction of rationality. For the general clauses such as good faith, public welfare, etc., were supposed to be "moral standards which are universally recognised by the people; but in a collectivistic democracy, which is clearly built upon antagonistic interests, such universal recognition of moral standards by the classes is clearly inconceivable."\footnote{Neumann, 'Governance," p. 543. To be sure, Neumann concedes that labor law prior to 1931 constituted an exception insofar as general clauses served "to effect a compromise}{

After alluding to a few general clause-studded statutes in the areas of contract, commercial, regulatory and labor law\footnote{Consult the singularly perceptive work by Otto Kahn-Freund, "Der Funktionswandel des Arbeitsrechts," 67 AfSwSp 146-74 (1932); and idem, Das soziale Ideal des Reichsarbeitsgerichts (Mannheim, 1931).} that had been interpreted by the Weimar courts in favor of "monopolists," Neumann con-
cluded "that in a monopolistic economy 'general principles' operate in the interest of the monopolists." It is difficult to evaluate the logical status of this conclusion within Neumann’s categorical framework. Given the merely illustrative – verging on anecdotal – orientation of Neumann’s post-1933 theoretical writings on Weimar, he may merely have been claiming that general clauses 'just happened' to have served monopoly interests specifically in Weimar. But his brief references to English and American law concerning unfair competition, characterized as the latter was by the standard of reasonableness, and to the antitrust cases against Standard Oil Comp. of New Jersey and American Tobacco Comp. in 1911 indicate that Neumann was speaking generally when he maintained that, "It follows, therefore, that in the realm of monopoly law the legal standards of conduct throughout serve the interests of the monopolists." 

It is also implausible to ascribe to Neumann the conviction that he had cogently demonstrated that general clauses in “monopoly capitalism” necessarily were interpreted in the interest of monopolists. After all, in answer to his own question concerning the factors that had led judges to accept “the theory of free discretion,” Neumann adduced “the economic motive of inflation,” which generated landmark equity decisions, and the judiciary’s “hostility to democracy.” Clearly such motivations were peculiar to German history and not common to “monopoly capitalism” in general. Structurally general clauses do not inherently resist interpretation by judges sympathetic to anti-monopolist interests. It must, therefore, be the case that Neumann meant something else.

In the event, the systemic bias of general clauses in favor of monopolists lay, despite Neumann’s repeated anecdotal illustrations to the contrary, not in the personal prejudices of the judiciary, but rather in the interaction of the differential socio-economic and political power of various classes with the legal system:

between the antagonistic interests of labor and capital. ... From 1931 onward, when the political influence of labor parties and labor unions was waning, the idea of parity became nothing but pure ideology and 'general principles' again became a means for giving sanction to the interests of capital." Neumann, “Change,” p. 58; cf. idem, “Governance,” pp. 544-46.

277 E.g., ibid., p. 550, where Neumann cites Charles E. Hughes’s famous comment that "the constitution is what the judges say it is."
The irrational norms are calculable for the monopolists, as they are strong enough to dispense, if necessary, with formal rationality. The monopolist cannot only do without calculable law, formal rationality is even a fetter to the full development of his power. The rational law has . . . not only the function of rendering exchange processes calculable, it has an equalising function also. It protects the weak. The monopolist can dispense with the aid of the court; he does not go to the courts. His power of command is a sufficient substitute for the coercive power of the state. By his economic power he is able to impose upon customers and workers, in the form of a free contract, all the conditions he thinks fit. . . . In such conditions, the monopolist attempts to abolish freedom of contract, freedom of trade and the formal rationality of law.278

Here Neumann could plausibly be interpreted to be arguing against his earlier claims; for it no longer appears crucial that prejudiced judges generate outcomes favorable to monopolies. Rather, the latter's advantage appears to lie in their ability to evade the reach of random, unpredictable and hence irrational 'equitable' decisions. According to this reasoning, then, even uniformly anti-monopoly judges would have been tendentially incapacitated from imposing severe restrictions on monopolists because the latter were economically powerful enough to supplant the judiciary altogether.

It was this consideration that led Neumann to underscore the supra-historical protective value of formal law to the non-ruling classes. For him the rule of general laws always embodied the potential of exerting a corrosive and disintegrating influence because it held open the possibility of freedom in a society based on inequality.279 At a time when monopoly capital's ambivalence toward a more formally structured law turned into outright hostility as its class enemies secured increasing influence over the legislative process, Neumann continued to insist on the virtues of formalism for the weak.280

The confusion in Neumann's position appears to result from his failure to distinguish consistently between the inevitable collapse of formalism in developed capitalist societies in general281 on the one hand
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and the functionality of general clauses for “monopoly capitalism” on the other. Neumann was persuaded that a capitalist society characterized by acute and potentially destabilizing class struggle could no longer be based on formal legal rationality because: 1. general laws were irrelevant to an economic system of non-equal competitors; and 2. large capitalist organizations became hostile to positivism once the legislature displayed hostility to their interests. Yet Neumann was not clear about what functions general clauses fulfilled once they supplanted positivism. His claim that monopolists were favored by the proliferation of general clauses because biased judges interpreted them in their favor may have some historically contingent validity for Weimar (albeit not one demonstrated by Neumann), but it contains no fruitful, generalizable social theory. Neumann’s other claim, namely, that general clause jurisprudence proved to be so destructive of the minimal degree of predictability required by large capitalist enterprises that monopoly capital, emerging from the realm of the private into that of the quasi-public and quasi-State, asserted a kind of absolutist sovereignty that threatened to swallow the Rule of Law with which it had always stood in tension – this claim is not only inconsistent with and more plausible than the first claim, but also contributes to understanding why the transition to Nazi rule did not rupture the existing modes of case-law adjudication.

V. The Rule of Law in Nazi Germany

The most favorable case for the continuity of the Rule of Law can be constructed by focusing on the narrow sphere of adjudication in the private-law economic core embracing contracts, torts, property, commer-

jurisprudence, which was inconsistent with the calculability required by a capitalist economy.

282 See the suggestive comments and case-law references in Friedrich Dessauer, Recht, Richtertum und Ministerialbürokratie (Mannheim, 1928), pp. 79-92.

283 In comparison Hedemann’s celebrated warning concerning the spread of general clause adjudication seems jejune with its exclusive reliance on the “erdrückende Fülle des Stoffes” and the latter’s consequent “innere Haltlosigkeit” as a causal explanation: Hedemann, Flucht, pp. 58-59. The foregoing sketch of the transition is, of course, woefully incomplete, inter alia, because it omits an account of the role played by the administrative-presidial system during the final years of Weimar. See Schmitt, Huter der Verfassung, Forsthoff, Der totale Staat. The recent suggestion by Maus, “Juristische Methodik,” that the proliferation of general clauses during the Nazi period was a function not merely of the conditions of a system of political terror, but also of a general, longer-term and independent economic need for “situational” law in the wake of increasing differentiation and particularization of social relations and an increased need for flexible State economic control, is interesting but methodologically flawed by the failure to undertake an analysis of decisional law.
cial law, corporations and (the quasi-public) labor law. In theorizing about this subject, three contemporary German left-wing Social Demo­
crat Marxist jurists in exile, Ernst Fraenkel, Franz Neumann and Otto Kirchheimer, arrived at divergent conclusions.284

In Fraenkel's view, the courts preserved the legal system necessary for capitalism to function in all of the aforementioned areas.285 Neumann and Kirchheimer were sceptical of such an analysis. Both agreed that Fraenkel had overrated the real-world functional significance of scattered court decisions.286 For Neumann, the fact “that hundreds of thousands, perhaps millions, of transactions in Germany are handled according to calculable and predictable rules” was merely a function of the fact that “[a]ny society based on a division of labor will necessarily produce competences, jurisdictions, regularities, which give the appearance of a functioning legal system.” Rational treatment of such “culturally indifferent rules of a predominantly technical character” as whether traffic moves to the right or left was possible and necessary even within the Gestapo.287 But with law reduced to and identified with the will of the Führer, it lost its specific character and became “a technical means for the achievement of specific political aims. It is merely the command of the sovereign.”288 Since the Nazis undermined whatever generality of law that had remained intact during Weimar and expanded the use of general clauses,289 Neumann concluded that, “Civil courts are primarily agents for the execution of the commands of monopolistic business organizations.”290 In this sense, then, the Nazi legal system merely represented the final collapse of the model of formal rational law that Neumann had seen in the process of distintegration since 1918.

Kirchheimer, on the other hand, attempted to analyze the specific contribution of the Nazis to this development. Thus, for example, in the area of corporation law, Kirchheimer noted that the new communitarian ideology delivered the coup de grace to minority stockholders.291 At

284 See Alfons Sollner, Geschichte und Herrschaft (F., 1979).
285 Ernst Fraenkel, Der Doppelstaat (F., 1974 [The Dual State (NY, 1941)]), pp. 102-103.
286 See Kirchheimer's review of Fraenkel's book in 56 PSQ 434-36 (1941); cf. Neumann, Behemoth, p. 516 n. 63. Towards the end of his life, however, Kirchheimer appears to have come to accept Fraenkel’s views; see Kirchheimer, Political Justice, pp. 301-302 and p. 302 n. 96.
287 Neumann, Behemoth, p. 440.
288 Ibid., p. 448.
289 Ibid., p. 447.
290 Ibid., p. 458.
the same time, the transformation of industrial trade organizations into compulsory quasi-estates, from the decisions of which no appeal was possible to civil law courts, promoted economic concentration and necessitated a re-definition of profit and expropriation in order to take account of the combined power of the Industrial Group bureaucracies and the State bureaucracy to make decisions about the allocation of productive inputs and the distribution of profits.\footnote{Kirchheimer, "Rechtsordnung," pp. 116-18. See also A.R.L. Gurland, "Technological Trends and Economic Structure under National Socialism," 9 SPSS 226-63 (1941).}

For Kirchheimer the concept of rationality as inhering in generally applicable norms the consequences of which could in some measure be predicted had no validity before Nazi courts. For absent generally binding legal norms to which both the rulers and the ruled could appeal, such norms as existed served only to generate a strictly technical rationality – in particular toward the goal of executing an order in the shortest period of time with the greatest effectiveness.\footnote{Kirchheimer, "Rechtsordnung," pp. 129-30.} Under these circumstances the courts, according to Kirchheimer, were largely deprived of their former function of deciding disputes between groups and individuals.\footnote{For indirect confirmation, see Franz Wieacker, "Richtermacht und privates Rechtsverhältnis," 29 (N.S.) AGR 1-38 at 34, 37 (1938).} As executory organs of a putative community the courts were deemed useful where a degree of individuation was desirable in establishing the relations between creditor and debtor, producer and consumer, etc.; litigating social groups could, however, no longer have recourse to them. Moreover, since the underlying statutes and codes could be amended at Hitler's whim, inopportune judicial decisions were deprived of their social quality as precedents for future similarly situated cases.\footnote{Kirchheimer, "Rechtsordnung," pp. 132-33. To a lesser degree parliamentary supremacy in Britain operates to the same effect. See Charles Haines, The American Doctrine of Judicial Supremacy (2nd ed.; NY, 1959 [1914]), pp. 8-12.}

The analyses of Fraenkel, Neumann and Kirchheimer are seriously impaired by their failure to undertake comprehensive surveys of the published private law decisions. Even Fraenkel, who is advertised on the back cover of the recent German edition of his book as having written it with a knowledge of detail that is unattainable today, cites only nineteen decisions of the civil senates of the Supreme Court and barely more than one hundred cases from all courts and areas of law.\footnote{Fraenkel, Doppelstaat, pp. 250-52.} Although Neumann and Kirchheimer may have been correct in faulting Fraenkel...

for having over-interpreted a few isolated decisions, their own generalizations rested on scantier decisional sources still.

Reduced to its core, the global critique by Neumann and Kirchheimer focuses on the claim that private-law adjudication in Nazi Germany ceased to constitute even the ideologically masked form of class conflict and vindication of social and individual rights that had prevailed in the Rechtsstaat before the rise of a monopolized economy. With the decline of the generality of law between 1918 and 1933 private-law adjudication ceased to operate as the medium through which fundamental concrete purposes and needs articulated themselves under capitalist conditions.

While monopolistically structured industry was tendentially supplanting the judicial system with regard to the ordering of its relations with suppliers, consumers, competitors and creditors, the antagonistic assertion of class interests re-emerged in the forum of the labor courts. Since the Nazis suppressed the organized conduct of class struggle by abolishing trade unions and working-class political parties, and — logically — stripped the labor courts of their jurisdiction over the classical class-wide disputes embodied in collective contracts, Neumann and Kirchheimer reasoned that the judicial system had ceased to function as a societally relevant institution. With labor-law adjudication reduced to individual master-servant disputes of an atomized working class, and private-law adjudication further undermined by the advance of monopolies, judicial decisions were deemed a charade unworthy of critical analysis.

VI. The Rule of Law, Ideology and the Supreme Labor Court: A Preview of the Results

Whatever the situation may have been in private-law adjudication — and here a comprehensive analysis is still lacking — in labor law it is not possible to disqualify the decisions as both mere camouflage and mere technical rationality. After all, master-servant law never — either before or after 1933 — dealt with "culturally indifferent rules" of a predominant-

297 Thus, for example, Fraenkel's chapter on contract fills a scant page and a half, including a citation to a single decision; ibid., pp. 105-107.
298 Even the most comprehensive postwar study of private law adjudication under Nazi rule is, like virtually all German jurisprudential literature, much more heavily oriented toward scholarly commentary than case-law. See Ruthers, Die unbegrenzte Auslegung.
299 Preuss, Legalität, pp. 44-61.
ly technical character." The issues and disputes litigated before the
Supreme Labor Court between 1933 and 1945 may not have risen to the
level of strikes and lockouts, the right to organize or the scope of
authority of plant councils, but they nevertheless reflected, and hence
offer insight into, the nature of capital-labor relations under unique
conditions in an advanced capitalist society. Such insight may remain as
anecdotal as the cases themselves are fragmentary – but no more so
than is the case in other settings.

Of relevance here is whether the system of labor law partook of some
of the characteristic elements of the Rule of Law even under the
assumption that the legal system as a whole did not. In this context it is
instructive to examine what Lon Fuller characterized as "[t]he demands
of the inner morality of the law."\footnote{Lon Fuller, The Morality of the Law (rev. ed.; New Haven, 1974 [1964]), p. 42.} In order to conform to these
demands, the rules of a system of law must be: 1. general; 2. promulgated;
3. prospective (and not retroactive); 4. clear; 5. free from contradiction; 6.
such that they do not require what is impossible; 7. constant through
time; and 8. such that declared rule and official action are congruent.\footnote{Ibid., pp. 33-94.}

In Fuller's view, "A total failure in any one of these eight directions does
not simply result in a bad system of law; it results in something that is
not properly called a legal system at all . . . ."\footnote{Ibid., p. 39.} Conformity with these
injunctions, on the other hand, constitutes "a procedural or institutional
kind of natural law."\footnote{Ibid., p. 184.} Although such procedural natural law "is, over a
wide range of issues, indifferent toward the substantive aims of law and
is ready to serve a variety of such aims with equal efficiency," it is also
not the case that "any substantive aim may be adopted without compro­
mise of legality."\footnote{Ibid., p. 153.}

Since Fuller failed to undertake a systematic analysis of the kinds of
"evil" substantive aims that are and are not consistent with the inner
morality of the law, he made himself vulnerable to pointed criticism by
H.L.A. Hart.\footnote{See Hart's review of Fuller's book in 78 HLR 1281, 1286-87 (1965); and idem, The
Concept of Law (Oxford, 1975 [1961]), ch. IX.} Similarly, in the context of Nazi labor law and RAG-adju­
dication, the aforementioned eight "demands of the inner morality of the
law" were satisfied as adequately as they had been before 1933 in
Germany. If there is any validity in the civil law setting to the claim that
"in the ordinary Courts and in the ordinary administration of justice every Rule of Law and every traditional canon of interpretation might be strained and twisted so as to give effect to Nazi ideas,"\(^{306}\) it can be only in the Legal Realist sense, which, for example, could apply a similar standard to the Lochner Era in the United States, merely substituting “free enterprise” for “Nazi.”\(^{307}\) Indeed, the Nazi system of labor law also qualifies as Justice as Regularity within John Rawls’s schema; for the latter is nothing more than “[t]he regular and impartial, and in this sense fair, administration of law,” which is defined as precluding “the subtle distortions of prejudice and bias as these effectively discriminate against certain groups in the judicial process” as well as “bribery and corruption, or the abuse of the legal system to punish political enemies.” But as Rawls himself concedes, this “conception of formal justice,” the Rule of Law and the precept implied by it – namely, that “similar cases be treated similarly” – do “not take us very far.”\(^{308}\) Just as was the case with Fuller’s demands of the inner morality of the law, Rawls’s formal justice “is not a sufficient guarantee of substantive justice,” but merely “excludes significant kinds of injustices.”\(^{309}\) But like Fuller, Rawls does not focus his attention on the nature of the differences between the included and excluded kinds of injustices.\(^{310}\) That very great injustice is consistent with formal justice emerges, however, from Rawls’s characterization of it as “simply an aspect of the Rule of Law which supports and secures legitimate expectations.” Read together with his claim that “even where laws and institutions are unjust, it is often better that they should be consistently applied” since “those subject to them at least know what is demanded and . . . can protect themselves accordingly,” Rawls’s vision of the Rule of Law would embrace the Nuremberg Laws.\(^{311}\)

The extraordinary capaciousness of the Rule of Law cannot itself provide an adequate perspective within which to explore the differentia specifica of the Nazi labor law system. In order to perform this function the concept of the Rule of Law must be freed from its formalist Procrus-


\(^{307}\) See, e.g., Robert McCloskey, American Conservatism in the Age of Enterprise (NY, 1964 (1951)); Clyde Jacobs, Law Writers and the Courts (Los Angeles, 1954).


\(^{309}\) Ibid., p. 59.

\(^{310}\) See ibid., p. 60, where Rawls expressly declines to evaluate Fuller’s thesis.

\(^{311}\) Ibid., p. 59. Indeed, precisely this aspect is said to have relieved at least part of German Jewry in the wake of the promulgation of the Nuremberg laws. See Bernhard Lösener, “Als Rassereferent im Reichsministerium des Innern,” 9 VfZ 264·313 at 276 (1961).
tean interpretation and be enriched by an ideological dimension.312 From this viewpoint a whole series of very different kinds of questions is raised. As in the formalist conception of the Rule of Law, the ideological approach also asks whether what is called law displays independence from gross manipulation. Thus both would conclude, for example, that Hitler's personal supervision of the murder of Ernst Röhm and other leaders of the SA as well as his self-legislated retroactive exculpation313 contradicted the very essence of any notion of law.314 But at this point their paths diverge, for the ideological approach proceeds to probe areas of class relations, social consciousness and cultural bonding that are inaccessible to the formalist approach.

The law-as-ideology approach asks, for example, whether the Rule of Law operated so as to mould consciousness or whether those subject to it tended to use it in a merely instrumental fashion. A fruitful answer to this question cannot be derived solely from an exhaustive examination of the cases decided by the Supreme Labor Court. Although study of the (impossibly) voluminous trial court cases would doubtless shed considerably more light on the scope and variety of conflicts giving rise to litigation, even such an expanded yet purely jurisprudential analysis would be incapable of distinguishing instrumental attitudes from forms of consciousness more directly concerned with the assertion and vindication of rights backed by law. In a system of class-organized collective bargaining such a distinction is easier to discern. Even in political regimes which suppressed forms of collective labor organization but accorded owners of labor power the same contracting rights as other commodity owners,315 contract- and tort-based, employee-initiated litigation could represent not only a submerged form of class struggle (for equal rights as bargaining partners) but also a moral contest in which individual workers aspired to participate equally with the bourgeoisie in the protections conferred upon members of civil society qua owners and traders.

314 Compare Carl Schmitt, "Der Führer schützt das Recht," 39 *DJZ* 945 (1 August 1934) - an early highpoint in the self-corruption and self-degradation of German jurisprudence.
315 Master-servant law was the rubric under which such relations were organized in Anglo-American jurisdictions. See Mark Freedland, *The Contract of Employment* (Oxford, 1976).
The situation in a post-liberal society still characterized by master-servant law of the pre-collective bargaining period is more complicated. Given the hopelessness of collective action by the working class against the Nazi regime or large employers; and given the fact that this generation of workers had witnessed the open and brutal destruction of the legal basis of class organization which it had taken almost a century to achieve – under these circumstances, workers could hardly have been suffering from any illusions concerning the sanctity of the Rule of Law. Therefore it is plausible to infer from the bread-and-butter kinds of issues (pensions, overtime pay, vacations, etc.) litigated by employees that the latter adopted a strictly instrumental attitude toward the law. Once, in other words, the word spread through the membership of DAF that it was still possible to sue employers for back-pay, benefits, etc., workers were quick to avail themselves of the free representation offered by that organization.

On the other hand, the minuscule amounts that were often at stake in the cases that reached the highest labor court suggest that more than pecuniary satisfaction motivated the litigants. Where employers lost in the lower courts and appealed, such a hypothesis appears eminently plausible: spite towards an individual employee or fear that a precedent might lead to more extensive liability could transcend the context of immediacy.\footnote{It is a desideratum of research to determine whether employers during the Nazi period formulated and pursued litigational strategies. Cf. n. 190 above.} Employees may well have viewed suits as one of the few available forms of expression of resistance that did not unduly endanger their livelihoods or lives.\footnote{A further desideratum of research is the nature of overt or indirect pressure exerted by employers on employees to discourage them from filing suit or to harass them for having filed suit.}

To the extent, however, that law legitimates itself through tradition and venerability,\footnote{In a revolutionary period new law that breaks with tradition can acquire legitimacy by virtue of the fact that the classes whose needs are served by this law experience their own power as initiators of the processes that give rise to this law. This latter condition was manifestly absent in the legal revolution wrought by the Nazis – at least insofar as workers were concerned.} it presupposes a continuity of industrial practice of which it is an expression. Under such conditions legal norms are underwritten by widely shared norms deeply rooted in historical custom. But it was precisely on this point that the Nazi innovation in the area of labor law was fundamentally flawed. For the overlay of communitarian ideology, which, as general clause, was meant to inform and control judi-
cial interpretation of the rump master-servant law, was an unconvincing invention of the Nazi movement wholly alien to the most profound day-to-day experiences of the working class which were constitutive of its world-view.\textsuperscript{319} Where employees’ litigational victories were based on judges’ manipulation of Nazi ideology, confusion rather than conversion may have been the consequence. Whether the cumulative result of many such victories was the gradual growth of belief in the existence of such a plant-community (and hence the conscious cooperation in its construction) is doubtful but deserves study.

A further test of the Rule-of-Law-like quality of labor law focuses on the extent to which employers (as well as the Nazi party and State) were prisoners of the rules that were designed, \textit{inter alia}, to set forth in a societally coercive manner the new scope of capitalist power vindicated by the Nazi revolution. In a variant formulation: Did the law discipline the ruling class?\textsuperscript{320} Or, in what is yet another way of asking the same question: Did the legal forms acquire a life of their own, acting stubbornly and perversely, as it were, so that even class-biased judges were confronted with what at times were virtually insurmountable hurdles?

The answer to all these questions, over a wide range of social and legal issues, is a conditioned “yes.” With notable exceptions\textsuperscript{321} the majority of RAG’s decisions maintained the court’s intellectual distance from the Nazi regime. Vis-a-vis the employing class the court’s task in this regard was much less fraught with obstacles and risks. Although the court never took it upon itself to challenge the validity of a statute expressly, it did on numerous occasions exercise its authority to review the actions of subordinate administrative agencies.\textsuperscript{322} Moreover, even relatively

\textsuperscript{319} Perhaps the period of blitzkrieg victories constituted an exception; but see Mason, \textit{Sozialpolitik}, pp. 299-322.


\textsuperscript{321} In particular certain RAG decisions in 1940 and 1941 concerning Jews abandoned any pretense of satisfying even the minimal requirements of legitimation; see ch. 11 below. As Germany’s military defeat approached, an increasingly martial plant discipline began to be reflected in blatantly instrumental decisions. See, e.g., RAG 45/44, decided 23 January 1945 (and reported in the last issue of \textit{DR} – 15 April 1945 at pp. 126-27), in which the court held that since maintaining discipline was no longer the right but the duty of the plant-leader, courts could no longer review the employer’s justification for imposing a fine on employees. In light of the unambiguous language of the relevant ordinance – which subjected employers to imprisonment for infractions – not even this decision can be said to have manipulated the law. See AO Nr. 13 zur Sicherung der Ordnung in den Betrieben, 1 November 1943, RABI, I, 543: AO zur Anderung der AO Nr. 13 . . . , 29 October 1944, RABI I, 415.

\textsuperscript{322} See the strictures by Wilhelm Herschel, “Rechtlicher und staatlicher Sinn der Bekanntmachung von Richtlinien und Tarifordnungen im Reichsarbeitsblatt,” 3 \textit{DAR} 39-42 at 41 (1935).
unambiguous expressions of the will of the Nazi legislator were often interpreted — with or without the aid of Nazi ideological verbiage — in ways that were not most obviously suggested or supported by the language or known intent of the legislator. Where such decisions redounded to the benefit of plaintiff-employees, the latter may well have come to regard the court as a mediating institution which might mitigate the otherwise harsh rule of their macro- and micro-political-economic class antagonists.

Crucial, however, to an understanding of the ideological role played by the court is an awareness of the effect on that role of the extraordinarily contingent nature of the distance between the court and the power of the Nazi political apparatus.\(^{323}\) In light of the (facially manifest) fact of a Nazi labor code (AOG) that openly proclaimed the subordination of the class of employees to that of employers under the protective supervision of the Nazi State,\(^{324}\) the legitimating power of RAG was both severely curtailed and enhanced. For, on the one hand, the creation by the Nazis of new positive law that restored the dominance of employers that the revolution of 1918 and the institutions of Weimar had attacked deprived the statute of a legitimating anchoring in the world that workers had shaped and been shaped by since the First World War. In this sense the positive law was insensitive to their experience.\(^{325}\) As a result, the court that was called upon to interpret a statute widely perceived to be illegitimate — but that was incapacitated from declaring it to be illegitimate — did not operate under conditions optimally suited to legitimate itself. On the other hand, RAG preserved more than the mere outer appurtenances of legality. Not only did it not sink to the level of a People's Court,\(^{326}\) but — with the exceptions already noted — generally pur-

\(^{323}\) For a contemporaneous international comparative study, see Hans Peter Ipsen, *Politik und Justiz* (H., 1937).

\(^{324}\) Cf. the astounding understatement by Harold Rasch, *Das Ende der kapitalistischen Rechtsordnung* (Heidelberg, 1946), p. 71, concerning occasional entrepreneurial exploitation of this superior position.


\(^{326}\) Whether the trial labor courts continued to function as before 1933 is another matter. Although the number of reported decisions is too small to permit of more than speculation, several dealing with Jews and Communists (see chs. 8 and 11 below) indicate that at least in some courts a tone prevailed that never seeped into RAG's published opinions. If significant numbers of employees experienced ideological hectoring by avowedly Nazi judges, then a very different assessment would be called for from the one offered here — especially since the volume of litigation reaching RAG was minuscule compared to that occupying the lower courts. If some trial courts thus delegitimated themselves vis-a-vis petitioning employees, analysis of the relationship between these courts and RAG would be analogous to that of the relationship between AOG and RAG.
ported to be applying logical criteria to universalizable rules or equitable standards much as the court had done before 1933.\textsuperscript{327} Had the outcomes generated by such 'objectivity' been uniformly to the disadvantage of employees, then the latter would doubtless have considered the court a sham. But where relatively significant rights were often vindicated – particularly in the teeth of a statute which it would have been more convenient and plausible to interpret adversely to employees – by a group of judicial officials who personally, institutionally and jurisprudentially vouched for the continuity of a system of reasoned elaboration in labor law, the court’s integrity may actually have been enhanced in the minds of affected parties.

\textsuperscript{327} But see Ludwig Bendix, \textit{Die irrationalen Kräfte in der Arbeitsgerichtsbarkeit} (B., 1929), and especially Kahn-Freund’s analyses cited in n. 271 above.
Chapter 2

The Jurisdiction, Procedure and Personnel of the Labor Courts

I. Jurisdiction

The statute that established the labor courts on 23 December 1926 (ArbGG) created the three-tier system that remained virtually intact throughout the Nazi period. These courts were granted exclusive jurisdiction over the following kinds of litigation: 1. suits brought by one collective bargaining party against the other; 2. contract and tort suits arising out of an employment relationship between employer and employee; 3. tort suits by one employee against a co-employee; and 4. a number of different kinds of actions arising out of the application of the Plant Council Statute.

The enactment of AOG, which abolished collective bargaining and plant councils, and expressly limited the courts' jurisdiction to individual actions (that is, to those embraced by points 2. and 3.), authorized the ministers of labor and justice to promulgate a new version of ArbGG, which would make the changes rendered necessary by AOG. Consequently, the new ArbGG, which was issued several months later, restricted jurisdiction to the individual, isolated actions that the atomized structure of the working class still permitted its member-monads.
Introduction

As a reflection of this shrunken jurisdictional scope, commentators noted that social-political study of RAG opinions was not so fruitful as it had once been. They appeared to bemoan the fact that questions of less fundamental import or of only passing significance such as national insurance or pension reductions arising out of the application of BBG had come to dominate the dockets. A contemporary foreign observer concluded that “the fundamental decisions affecting the laborer are not matters for review by the courts. Within their narrow orbit they can and do have little part in determining the relationships between employer and employee.” If by this latter phrase the author simply meant that the courts’ significance dwindled as the scope of legally permissible class conflict was violently compressed, his claim is uncontroversial. But he appears to have meant more than a mere parallel movement:
The labor courts no longer occupy a high position in a complex system of conflicting interests and no longer help umpire between competing capital and labor groups, but are rather the peripheral agencies for interpreting and applying a vast mass of administrative legislation. They serve essentially as pacifiers in a system which is characterized by its almost unlimited administrative discretion.

Here the author perceived a qualitative transformation of the nature of the courts’ role and functioning even within the self-same scope of individual actions. It is one of the purposes of this work to inquire into whether in fact the structure of judicial decision-making did change even in this narrow area of a once broader jurisdiction.

II. Structure of the Three-Tiered System of Labor Courts

As was the case during Weimar, the trial court (AG), the intermediate appeals court (LAG) and the Supreme Labor Court (RAG) were composed of professionally trained jurists and lay assessors (Beisitzer). When established, RAG was the first supreme court in Germany on

6 See [Wilhelm] Herschel, “Der soziale Gedanke in der Rechtsprechung des Reichsarbeitsgerichts,” 47 SP cols. 291-98 at 291-92 (1938). Justus Hedemann, Deutsches Wirtschaftsrecht (2nd ed.; B., 1943 [1939]), p. 275, does not appear to have shared this disappointment. In a (to be sure self-serving) letter to the president of the Supreme Court, the chairman of RAG stressed that the Nazi legal revolution had in fact made the cases coming before the court jurisprudentially more difficult. See the letter of 12 October 1934 from Friedrich Oegg to Erwin Bumke, BA R 2/23926, fol. 46-49.
8 Ibid. at 188-89.
which lay assessors sat.⁹ In the trial courts, of which there were 454 in 1936,¹⁰ each panel was composed of a chairman and two lay assessors – one from the “circle” of entrepreneurs and one from that of the employees.¹¹ An administrative body selected the assessors from lists which before 1933 were supplied by the collective bargaining organizations and after 1933 by DAF. Assessors were appointed for a period of three years.¹² Trial court judges were, unlike those in other German court systems (ordentliche Gerichte), initially appointed for a period ranging from one to nine years; although they could be reappointed, they could also receive tenure after three years.¹³ Similarly, the appellate courts, of which there were fifty-nine in 1936,¹⁴ consisted of one chairman and two lay assessors per panel.¹⁵

The highest labor court was created as part of the Supreme Court (Reichsgericht). Before the enactment of ArbGG the third civil senate of the Supreme Court had cognizance of actions arising out of employment relations. In order to secure continuity in labor law adjudication, the president of the third civil senate was appointed chairman of the new RAG while four judges from the same senate were also assigned to it.¹⁶

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⁹ See Friedrich Oegg, “Das Reichsarbeitsgericht,” in Adolf Lobe, Fünfzig Jahre Reichsgericht am 1. Oktober 1929 (B., 1929), pp. 116-43 at 124. By “supreme court” in the text is meant a Revisionsgericht – that is, one to which appeals can be made only on points of law.

¹⁰ Statistisches Handbuch von Deutschland 1928-1944, ed. Länderrat des Amerikanischen Besatzungsgebiets (Munich, 1949), p. 638. The number of trial courts declined from 527 in 1928 to 450 in 1940.

¹¹ § 16 ArbGG. § 17 authorized each trial court to establish several panels.

¹² § 12 ArbGG. The unemployed were eligible to be employee-assessors; § 23. Art. I Gesetz über die Besitzer der Arbeitsgerichts- und Schlichtungsbehörden und der Fachausschüsse für Hausarbeit, 18 May 1933, RGBI I, 276, provided for the removal of assessors appointed during Weimar.

¹³ § 18 para. 4 ArbGG. The judicial protection afforded by Art. 104 of the Weimar constitution thus did not apply to these untenured trial court judges. See Alfred Hueck and H.C. Nipperdey, Lehrbuch des Arbeitsrechts, vol. 2 (3rd-5th eds.; Mannheim, 1932 [1930]), p. 690.

¹⁴ Statistisches Handbuch von Deutschland 1928-1944, p. 638. The number declined from eighty in 1928 to fifty-nine in 1940.

¹⁵ § 35 para. 2 ArbGG. On the structure of the labor courts in general during the pre-war Nazi period, see Gerhard Lang. “Besetzung und Aufbau der Arbeitsgerichtsbehörden” (Diss., Tübingen, 1939).

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Each senate of RAG was composed of a chairman, two associate judges and two lay assessors.\textsuperscript{17}

At the outset of World War II the lay assessors were eliminated at the trial court level.\textsuperscript{18}

III. Procedure

Although the general rules of civil procedure governed the labor courts, the latter were statutorily required to expedite litigation.\textsuperscript{19} The proceedings at the trial court level were in principle open to the public, but the court could – under the Nazis as in Weimar – exclude the public if public order, state security or morals were threatened.\textsuperscript{20}

Under the original ArbGG only legal representatives of the collective bargaining organizations could represent parties before the trial courts. All other lawyers who were professional litigators were excluded.\textsuperscript{21} Parties could appear \textit{pro se} at trial\textsuperscript{22} but not before the two higher courts. In collective bargaining disputes before 1933, however, a representative of the collective bargaining party could appear before LAG.\textsuperscript{23}

AOG altered this provision of ArbGG, which transferred the virtual monopoly of trial representation from the now dissolved collective bargaining organizations to DAF with its two separate departments for entrepreneurs and workers.\textsuperscript{24} In 1935 this provision was amended to permit the chairman of the trial court to admit as legal representative an attorney or other qualified person if representation by DAF was “out of

\textsuperscript{17} §§ 40-46 ArbGG. Since only one senate was established within RAG but more than three judges belonged to it, presumably the judges rotated, performing judicial tasks in other areas of jurisdiction of the third senate and in other senates as well. See Oegg, “Reichsarbeitsgericht,” pp. 127-28.

\textsuperscript{18} § 12 para. 1 VO über Massnahmen auf dem Gebiet der Gerichtsverfassung und der Rechtspflege, 1 September 1939, RGBI I, 1658. Given the control which DAF exercised over the list of lay assessors, it is not clear why Frieda Wunderlich, \textit{German Labor Courts} (Chapel Hill, 1946), p. 153, characterized this change as "revolutionary."

\textsuperscript{19} §§ 9, 46, 56-57, 64, 72 ArbGG. ZPO and GVG applied to the labor courts. See Wunderlich, \textit{German Labor Courts}, p. 153. Cf. \textit{ibid.}, pp. 95, 99-100, 102-103, on the speed with which cases were carried to final judgment.

\textsuperscript{20} 52 ArbGG. A party could also petition to close the proceedings if business or other secrets were at issue.

\textsuperscript{21} § 11 para. 1 ArbGG (1926). On the controversy surrounding this issue, see Wunderlich, \textit{German Labor Courts}, p. 121. On lawyers in Nazi Germany, see Fritz Ostler, \textit{Die deutschen Rechtsanwalte 1871-1971} (Essen, 1971), pp. 229-304.

\textsuperscript{22} Hueck/Nipperdey, \textit{Lehrbuch}, II, 728 (1932).

\textsuperscript{23} § 11 para. 2 ArbGG (1926).

the question." Ministerial guidelines specified that such representation was out of the question when either the party was not a member of DAF or DAF declined to represent the party although he or she was a member.

Members did not have a legal entitlement to representation. If the proposed litigation did not hold out prospects of success and was inconsistent with Nazi principles and the "honor of labor," DAF's statutes provided that representation be denied. Independent counsel was also admitted when DAF itself was a party to the dispute. The new ArbGG permitted no exceptions to the rule compeling representation before the higher courts. Court costs ranged from one mark to a maximum of fifteen marks depending on the amount in controversy.

If the amount in controversy exceeded 300 marks, an appeal to LAG was permissible. Where this requirement was not met, the court could still permit an appeal if the action had "fundamental importance." The court was required to permit an appeal on the basis of fundamental importance if in interpreting a legal rule it deviated from a judgment – submitted during the proceedings – that had been handed down for or against a party to the litigation. An expedited appeal (Sprungrevision) to RAG was permitted where the amount in controversy requirement was met and the opposing party consented or the minister of labor declared that an immediate decision by the highest court was in the general interest. This procedure was infrequently used. Towards the very

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26 Richtlinien zu § 11 Abs. 1 Satz 2 des Arbeitsgerichtsgesetzes, 13 June 1935, RARbBl I, 203.
28 See Wunderlich, German Labor Courts, p. 157.
29 § 11 para. 2 ArbGG.
30 § 12 ArbGG, § 91 ZPO directed the loser to reimburse the winner for these costs. Wunderlich, German Labor Courts, p. 74, states – without authority – that the loser in labor court cases did not reimburse the winner for his counsel's fees.
31 § 8 ArbGG. Wunderlich, German Labor Courts, p. 75, states that the sum was fixed during Weimar at the level of the average monthly income of medium-salaried employee "in order to prevent protraction of a suit brought by a little man concerning his salary." This sum was raised to 500 marks by § 5 VO zur weiteren Vereinfachung der bürgerschen Rechtspflege (Dritte VereinfachungsVO – 3. VereinfV.), 16 May 1942, RGBI I, 333.
32 § 61 ArbGG.
33 § 76 ArbGG.
end of the war a ministerial decree in effect abolished the intermediate appellate level of the system; trial courts could permit an appeal to RAG only on the basis of fundamental importance, taking wartime conditions into account.  

The trial before LAG was de novo. New evidence that could have been submitted to AG and consideration of which would delay the appellate proceedings was admissible only if the court was persuaded that the party had not acted negligently or with the intention to delay the proceedings. An appeal as of right to RAG lay where the amount in controversy exceeded 6,000 marks, a sum that was raised to 10,000 marks at the outset of the war. Like the trial court, the appeals court could also permit an appeal if it found the controversy fundamentally important. An appeal could be grounded only on the claim that the judgment rested on the non-application or incorrect application of a provision of a statute or of a Tarifordnung affecting the regulation of individual employment contracts.

During Weimar the parties to a collective bargaining agreement could agree to exclude the jurisdiction of the labor courts and to present their controversy for resolution to an arbitration tribunal (Schiedsgericht). Under the Nazis, the trustee of labor (Treuhänder der Arbeit) was authorized to make this determination in place of the parties.

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34 § 4 VO über ausserordentliche Maßnahmen auf dem Gebiet des bürgerlichen Rechts, der bürgerlichen Rechtspflege und des Kostenrechts aus Anlass des totalen Krieges, 27 September 1944, RGBI I, 229. The G. über die Mitwirkung des Staatsanwalts in bürgerlichen Rechtssachen, 15 July 1941, RGBI I, 383 – which permitted the state prosecutor to petition the Supreme Court to order proceedings to resume if, from the standpoint of the Volksgemeinschaft, doubt obtained concerning a decision in a private law case – was applied to one labor court case; see ch. 1 § II above.

35 § 67 ArbGG; § 529 paras. 1-2 ZPO. A case could not be remanded solely on the basis of procedural defects at trial. § 67 was repealed by § 4(14) VO zur weiteren Vereinfachung der bürgerlichen Rechtspflege (Vierte VereinfachungsVO – 4. VereinfV.), 12 January 1943, RGBI I, 7.

36 § 72 para. 1 ArbGG and § 546 ZPO; § 7 VO über Massnahmen auf dem Gebiet der Gerichtsverfassung und der Rechtspflege, 1 September 1939, RGBI I, 1658.

37 § 72 para. 1 ArbGG. Appeals arising out of suits to compel an employer to retract a discharge (§§ 56-61 AOG) were not permissible.

38 § 73 para. 1 ArbGG. An appeal could not be based on the incorrect laying of venue.

39 § 91 ArbGG (1926).

40 § 91 ArbGG. On these tribunals, which will not be dealt with here, see §§ 91-107 ArbGG.
Introduction

IV. Volume of Litigation

The amount of litigation that came before the labor courts was very large during the Weimar Republic, peaking in 1931. During the Nazi period the decline that had set in that year accelerated. Table 1 indicates the development over time at all three levels.

Table 1

Litigation in the Labor Courts, 1927-1940

<table>
<thead>
<tr>
<th>Year</th>
<th>Suits filed/ pending</th>
<th>Formal judgments</th>
<th>Discretionary appeals permitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1927a</td>
<td>164,618</td>
<td>23,908</td>
<td>1,661</td>
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<tr>
<td>1928</td>
<td>379,689</td>
<td>62,301</td>
<td>4,673</td>
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<tr>
<td>1929</td>
<td>427,614</td>
<td>69,181</td>
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<td>1930</td>
<td>438,449</td>
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<td>4,672</td>
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<td>441,243</td>
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<td>371,592</td>
<td>64,081</td>
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<td>261,530</td>
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<td>1934</td>
<td>200,052</td>
<td>28,629</td>
<td>983</td>
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<td>188,908</td>
<td>26,505</td>
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<td>1936</td>
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<td>23,976</td>
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<tr>
<td>1938</td>
<td>151,577</td>
<td>20,602</td>
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<tr>
<td>1939</td>
<td>122,795</td>
<td>15,584</td>
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<tr>
<td>1940</td>
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<td>10,567</td>
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### Table 1 (continued)

**Appeals Courts**

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<td>693</td>
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<td>20,042</td>
<td>8,775</td>
<td>690</td>
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<tr>
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<td>610</td>
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<th>Formal judgments</th>
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<td>293</td>
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<td>470</td>
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<tr>
<td>1931</td>
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<td>525</td>
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<td>478</td>
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<td>260</td>
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<td>1934</td>
<td>350</td>
<td>175</td>
</tr>
<tr>
<td>1935</td>
<td>407</td>
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<td>1936</td>
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<td>208</td>
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<td>1937</td>
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<td>215</td>
</tr>
<tr>
<td>1938</td>
<td>424</td>
<td>184</td>
</tr>
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<td>1939</td>
<td>459</td>
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<tr>
<td>1940</td>
<td>390</td>
<td>240</td>
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</table>

The courts came into being on 1 July 1927.  
Source: The annual article entitled, “Die Tätigkeit der Arbeitsgerichtsbehörden,” in *Vierteljahrshefte zur Statistik des Deutschen Reiches*, ed. Statistisches Reichsamt; the report, which appeared in the second issue of each annual volume (except for vol. 38, issue 3), referred to the litigation of the previous year. No data were published for the period after 1940. There follows a list of the volume, pages and year of the annual article: 37:58-69 (1928); 38:112-25 (1929); 39:174-87 (1930); 40:114-31 (1931); 41:105-23 (1932); 42:106-24 (1933); 43:160-74 (1934); 44:98-102 (1935); 45:67-71 (1936); 46:97-101 (1937); 47:91-95 (1938); 48:147-50 (1939); 49:65-68 (1940); 50:59-62 (1941).
In the trial courts the number of cases filed and pending declined 40.7 per cent between 1931 and 1933 and a further 53.0 per cent between 1933 and 1939. The number of formal judgments fell even more sharply – by 46.6 per cent and 61.2 per cent respectively. The number of discretionary appeals permitted peaked in 1929, falling 70.2 per cent by 1933 but then remaining relatively stable. The number of appeals to LAG declined by 47.8 per cent between 1931 and 1933 and by 59.9 per cent between 1933 and 1939. The number of formal judgments issued by the appeals courts fell by 53.1 per cent during both periods. The number of discretionary appeals allowed by these courts also reached a high-point in 1929, declining 28.3 per cent by 1933 and a further 38.4 per cent by 1939. The number of appeals submitted to (formal judgments rendered by) RAG declined 51.2 per cent (50.5 per cent) between 1931 and 1933, but then fell only an additional 4.2 per cent (10.8 per cent) by 1939.

In light of the fact that the number of appeals to and formal judgments rendered by RAG during the Nazi years declined only marginally, whereas the decline in the volume of litigation in the lower courts and in the number of discretionary appeals permitted by them was significantly sharper, it may be concluded that either the number of cases exceeding the jurisdictional amount rose as a share of all cases or the share of appealable cases actually appealed rose. In part the reduced volume of litigation was due to the increase in the number of in-court compromise settlements and of out-of-court settlements encouraged by a large network of counseling and conciliation centers maintained by DAF.

V. Composition of RAG

In 1935 the president of the Supreme Court (Reichsgericht), the presidents of eight of the eleven senates and sixty-three of that court’s seventy-nine judges (Reichsgerichtsräte) had been appointed before the Nazis came to power. By 1940 the vice-president, the presidents of all

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42 The former held true until 1933 when the data ceased to be published.
43 See Bulla, “Ein Jahr Rechtsberatung der Deutschen Arbeitsfront,” 3 DAR 158-61 (1935); Cole, “German Labor Courts,” p. 184; Reifner, “NS-Beratungsstellen.” Compromises as a form of resolution of litigation rose from about one-quarter of all trial court cases in 1933 to about two-fifths in 1934; see Wunderlich, German Labor Courts, table 18 at p. 94.
44 Calculated according to the data in: Reichsjustizministerium, 1 Kalender für Reichsjustizbeamte für das Jahr 1936, part 2 (B., n.d.), pp. 27-28. In addition, Otto Georg Thierack was appointed vice-president of the court; an early member of the Nazi party, Thierack later became minister of justice. See [Great Britain, Ministry of Economic Warfare], Who's Who in Germany and Austria [5th ed. of Who's Who in Nazi Germany]
eleven senates and sixty-two of eighty-four judges had been appointed by the Nazis. Although the Supreme Court was, with one exception, spared the purges of Marxists and Jews which the SS and SA carried out in other courts between January and April of 1933, a number of its members were removed as a result of anti-Jewish legislation. Hermann Grossmann, who had been appointed to RAG in 1930, was the only member of the SPD to sit on the Supreme Court and the only one of its judges removed because of his (pre-1933) opposition to the Nazis. But no judge was removed for political reasons pursuant to BBG because Grossmann, hoping to forestall the application of that law to the court, retired before it went into effect in April 1933. Of eighty-seven members of penal senates for whom information was verifiable, thirty-nine were members of the Nazi party.

At RAG all eleven judges sitting in 1932 – with the exception of Grossmann – remained in office at least through 1934. By 1936 four of the court’s ten members had been appointed by the Nazis; by 1938 the Nazis had appointed six of eleven members. From 1939 to 1945 only the chairmen of RAG were holdovers from the period before 1933. Table 2 summarizes the available data relating to membership in the Nazi party of judges serving on RAG during the Nazi period.

(n.p., n.d. ["Information believed to be correct as of 31 March 1945"]), II, 166. The Kalender indicates that there were eighty-three Reichsgerichtsräte at the time but lists only seventy-nine by name. On the president of the Supreme Court during the latter years of Weimar and the entire Nazi period, see Dieter Kolbe, Reichsgerichtspräsident Dr. Erwin Bumke (Karlsruhe, 1975), pp. 204-402.

46 Calculated according to the data in: Reichsjustizministerium, 6 Kalender für Reichsjustizbeamte für das Jahr 1941, part 2 (B., n.d.), pp. 35-36.

47 See [Sievert] Lorenzen, "Das Eindringen der Juden in die Justiz vor 1933. III," 101 DJ 955-66, table 1 at 966 (1939). The data contained in this article appear to be mathematically inconsistent.

48 In January 1934 Grossmann abased himself in a letter in which he professed his aryan descent in order to retain his pension. See Kaul, Geschichte, pp. 54-58.

49 Ibid. p. 59. After 1933 only Nazi party members were appointed presidents of penal senates.

50 The following remarks, insofar as they are based on the archival material in Potsdam published by Kaul, Geschichte, assume that the members of the third civil senate were also members of RAG.

51 Based on the archival materials published by Kaul, Geschichte, pp. 331-39. Loss and Epping, who were also appointed to the Supreme Court before 1933, served briefly on RAG.
Table 2

Nazi Party Membership of Judges serving on RAG during Nazi Period

<table>
<thead>
<tr>
<th>Name</th>
<th>Tenure*</th>
<th>Joined</th>
<th>Name</th>
<th>Joined</th>
<th>Appointed*</th>
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<td>Nazi Party</td>
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<tr>
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<td>1930-45</td>
<td>1937</td>
<td>Altsötter</td>
<td>1937</td>
<td>1935</td>
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<td>1930-34</td>
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<td>1933</td>
<td>1938</td>
</tr>
<tr>
<td>Brodführer</td>
<td>1926-38</td>
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<td>Besta</td>
<td>1933</td>
<td>1936</td>
</tr>
<tr>
<td>Citron</td>
<td>1928-33</td>
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<td>Burmeister</td>
<td>1941</td>
<td>1935</td>
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<tr>
<td>Epping</td>
<td>1927-45</td>
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<td>1941</td>
<td>1939</td>
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<td>Grossmann</td>
<td>1930-33</td>
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<td>Leopold</td>
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<td>1941</td>
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<td>Hagemann</td>
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<td>Lersch</td>
<td>1937</td>
<td>1933</td>
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<td>Königsberger</td>
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<tr>
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<td>1930-35</td>
<td>no</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Appointment and tenure refer to service on the Supreme Court and not specifically to service on RAG.
Sources: See tables 3 and 4.
Of the twenty-eight judges who sat on RAG between 1933 and 1945, sixteen were holdovers from the period before 1933 and twelve were appointed after the Nazis gained power. Of the former only two (Blumberger and Schrader) joined the Nazi party, whereas all of the latter became members with the exception of Rusch who died shortly after having been appointed to the court. Of these eleven Nazi appointees who joined the Nazi party, seven were already party members at the time of their appointment. Only one Nazi appointee (Seibertz) had joined the party before 1933. The number of jurists in the party before that time was in general small; and it is noteworthy that it was apparently not considered feasible and/or necessary after 1933 to select judges competent in labor law who were longtime party members.

The transformation of the court's party-political composition occurred relatively late and swiftly. As late as 1935 no judge was a member of the Nazi party; by 1938 seven of the court's members were Nazis; in its last year of existence all of the court's long-term members were also Nazi party members. The trend toward "partification" of the court emerges from table 3.

52 Since Alstötter, one of the four judges who joined the Nazi party after having been appointed to the court, had been a member of the SA before he was appointed, it is conceivable that further biographical information on the other three judges would reveal that they were more than mere external compromisers. As a member of the SS Alstötter stood trial at the so-called subsequent Nuremberg proceedings. See "The Justice Case," Military Tribunal III, Case III: The United States of America against Josef Alstötter [et al.], in: Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, Nürnberg, October 1946-April 1949, vol. III (Washington, 1951). Alstötter, who after his service on RAG was a Ministerialdirektor in the ministry of justice in charge of the civil law division, was sentenced to five years; released in 1950, he was still an attorney in Nuremberg as late as 1966. See P.A. Steininger and K. Leszcynski, eds., Fall 3 (B. [GDR], 1969), p. 315. On the trials, see Charles La Follette, Der Nurnberger Prozess gegen führende Juristen des Dritten Reiches (Stuttgart, 1948); Raul Hilberg, The Destruction of the European Jews (Chicago, 1967 [1961]), pp. 684-715.


## Table 3

Members of the Supreme Labor Court, 1927-1945

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<tr>
<th>1927</th>
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<td>Staffel (V)</td>
<td>Staffel (V)</td>
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<td>Hagemann</td>
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*Note: The table continues with additional names, but the snippet provided does not fully include all entries.*
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<td>Wunderlich</td>
<td>Altstötter</td>
<td>Besta*</td>
<td>Schwiegmann*</td>
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<td>Loss</td>
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<td>Rusch</td>
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Table 3 (continued)

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<th>Year</th>
<th>1942</th>
<th>1943-1944</th>
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<tr>
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<td>Hagemann (C)</td>
<td>Schrader*</td>
<td>Blumberger* (C)</td>
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<td>Oegg (C)</td>
<td>Lersch*</td>
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<td>Bechmann*</td>
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<td>Lersch*</td>
<td>Stange*</td>
<td>Lersch*</td>
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<td>Alstötter*</td>
<td>Seibertz*</td>
<td>Leopold*</td>
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<td>Besta*</td>
<td>Schwemmann*</td>
<td>Stange*</td>
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<td>Bechmann*</td>
<td>Upenkamp*</td>
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<td>Seibertz*</td>
<td>Denecke*</td>
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<td>Schwemmann*</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Denecke*</td>
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</tbody>
</table>

C: chairman of RAG and/or president of the third civil senate

V: vice-chairman of RAG

Name in italics: appointed to RG during Nazi period

*: was member of Nazi party in this year
Table 3 (continued)

Sources:


1943-1944: BA R 22/4024 and 4025

Note.

In order to achieve consistency, Kaul's data have been generally been followed where available (he provides no data before 1932 or for 1937 and 1943-44; supplementary data for 1930 and 1937 could not be located). In several instances his data are inconsistent with those found in the files of the *Reichsgericht* stored at the *Bundesarchiv*. Thus, for example, the "Übersicht über die Besetzung der Zivil- und Strafsenate sowie des Reichsarbeitsgerichts vom 1. 7. 1934 nach dem Stand vom 13. 10. 1934," which was attached as appendix 5 to a letter from Bumke, the president of the Supreme Court, to the minister of justice, dated 13 October 1934, indicates that Linz, although a member of the fifth civil senate, was the vice-chairman of RAG; several other judges who also served on other senates are similarly listed as members of RAG; several judges included by Kaul are not present on this list. See BA R 2/23926, fol. 62. The same document for 1939 includes Schrader as vice-chairman although he is missing from Kaul's list; the latter includes Burmeister although he is in turn missing from the former list. See BA R 2/23920. In one instance Kaul's listings have been deviated from: since he includes Martin Heidenhain as serving only one year at RAG (1934), whereas the aforementioned source for that year does not include him,
he has not been included in the tables in this chapter. The data for 1943-44 are based on the names of the judges indicated as having signed the opinions of the court preserved in BA.

With the possible exception of the court’s adjudication concerning Jews, no clear-cut correspondence is discernible between trends in the development of decisional law and the majoritization of the court by Nazis. This continuity of adjudication in the face of the transformation of the membership of the court reveals at least as much about the rigidity and/or malleability of judicial reasoning as it does about the judges’ personal backgrounds (see table 4) and subjective attitudes.
Table 4

Biographical Data on the Members of the Supreme Labor Court, 1927-1945

<table>
<thead>
<tr>
<th>Name</th>
<th>Born-died(^a)</th>
<th>Tenure at RG</th>
<th>Tenure at RAG</th>
<th>Party affiliation, etc.</th>
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<tbody>
<tr>
<td>Altstötter, Josef</td>
<td>1892-?</td>
<td>1935-42</td>
<td>1935-42(^b)</td>
<td>S.A., 17 April 1937 (Oberscharführer)</td>
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<td>S.S., 15 May 1937 (Obersturmführer)</td>
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<td>NSDAP, 1 May 1937 no.5823836</td>
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<tr>
<td>Bechmann, Wilhelm</td>
<td>1887-?</td>
<td>1938-45</td>
<td>1939-45</td>
<td>NSDAP, 1 May 1933 no. 2671349 (cell leader)</td>
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<tr>
<td>Besta, Paul</td>
<td>1883-?</td>
<td>1936-44</td>
<td>1936-44</td>
<td>NSDAP, 1 May 1933 no. 3021719</td>
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<tr>
<td>Blumberger, Paul</td>
<td>1879-?</td>
<td>1930-45</td>
<td>1945</td>
<td>NSDAP, 1 May 1937 no. 5823844 (block-leader)</td>
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<tr>
<td>Brandis, Bernhard</td>
<td>1875-?</td>
<td>1930-34</td>
<td>1931-34</td>
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<td>Brodführer, Friedrich</td>
<td>1878-?</td>
<td>1926-38</td>
<td>1931,1933-38</td>
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<tr>
<td>Name</td>
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<td>Tenure at RG</td>
<td>Tenure at RAG</td>
<td>Party affiliation, etc.</td>
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<td>Burmeister, Heinrich</td>
<td>1883-?</td>
<td>1935-45</td>
<td>1939</td>
<td>DNVP, 1919-20</td>
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<td>NSDAP, 1 January 1941 no. 8341987</td>
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<td>Citron, Curt</td>
<td>1878-?</td>
<td>1928-33</td>
<td>1928-31</td>
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<td>Czolbe, Felix</td>
<td>1863-?</td>
<td>1915-31 (?)</td>
<td>1927-31</td>
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<td>1884-1974</td>
<td>1939-45</td>
<td>1939-44</td>
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<td>NSDAP, 1 April 1941 no. 8778091</td>
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<td>1878-?</td>
<td>1930-33</td>
<td>1930(?)-33</td>
<td>SPD</td>
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<td>Hagemann, Rudolf</td>
<td>1876-?</td>
<td>1919-42&lt;sup&gt;d&lt;/sup&gt;</td>
<td>1932-42</td>
<td>DNVP, 1918-33</td>
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<td>Königsberger, Friedrich</td>
<td>1876-?</td>
<td>1927-35</td>
<td>1927-35</td>
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<td>Krug, Ludwig</td>
<td>1869-?</td>
<td>1922-35</td>
<td>1932-35</td>
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<td>Leopold, Hans</td>
<td>1886-?</td>
<td>1941-45</td>
<td>1945</td>
<td>NSDAP, 1 May 1933 no. 3534561 (block-leader)</td>
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<td>Name</td>
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<td>Tenure at RAG</td>
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<td>Lersch, Emil</td>
<td>1879-1963</td>
<td>1933-45</td>
<td>1934-45</td>
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<td>Bundesgerichtshof, 1950-52</td>
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<td>Linz, Karl</td>
<td>1868-?</td>
<td>1919-37</td>
<td>1927-31(?)c</td>
<td>Center party, until about 1923</td>
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<td>Loss, Richard</td>
<td>1872-?</td>
<td>1931-42</td>
<td>1932-38,1940-42</td>
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<td>1927-42</td>
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<td>Pick, Georg</td>
<td>1869-?</td>
<td>1927-19??</td>
<td>1927-28</td>
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<td>Rusch, Gerhard</td>
<td>1884-1936</td>
<td>1934-36</td>
<td>1934-36</td>
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<td>Schrader, Karl</td>
<td>1876-?</td>
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<td>1927-38, 1943-44</td>
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<td>DNVP, 1918-32</td>
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<td>NSDAP, April 1933 no. 3131721 (block-leader)</td>
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<td>1937-45</td>
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<td>Seibertz, Norbert</td>
<td>1889-?</td>
<td>1936-45</td>
<td>1938-44</td>
<td>Pan-German NSDAP, 1 August 1932, no. 1274152, (local group-leader)</td>
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<td>1861-?</td>
<td>1914-30</td>
<td>1927-30</td>
<td>Deutsche Volkspartei, 1920-22, NSDAP, 1 May 1933, no.2207630</td>
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<td>1882-?</td>
<td>1938-45</td>
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<td>1867-1942</td>
<td>1922-34</td>
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<td>1930-35</td>
<td>1931-35</td>
<td>Deutsche Volkspartei, Member of Reichstag, 31 May 1921-31 March 1930</td>
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</table>
Table 4 (continued)

According to D. Schaefer, "Das grosse Sterben im Reichsgericht," 35 DRZ 249-50 (1957), many Supreme Court judges were arrested in Leipzig by Soviet military authorities, some of them — including Blumberger and Burmeister — dying in prison.

Altötter had been appointed assistant judge at the Supreme Court on 1 June 1932. According to a statement under oath made by Altötter in connection with the Nuremberg war crimes proceedings against him, he served at RAG from 1936 to 1939. See Nuremberg document NG-693 (mimeograph on file at Harvard Law School library).

Retired and served as untenured judge (Beamter auf Widerruf) as of 1941.

Beamter auf Widerruf from 1 April 1942 to 31 July 1942.

Linz signed a RAG opinion in 1936; presumably he was substituting for another RAG judge.

Beamter auf Widerruf from 16 October 1939 to 31 May 1942.


It is possible that the Seibertz in question was named Gottfried, who was born in 1884 and joined the Nazi party on 1 May 1933; his party no. was 3530081. Table 4 (continued)
Sources: See table 3.

BA R 2/23925, 23926, 23927 (RFM).
BA R 43 I/1212, 1213; BA R 43 II/1511b (Reichskanzlei).
BA FB 4319 N to FB 4329 N (microfilm of personnel files of Supreme Court judges).
Berlin Document Center (letter of 19 December 1983 to author).
Bundesgerichtshof (letter of 16 January 1984 to author).
Bundesjustizministerium (telephonic communication to author in October 1983).
*Personalverzeichnis des hoheren Justizdienstes*, compiled by RJM
  (B., 1938), passim.
VI. Social Honor Courts

AOG devoted its lengthiest title (title 4, §§ 35-55) to defining and providing methods to deal with gross infractions of the social obligations grounded in the plant-community. Such violations of so-called social honor were placed under the jurisdiction of a new court system – the social honor courts. Honor courts, as such, were not an innovation of the Nazis. They had long existed for various professions and corporative estates.55 AOG defined the aforementioned transgressions as involving:

1. for the entrepreneur or plant-leader: the abuse of his position of power in connection with maliciously taking advantage of a Follower’s labor power or violating his honor; 2. for the Follower: a. endangering labor peace by maliciously inciting the Following; b. consciously arrogating to themselves the right to unauthorized interference in management of the plant; or c. on-going malicious disturbance of the community spirit; and 3. for both plant-leaders and Followers: the repeated frivolous submission of unfounded complaints to the trustee of labor or persistent contravention of the latter’s orders (§ 36 AOG). Penalties ranged from a warning to a fine of 10,000 marks. In addition, an entrepreneur or manager could be deprived of his qualification (Befähigung) to be a plant-leader,56 whereas an employee could be removed from his place of work (§ 38 AOG).57


56 An owner who was deprived of his position as plant-leader still retained economic control as entrepreneur. See ibid., § 38 n. 15 at p. 569. Disqualification as plant-leader did not lead to expropriation especially since the disqualified owner could appoint his deputy although he allegedly could not issue him binding orders; ibid. Cf. Heinz Rohde, Arbeitsrecht – Sozialrecht – Gemeinschaftsrecht (B., 1944), p. 134.

57 As Karl Korsch noted, this punishment affected the employee not only qua Follower but in his "entire earthly reality," leading to his relegation to the "corporate estate of unemployment." See Karl Korsch, Zur Neuordnung der deutschen Arbeitsverfassung, Ratekorrespondenz, no. 6, pp. 1-20 at 20 (1934), republished in Karl Korsch, Politische Texte, ed. Erich Gerlach and Jürgen Seifert (F., 1974), pp. 271-97.
Introduction

Although this catalog of infractions and penalties was initially perceived by emigre and anti-Nazi foreign observers as proof that the system of social honor courts functioned as a further instrument to oppress the German working class, opinion subsequently shifted toward viewing the system as "mere show," as terror directed against small businessmen providing "those workers who have swallowed, but not yet digested, Nazi doctrine with the temporary illusion that in the New Germany the economic power of the employer will be curbed for their benefit."  

The honor courts, which applied the rules of the general code of civil procedure (§ 40 AOG), consisted of one judicial civil servant chosen by the minister of justice and the minister of labor and two lay assessors – one plant-leader and one member of a plant-level confidence council (Vertrauensrat) (§§ 41-43 AOG). Charges of the violation of social honor were presented to and investigated by the trustee of labor (§ 43 AOG). As a disciplinary rather than a penal code, the social honor system did not impose a duty on members of the plant-community to bring charges concerning every violation or on the trustee of labor to file charges before the honor court. The chairman of the honor court could, on the basis of a preliminary inquiry, either reject the labor trustee's request to institute proceedings or impose a penalty including a warning, reprimand or fine of a maximum of 100 marks. Both the defendant and the trustee of

58 For a sample of the typically vague and semi-mystical accounts of honor and its violation, see Wilhelm Herschel, "Soziale Ehre und Ehrenkrankung," 4 DAR 11-13 (1936); idem, "Ehrenschutz im Arbeitsrecht," 12 DAR 21-23 (1944); Fritz Seiler, "Wesen und Schutz der sozialen Ehre der nationalsozialistischen Gesetzgebung unter besonderer Berücksichtigung des Gesetzes zur Ordnung der nationalen Arbeit" (Diss., Cologne, 1936); Karl Erbe, "Die soziale Ehre und die Verstöße gegen Sie [sic]" (Diss., Jena, 1936); Brauer, "Sinn und Bedeutung der sozialen Ehrengerechtsbarkeit," 2 ZdA/DR 567-69 (1935).


60 See, e.g., Leopold Franz [pseudonym for Franz Neumann], "Die Ordnung der nationalen Arbeit," 1 ZSozialismus 160-65 at 164 (1934).

61 Wunderlich, German Labor Courts, p. 177.


64 § 13 Dritte VO zur Durchführung des Gesetzes zur Ordnung der nationalen Arbeit (Bildung und Verfahren der Ehrengerichte), 28 March 1934. RGBl I, 255, provided for partial application of ZPO.

labor could move for a trial (§§ 44-46 AOG). The trustee of labor could appeal any decision handed down by the court, whereas the accused could appeal only if he had been fined more than 100 marks or had been removed from his place of employment or deprived of his status as plant-leader (§ 49 AOG). The appeals court (Reichsehrengerichtshof) consisted of two judges and three lay assessors – a plant-leader, a member of a confidence council and a person chosen by the Reich government (§ 50 AOG). The trial before this highest court was de novo (§ 51).

The overwhelming majority of social honor court cases involved defendants who were owners or managers. Most of these plant-leaders were charged with having abused their power in the sense of having verbally or physically abused their employees or of having underpaid or otherwise provided for their employees in a substandard manner. Virtually all the accused employers owned or managed relatively small businesses. The small number of trials of employees and the politically innocuous character of most of their transgressions indicate that employers and the State developed other, extra-judicial methods for dealing with political-economic opposition in the plants. The fact that the reported honor court cases involved only a single strike offers striking confirmation of this claim. Once World War II was under way, the courts fell into virtual desuetude.

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66 There were twenty-three social honor courts corresponding to the districts of the trustees of labor; see § 41 AOG and Hueck-Nipperdey-Dietz, Kommentar, § 41 n. 1 at pp. 592-93.

67 Mansfeld complained that the lower courts were not paying enough attention to the fact-patterns so that the appeals court was overturning many decisions on the basis of its review of the evidence rather than on points of law. See Mansfeld’s commentary on REG EV. Arb. II 8/35, 25:259-67 at 266-67, No. 5, 30 September 1935.

68 Based on the 153 cases reported in ARS. A disproportional number of cases involved agricultural employers. Cf. Horst Arndt, “Der Führer des Betriebes im sozialen Ehrenstrafrecht” (Diss., Freiburg, 1937); Harlow Heneman, “German Social Honor Courts,” 37 Michigan Law Review 725-44 at 734 (1939); Wunderlich, German Labor Courts, table 34 at p. 178; Sch., “Entwicklung der sozialen Ehrengerichtsbarkeit. I. Zahlenmässige Übersicht,” 47 SP cols. 43-46 (1938).


70 SEG Mitteldeutschland, EG Arb. I 36/35, 26:193-97, No. 6, 19 November 1935, involved a strike by female agricultural workers; the court characterized strikes as “unthinkable” in the Nazi State (p. 196).

71 See the complaint by Rohde, Arbeitsrecht, p. 130. A considerable number of published cases involved charges against the leaders of small plants relating to various forms of sexual harassment, abuse and exploitation; most of these were stylized under the rubric: Violations of Sexual Honor. The ever-sameness of the acts is of less interest than the judicial reactions they triggered. Thus in the case of a manager who expressed his interest in his secretary’s brassiere and imperiously demanded that she keep taking dictation while she warded him off, the appeals court reduced the penalty from removal from the
A Cautionary Note on writing Analytic History of a Supreme Court in a Code-Country

Historical analysis of the United States Supreme Court can for a number of obvious reasons not be taken as a model for the study of supreme courts in continental Europe. On a relatively superficial level, the difference between the two systems is expressed in the strong 'personalizing' orientation of American Supreme Court historiography. This scholarly tradition reflects what Max Weber called "the genuinely 'charismatic' character" of the judicial process in the United States where the significance of a precedent is a function of the personal authority of the concrete judge who created it. Although the members of the highest courts in Germany were not anonymous, their published opinions were. Not only were they unsigned, they included no dissents, thus making it almost impossible to ferret out conflicts, wings, coalitions and trends within the individual courts. The incorporation of lay assessors into the Supreme Labor Court strengthened the impersonal character of its decisions.

The impossibility of popular, journalistic or scholarly preoccupation with judicial personalities thus stymied the rise of an "eggs-for-break-plant to a fine of 1,000 marks because defendant had made the plant prosper and had not extended his contacts beneath the secretary's clothing. (REG EV. Arb II 8/36, 29:189-92, No. 4, 4 February 1937.) Mitigating economic circumstances also prevailed in the case of a manager who constantly directed his flatulence at female employees. (REG 1/34, 23:65-69, No. 1, 5 February 1935. This was the first decision of REG published in ARS. For the trial court decision, see SEG 1/34, 22:52-56, 15 September 1934.) The court also found mitigating circumstances in the case of a married owner of an inn who had been a member of the SA since 1931 and who had repeatedly tried to induce two employees to engage in sexual intercourse with him. The fact that the two employees, one of whom the court described as a "stately, good looking girl," said "du" to defendant and had exchanged "indecent expressions" with him, sufficed to devalue their morality in the eyes of the court. (REG EV. Arb II 16/35, 26:314-20, No. 5, 26 November 1935.) In a similar vein, a butcher, who had been sentenced to nine months in prison for having sexually used two fifteen-year-old female employees, was fined 1,500 marks in lieu of being deprived of his qualification as plant-leader on the grounds that the employees had not been sexually "untouched." (SEG E.V. Arb I 4/40, 41:134, No. 1, 5 November 1940. This was the last decision of the court reported in ARS.)

73 Opinions were signed but not in their published form. The names of the judges and lay assessors who decided individual RAG cases in 1943-1944 may be consulted in BA R 22/4024 and R/22 4025. For an interesting discussion of the problems of responsibility and leadership in the judicial context, see Willi Seidel, Führerprinzip in der Rechtspflege? (B., n.d. [1936]).
fast" school of analysis. But it is not the "charismatic" origins of precedent but rather the macro-juridical structure and function of the system of precedent that are most commonly adduced as requiring a different approach to the study of code and common law supreme courts. As a close observer of the German labor courts remarked:

Decisions cannot be judged merely by a study of the Federal Labor Court [RAG]. Unlike Anglo-Saxon countries, in Germany court decisions even of supreme courts did not create law and were not binding except in the particular case at issue. Nevertheless, the lower courts were largely influenced by precedent. Unity of decisions was preserved by the fact the Federal Labor Court was bound by decisions of any Senate of the Federal Supreme Court [RG] (not, however, by its own decisions) . . . .

Theoretically, supreme court decisions could be rejected by inferior courts . . . This freedom obliged courts to base opinions on solid reasons and prevented petrification of the law. The independence of lower courts made difficult uniform application of labor law and the creation of legal security, resulting in a multiplicity of actions. This was outweighed by the fact that every lower court helped in the creation of labor law. Frequent deviation from a Federal Labor Court decision, if convincingly argued, could bring to the attention of the Federal Labor Court the fact that its decision was considered erroneous by the lower courts.

In general, however, Federal Labor Court judgments were not disregarded by lower courts. On this view, then, an analysis of the decisions of the highest court in isolation from those of the lower courts would assume the risk of distorting the state of the law. Moreover, such an analysis would be incapable of reconstructing the aggregate judicial process by which judge-made law is generated in a code-country.

To these serious criticisms two kinds of mitigating objections may be directed. First, on an eminently practical level, the volume of litigation in the lower courts was not only enormous, but also virtually unreported. Thus between 1927 and 1940 more than three million suits were filed or pending in the trial courts (more than one million during the Nazi period) while more than 140,000 appeals were filed in the appellate

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74 The impossibility of studying judicial personalities is part and parcel of the macro-social, class structure-oriented analyses of the judicial system typical of German legal scholarship. See Ernst Fraenkel, Zur Soziologie der Klassenjustiz (B., 1927); Friedrich Dessauer, Recht, Richtertum und Ministernalburokratie (Mannheim, 1928); Otto Kahn-Freund, Das soziale Ideal des Reichsarbeitsgerichts (Mannheim, 1931); Wolfgang Däubler, "Das soziale Ideal des Bundesarbeitsgerichts," Streik und Aussperrung, ed. Michael Kittner (F., n.d. [1974]), pp. 411-522.
76 When data ceased to be published.
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courts (more than 50,000 under the Nazis). During this period the trial
courts handed down between 10,000 and 75,000 formal judgments annu­
ally while the appeals courts handed down between 1,000 and 9,000
annually. The fact that the vast majority of initial suits and even a
majority of appeals were resolved in some manner short of a full trial
and formal judgment indicates that the decided cases themselves may
offer a skewed picture of the legal issues presented to and resolved by
the courts. Even with regard to formal judgments, the most comprehe­
sive labor court reporter did not begin publishing trial court decisions
until 1933 and then literally only a few. Although various legal journals
and newspapers also reported lower court cases (usually in extracts),
the criteria used to select this minuscule number for publication are
unknown. A strong suspicion of unrepresentativeness remains.

The number of cases presented to and decided by the Supreme Labor
Court, on the other hand, is manageable; moreover, the court’s entire
decisional output is comprehensively reported. In terms of practicality
and practicability, then, the decisions of the lower courts are not ame­
nable to treatment according to the same canons of scholarly interpreta­
tion to which the decisions of the highest court can be subjected.

Second, on a methodological plane, the aforementioned critique of a
supreme court-oriented analysis is undercut by two important results of
a reading of all of RAG’s decisions during the Nazi period: a. the court
was not inundated with appeals from lower court decisions that repeat­

77 Calculated according to table 1 in ch. 2 above.
78 Ibid.
79 ARS began including trial court decisions in vol. 19 (vol. 16 contained a few such
decisions in cases arising under a crisis law late in Weimar). Before large numbers of
cases began reaching RAG, ARS did publish a relatively large number of LAG decisions,
but these diminished over time.
80 Between 1927 and 1940 ca. 8,000 appeals were filed with and ca. 4,000 formal judgments
handed down by RAG. See the source mentioned in n. 6 above. ARS published 3,921
decisions of RAG between 1927 and 1944 (1,902 during the Nazi period). Die
Rechtsprechung des Reichsarbeitsgerichts, ed. Hermann Meissinger, vol. 1 (Stuttgart,
1958), no pagination [p. 5], states that the court decided more than 4,000 cases of which
about 3,500 were reported in ARS. The latter figure may exclude decrees and orders
(Beschlüsse), thus accounting for the discrepancy with the aforementioned figure. The
archives of RAG at the Zentrale Staatsarchiv at Potsdam include the records of 4,576
proceedings. See Schriftenreihe des Deutschen Zentralarchivs, no. 1: „Übersicht über die
Bestände des Deutschen Zentralarchivs Potsdam“ (B. [GDR], n.d.), p. 84. On the fate of the
Bensheimer publishing company, the publisher of ARS, see Horst Göpinger, Die
Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus
(Villingen, 1963), p. 142.
81 It remains a desideratum of research to determine whether the records of the trial
courts have survived.
82 Lower court decisions are analyzed in connection with treatment of Jews, Communists
and other enemies of the regime. See Part IV below.
edly disregarded or contradicted its own prior decisions\textsuperscript{83}; and b. the court took great pains to underscore that it was upholding its precedents or to justify why it had decided to deviate from precedent. In light of the fact that in 1935 the Nazis enacted a statute expressly authorizing the Supreme Court to deviate from precedent pursuant to the transformation of legal views brought about Hitler's assumption of power,\textsuperscript{84} the attention that the court devoted to precedent considerably weakens the claim that precedents established by a German supreme court lacked sufficient authority to merit analysis outside the context of their influence on the lower courts.\textsuperscript{85}

\textsuperscript{83} It is possible that RAG overruled such lower court decisions in brief unreported decisions, but the unpublished decisions preserved in BA R 22/4024 and R 22/4025 do not confirm this speculation.


Part II

The Impact of the Nazi Reconceptualization of Capital-Labor Relations on the Central Doctrines of Labor Law

Chapter 3

The Plant-Community

The communitarian ideology fostered by the Nazis at a number of different levels of societal aggregation was as eclectic as and self-contradictory as might be expected of a many-layered mélange designed to reconcile the antagonistic interests of mutually hostile social classes. On the macro-social plane Nazi ideology sought to undermine the remnants of anti-capitalist consciousness in the German working class by replacing the notion of class struggle with the image of a Volk-community embracing employers and employees.1 Having been admitted to first-class citizenship within a purified and reconstituted Germanity, workers were offered the opportunity to participate as equals in an international war against the plutocracies.2

Although it may be granted that this aspect of Nazi ideology was “a perversion of the Marxist ideology, aimed at ensnaring the Marxist working class,” “pseudo-Marxist elements”3 could, virtually by definition, no longer play a part once attention was turned away from national and international relations and toward the direct confrontation between workers and capitalists at the workplace.4 In this sphere the Nazis resurrected an entire complex of images, symbols and terminology in imitation of pre-capitalist, in particular Germanic feudal, societies in order to simulate a transvaluation of the employment relationship. But at the same time Nazi ideology absorbed a much more recently articulated and practiced ideology of social control. This modern program, in turn, comprehended two related but distinct variants: an older traditional, social-conservative, paternalistic regime of factory authori-

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Reconceptualization

Reconceptualization, on the one hand, and a post-World War I product of economic rationalization, scientific management, industrial psychology, personnel relations and welfare capitalism, on the other.

In this chapter the German forerunners of the Nazi plant-community will be examined briefly; then the ideology of the Nazi plant-community and the role of the court will be presented in greater detail.

I. The Plant-Community and Master-Servant Law

Before the plant-community can be analyzed, however, it is necessary to scrutinize the logical relation between the plant-community and the German counterpart to the Anglo-American master-servant relationship (personenrechtliches Arbeitsverhältnis), which, for example, both Blackstone and Kent classified under the law of persons or even domestic relations. It has been stated that the personal – in contradistinction to the merely contractual – labor relationship is grounded in the plant-community as the point of departure of all labor law and as the basic unit of all economic activity. Yet the existence of a personal labor relationship does not logically entail an underlying plant-community. The very fact that slavery was subsumed (by Blackstone for example) under the master and servant relation indicates that the latter is compatible with economic units and a macro-economic system which the Nazis would not have wished to invoke as an exemplar of community.

The difficulty in trying to conceptualize the relation between plant-community and labor relationship lies in the circumstance that these two notions differ fundamentally in the degree to which they capture significant elements of social reality. As shown in chapter 4, the doctrine

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6 It was commonplace for German labor law scholars to claim that the Germanic roots of German labor law were more closely related to the English law of master and servant than to the Roman law roots of modern labor law. See, e.g., Erich Molitor, *Der Arbeitsvertrag und der Entwurf eines Allgemeinen Arbeitsvertrags-Gesetzes* (Mannheim, 1929), p. 7. But see H. Dankwardt, "Der Arbeitsvertrag," 14 JDhrudP 228-83 (1875).


8 *Commentaries on American Law*, II,*248-53.

of the personal labor relationship does directly reveal (or transparently
deny) the peculiar composite of individual contractual autonomy and
personal and systemic-impersonal heteronomy to which the wage work­
er is subject. The plant-community, however, is merely the corporativist-
fascist ancestor of such modern managerial ideologies as: 'We're all in
the same boat,' or 'Capital accumulation is labor's best friend,' or 'A
large firm is more like a football team than two opposed parts.' This is
not to say that the acceptance of such views by large numbers of work­
ers, unions or whole national labor movements may not decisively mould
the resolution of societal conflicts, particularly during periods of eco­
nomic crisis and/or depression. But the Nazis meant much more than a
makeshift community of adversity or a technologically mandated shot­
gun marriage. They imputed virtually metaphysical properties to the
plant-community which were alleged to be organically constitutive of
Nazi society as a whole.10

The highest courts in Weimar (and in the Federal Republic of Ger­
many11) accepted, developed and based some of their decisions on ver­
sions of the plant-community. What is of interest here is not so much
that their vision of the substance of that community was not identical
with the Nazi view, but rather that the plant-community itself did not
occupy the same dominant position, capable of shaping virtually all
other relations. In this sense, then, the substance of the personal labor
relationship was not univocally tied to that of the plant-community in
the pre-Nazi and post-Nazi period. For the Nazis, however, the plant-
community constituted the absolute bedrock of labor relations in more
or less the same way as scarcity does within orthodox economics. It
transformed the content of the personal labor relationship, which did
not stand in a similarly active relation to it.

To summarize, then, the character of the relation between the plant-
community and the personal labor relationship: 1. since the latter exists
in all capitalist societies whereas the former represents an ideological
creation of only some societies, the former cannot be said logically to
involve the latter; 2. even in those societies in which the two co-exist, the
personal labor relationship can both dwarf in importance and be rela­
tively autonomous of the plant-community in terms of decisional law;
and 3. in Nazi labor law the paramount ideological importance of the

10 See, e.g., Roswitha Schmidt, "Die Betriebsgemeinschaft" (Diss., Munich, 1936).
11 See Olaf Radke, "Die Nachwirkungen des 'Gesetzes zur Ordnung der nationalen
Arbeit,'" 13 AuR 302-308 at 306 (1965).
plant-community, anchored in statute, 'logically' antecedes the personal labor relationship in the following sense: it was only under the influence (or pressure) of the doctrine of the plant-community, as developed in juristic literature, that RAG eventually incorporated the personal labor relationship into its formerly contractualist conception of the labor relationship. Under this set of historically contingent circumstances it is appropriate to treat the plant-community before the personal labor relationship.

II. The Plant-Community before the Nazis

A. Political Ideology

The idea of the plant-community has been traced back a century before Nazism to the German romantics, Hegel's doctrine of corporations and Catholic social doctrine. In spite of the similarities relevant to a study of the history of ideas, the socio-economic and political differences between, for example, Hegel's corporations and an industrial factory are too significant to be overlooked. Thus, although for Hegel the corporations served important functions for their members by protecting their welfare and honor, and by acting as a "second family" in a way in which the "more remote bourgeois society" could not, they constituted voluntary associations of independent farmers, tradesmen, etc. As such, the component elements of the macro-political corporativist movement differed fundamentally from those "modern autocratic associations" (Herrschaftsverbände) which, by the time Otto Gierke commented on them, had become the merely formally voluntary places of employment of millions of dependent workers.

For the purposes of capturing the ideological texture of the Nazi plant-community, Ferdinand Tönnies is a more apposite point of departure. His *Gemeinschaft und Gesellschaft* first appeared in 1887; its eighth and last edition was issued under Nazi rule in 1935, the year before the author's death. "Community" was characterized by a variety

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Reconceptualization

of attributes: affirmative; real and organic life; intimate, secret, exclusive living together; complete unity of human wills; blood; locality; neighborhood; family; consensus; language; promise; village; agriculture; Volk; handicraft; religion.16 “Society,” in addition to representing the easily imaginable polar opposites of everything for which community stood, embraced in Tönnies’ view virtually all the ‘defects’ of bourgeois-capitalist society that Hegel, Maine and Marx had analyzed.17

The more farsighted social thinkers in societies that have experienced “the great transformation”18 have recognized that one of the paramount goals of any industrial society must be the sublation of what is (or was) positive in community within society purged of its self-destructive elements.19 It was this insight that towards the end of the nineteenth and beginning of the twentieth century led to the rise, at the level of the single firm or plant, of efforts in German industrial circles to mitigate the most destabilizing consequences of capitalist industrialization. These micro-economic material and spiritual welfare programs first appeared in a social-conservative, paternalistic guise and later in a more sophisticated version under the auspices of scientific management.

Krupp embodied the former of these two branches. Richard Ehrenberg, an economist and business historian, articulated the theoretical justification for this variant of industrial welfare. Criticizing those—such as the Kathedersozialisten—who reduced the labor relationship to contract, conflict and struggle between labor and capital, and domination, for having been blind to the fact that the labor relationship was above all a labor community, Ehrenberg was nevertheless acutely aware that all economic life since the rise of commodity exchange had rested on the interaction of exchange-oriented and communitarian principles of organization. The then current advance of socialism he understood as a quasi-natural reaction to the excrescences of the acquisitive society. He therefore rebuked liberal contractarians for not seeing that the

16 Cited according to the reprint of the final edition (Darmstadt, 1963), pp. 8-39.
17 See ibid., p. 61; cf. ibid., pp. 40-83.
18 See Karl Polanyi, The Great Transformation (Boston, 1971 [1944]).
reduction of the labor relationship to market confrontation between buyer and seller would make the world ripe for socialism.20

In Ehrenberg's description of the labor community it is difficult to know where the objective-inevitable ends and the subjective-discretionary begins. At times the former becomes so prominent that industrial welfare programs seem to serve more or less the same function as an association for the creation of the next solar eclipse. At other times, particularly when Ehrenberg presents concrete examples of the labor community, he cannot avoid invoking the image of artificiality. Thus he distinguishes between the objective and subjective interest of a business; the former is the need for maintenance and development in every enterprise, whereas the latter represents the aspiration of those active in the enterprise to work for its preservation and development. He notes that the two are most closely bound up with each other in the person of the entrepreneur. But when he seeks to transcend this banality, which amounts to no more than that every successful capitalist must be the character mask of his capital,21 by discovering some objective basis for an equivalent link between employees and enterprise, Ehrenberg is reduced to narrating incidents from the life of Werner Siemens, who treated his employees "as if they were" his equals so that they would consider themselves permanently attached to the firm, to which they would then refer as "we."22

The nature of this kind of equality is revealed in more detail when Ehrenberg recoils in horror at the thought that a statute or contractual provision could attempt to establish an equality of status between an entrepreneur and his employee.23 More explicit still is the characterization of Krupp's industrial welfare program as "monarchically organized."24

After World War I the plant-community found increasingly powerful sponsorship in the German scientific management movement. The similarities between the latter and its American counterpart as well as the differences between it and the social-conservative welfare movement are of less interest here than the overriding fear of socialism that united German employers much more immediately than was the case in the

21 See Karl Marx, Das Kapital, 1 (1st ed.; H., 1867 [reprint]), xi.
22 Ehrenberg, "Das Arbeitsverhältnis," pp. 192-93.
23 Ibid., pp. 177-78.
24 Ibid., pp. 201-202.
United States. The revolutionary overthrow of the old regime, the ascen-
dancy of the SPD, the emergence of a German bolshevik party, and the
creation of the Weimar system with its statutorily mandated institution-
alization of worker participation in micro- and macro-economic organi-
ization and its openness to socialization, all contributed to underm-
iming the authority of capital on the macro-economic level and manage-
ment on the micro-economic level.

In the course of the 1920s two wings of the industrial communitarian
movement evolved. One direction stressed the idea of the works-commu-
nity within the framework of individual plants and recognition of the
trade unions; the other grouping aspired to a macro-social corporativist
synthesis of the works-communities in connection with an unambiguous
rejection of the trade union movement.26 Whereas the Deutsches Insti-
tut für technische Arbeitsschulung (DINTA), an organ of scientific
management, embodied the first wing, an organization led by Paul Bang,
a member of parliament from the German National party between 1928
and 1933, sought to galvanize support for the second.27

For Bang it was necessary that the entrepreneur once again become
leader of his plant and of his workers – also beyond the scope of the
interests of the plant: “The worker has a right to this leadership.”28 The
rupture in 1929 between Bang’s wing and the representatives of large
capital in connection with the acceptance of the Dawes Plan meant that
the plant-community movement lacked a unifying political world view.29
Although the corporativist orientation of Bang’s group proved irrecon-
cilable with the interests of large capital, which particularly during the
depression-crisis after 1929 favored a shift from regional/ national col-

25 See Arthur Rosenberg, Entstehung der Weimarer Republik (F., 1961); Geschichte der
Weimarer Republik (F., 1961); David Abraham, The Collapse of the Weimar Republic
26 See Theodor Schmitz, “Werksgemeinschaft und Gewerkschaften” (Diss., Freiburg,
pp. 123-27.
27 On Bang, see the entry in 1 Neue Deutsche Biographie ([West] B., 1953). Bang, who was
a Staatssekretär in the ministry of economics at the outset of Hitler’s regime, initiated the
first anti-Jewish legislation in March 1933. See Raul Hilberg, The Destruction of the
European Jews (Chicago, 1967 [1961]), n. 5 at pp. 19-20; Uwe Adam, Judenpolitik im
Dritten Reich (Düsseldorf, 1979 [1972]), pp. 44-45.
28 Paul Bang, Deutsche Wirtschaftsziele (2nd ed.; Langensalza, 1926) p. 171. Cf. the
journal Nationalwirtschaft. Blätter für organisichen Wirtschaftsaufbau. Associated with
Bang were the Bund für Nationalwirtschaft und Werksgemeinschaft and the Gesellschaft
29 See Schmitz, “Werksgemeinschaft,” pp. 76-79; Gerhard Albrecht, “Arbeitsgemein-
schaft, Betriebsgemeinschaft und Werksgemeinschaft,” 126 JfNuS 530-62 (1926);
Gerhardt, Deutsche Sozialpolitik, p. 66.
lective bargaining to plant-level agreements, the possibility of creating "a modern patriarchalism" inspired both wings. Within the new constellation of societal forces created after 1918 the communitarian movement represented an approach that could be adopted by capitalists, who were no longer "master" of their own plants, to retain their positions as "leader." Indeed, the plant-community was regarded as having a good chance of succeeding within the limits set by the Plant Council Statute – provided that the entrepreneur was by nature a social leader and that his employees were not "communistically infected."

This latter aspect assumed general significance in connection with efforts to transcend the level of the merely rational and to create feelings of attachment and obligation that emanated from other strata of the soul. For Marxism, as a substitute for a religious faith, could not be demonstrated away by logic, but only experienced away by another, coherent world view that would grip and re-orient workers. In language that anticipated virtually the entire gamut of Nazi themes, a participant in a symposium on The Social Problems of the Plant (1925) apparently believed that he had discovered the kinds of appeals that would resonate in the souls of workers. After having pointed to various feelings of community that would unite the chairman of the board and unskilled labor (such as feelings of humanity, consciousness of Volk-community, communality of religion, locality, prejudices, cooperation, etc.) as potentially of equal value, he declared that the chairman of the board and the unskilled laborer were also precisely that – chairman of the board and unskilled laborer. The business of the one was to give orders and that of the other to obey.

Regardless of whether this apology for the old regime was too crude and transparent to serve its supposed propagandistic purposes, other promoters of the movement were content to rest their case on much
more modest grounds. For many the plant, which “as the life source of
the individual, rebels against everything unorganic, unnatural of an
economic revolution,” became a kind of “emergency community” to
which employer and employees could cling in chaotic times.37 In a relat­
ed vein, the plant-community could generate the feelings of connected­
ness that could overcome the senselessness of the division of labor,
which together with the feeling of being exploited, had made Marxism
the religion of millions.38

B. Statutory Law

The evolution of the notion of a plant-community under the Nazis
would be incomprehensible if its statutory basis and adjudicatory appli­
cation in Weimar were neglected.39 The Weimar constitution itself pro­
vided for the establishment of plant councils (art. 165). In them employ­
ees could attend to their social and economic interests; but employees,
now that they were endowed with equal rights, were bound to regulate
their wages and working conditions in association with employers. This
statutory obligation of concerted action was not unique. During World
War I Kaiser Wilhelm II was signatory to a law requiring that war-relat­
ated plants with more than fifty employees establish worker committees;
they were subject to a duty to promote harmony (gutes Einvernehmen)
among the workers and between the workers and the employer.40

The communitarian undercurrent in the Plant Council Statute itself
was more pronounced still.41 In its first section it assigned a two-fold
purpose to the plant councils: representation of the common economic
interests of the employees vis-a-vis the employer and “support of the
employer in the fulfillment of the purposes of the plant.” Chief among
the plant council’s tasks (§ 66 BRG) was to support management with its

37 Hermann Meissinger, "Die Betriebsgemeinschaft," Die sozialen Probleme des
Betriebes, pp. 245-53 at 247, 251.
38 Heinz Pothoff, "Die sozialen Probleme des Betriebes," Die sozialen Probleme des
Betriebes, pp. 9-16 at 9, 11. Cf. idem, "Die Rechtsgrundlage der Betriebsgemeinschaft," 11
Arbeitsrecht 713-20 (1924). For a similar view, see Hugo Sinzheimer, "Das Rätesystem," in
Hugo Sinzheimer, Arbeitsrecht und Rechtssozioologie, ed. Otto Kahn-Freund and T. Ramm,
I (F., 1976), 325-50 at 346-47 (first published as Zwei Vorträge zur Einführung in den
Rätegedanken [F., 1919]).
39 This oversight mars Mason, "Entstehung."
40 §§ 10-11 G. über den vaterländischen Hilfsdienst, 5 December 1916, RGBl p. 1333. For a
still more remote precursor, see the amendments to the § 134 GewO: Gesetz, betreffend
Abänderung der Gewerbeordnung, 1 June 1891, RGBl p. 261.
41 BRG, 4 February 1920, RGBl p. 147.
advice in order to provide for as high a level as possible of plant output to be produced with the greatest possible economization. In language that virtually reproduced the aforementioned wartime act, § 66 para. 6 required the plant council to espouse concord between employees and employer.

Even apart from the fact that those elements of the council movement that constitutionally guaranteed the working class participation in macro-economic planning and socialization remained a dead letter, the language of the statute discloses the extent to which the plant councils as institutionalized represented a "distorted caricature." As a leading labor lawyer of the Christian trade unions, who was to play his part in the development of labor law scholarship under the Nazis, formulated it, the statute originated in part as a "diversionary maneuver" designed as a tactic to create conditions under which the revolutionary idea of soviets could sink into oblivion.

Given the socialist orientation of significant segments of the German labor movement and the principled openness of the constitution to socialization, it is manifest that the cooperation between labor and capital at the plant level mandated by BRG laid the basis for a self-contradictory political movement. Nowhere is this ambivalence more vividly on display than in the work of Hugo Sinzheimer, who was the author of art. 165, one of the founders of the new discipline of labor law during Weimar and a leading spokesman of the trade unions and the Majority SPD. Although responsible for the incorporation of certain Marxist insights into German labor law literature, he also took the ambiguity of the constitution and BRG very seriously. Thus in the course of the debates in the Constitutional National Assembly in 1919, Sinzheimer spoke of an antagonism and a community between labor and capital; the latter he saw grounded in the interest which employers and employees had in production. In his textbook on labor law, Sinzheimer noted that a community or joint relation was present where the performance of...
several persons was united to fulfill a community or joint purpose; both parties shared in and enjoyed the benefit of such a purpose. The result was a community of assets. But, Sinzheimer continued, such was not the case in the labor relationship. Here the performances were not united but executed for the opposite party. Consequently, the labor was due the employer and the wage the employee.\textsuperscript{46}

Yet Sinzheimer also stated that art. 165 created a community between labor and property such that labor ceased to find its representation only in property. By virtue of art. 165 labor and property were joined in a "new organic unity, which is independent of the will of the participants."\textsuperscript{47} Sinzheimer excluded political labor conflict from his systematic analysis because labor conflict was a means of producing the will to unity in the community between property and labor.\textsuperscript{48} On the other hand, he emphasized that the basis for the legal conjoining (\textit{Verbundenheit}) in the plant was the subjugation of the personal and objective elements under the dominion inherent in property, which in turn created an organization characterized by domination (\textit{Herrschaftsverband}).\textsuperscript{49}

The theoretical origins of the self-contradictory structure of Sinzheimer's reformist views are not at issue here.\textsuperscript{50} Rather, the purpose of this brief review is merely to underscore how widespread was the conviction that a plant-community existed.\textsuperscript{51}

\textbf{C. Decisional Law}

The final and, in the present context, central aspect of the evolution of the notion of the plant-community before 1933 is the treatment accorded it by the courts. Before RAG was created in 1927, the Supreme Court handed down two decisions that were to lay the groundwork for further adjudication.

In the first case, decided in 1923, plaintiff-employer was struck in 1920 by some of its employees; the non-striking employees, some of whom were defendants in the case, demanded their wages because they had

\textsuperscript{46} Hugo Sinzheimer, \textit{Grundzüge des Arbeitsrechts} (2nd ed.; Jena, 1927 [1921]), p. 167.
\textsuperscript{47} Ibid., pp. 208-209.
\textsuperscript{48} Ibid., p. 212 n. 2.
\textsuperscript{49} Ibid., pp. 218-19.
offered their services, which plaintiff refused to accept because the
strikers had closed the power plant leading to the closing of streetcar
operations. Plaintiff sought a declaratory judgment that defendants
were not entitled to their wages for the duration of the strike. The lower
courts held for defendants pursuant to § 615 BGB, which provided that
an employee was entitled to his wages, without having to perform subse-

The Supreme Court held that the provisions of BGB did not constitute
an appropriate point of departure for coming to a satisfactory resolu-
tion of the contest. For whereas BGB was written from the individualis-
tic point of view of its time, the acceptance which the notion of the social
labor-community and plant-community had found in the meantime
meant that one was no longer dealing with the relationship of an indi-
vidual worker with the employer, but rather with an arrangement
between two societal groups – entrepreneurs (Unternehmertum) and
workers (Arbeiterschaft). No longer was the output of the plant solely a
product of the entrepreneur with his capital and tools; no longer was the
employee a mere tool of the entrepreneur, but rather “a living member of
the labor-community.” As a result, where the labor-community failed to
operate for reasons not originating in the entrepreneur, the conse-
quences also no longer affected him alone. Where the workers, by strik-
ing, caused the revenues to cease being generated, it was unreasonable
to expect the entrepreneur to provide for wages from other means.
Although the court stressed that the case did not turn on making the
non-strikers liable for the actions of their striking “comrades,” the court
in effect acknowledged that it was applying the notion of the plant-com-
munity in order to make it impossible for employees to use the tactic of
assigning a relatively small number of key workers the task of striking
so that the remaining workers could support them with their wages. In
essence the court was relieving employers of the need to lock workers
out by declaring that the workers had locked themselves out. (RGZ
106:272-77, III 93/22, No. 74, 6 February 1923.)

Three years later, in connection with a plant closing, the Supreme
Court held that within the meaning of the Plant Council Statute a plant
was not the business enterprise in the external sense of the totality of
machines, etc., operating, but “rather a living organism within which
entrepreneur and workers close ranks to form a production-community
and in common aim at the same goal” – namely, that specified in § 66
para. 1 regarding output and economization. (RGZ 113:87-92, III 428/25, No. 19, 16 February 1926.)

Soon after its formation RAG adopted the view of the Supreme Court. Now that the worker had become an "organic member of the plant," the extension of his rights corresponded to an extension of his obligations to include a certain responsibility for the plant. The fact that the worker had no direct share in the output or profit did not in principle affect his responsibility, but merely limited the sphere of dangers or risks to the plant for which he bore partial responsibility. (RAG 72/28, 3:116-25, No. 35, 20 June 1928.)

RAG also definitively interpreted § 1 BRG to mean that the two tasks assigned to the plant council - representation of the interests of the employees and support of the employer in fulfilling plant purposes - were juxtaposed as equal in value; the chairman of the council could not give preference to the employees, but was constrained to take into consideration the interests of the whole plant. (RAG 635/28, 6:335-42, No. 82, 29 May 1929.)

Judicial articulation of the legal import of the plant-community was subjected to intense criticism by contemporaries. Franz Neumann, for example, warned against adopting a romantic notion of community in the tradition of Tönnies. Instead, he sought to analyze the substance of this community in terms of the dependence of the employee on the means of production owned by the employer. Neumann pointed to three functions performed by property: 1. a capital function (possession of the means of production); 2. an administrative function (management of the means of production including human beings); and 3. the use and usufruct of the means of production. BRG, however, afforded employees participatory rights only with regard to the administration of the plant and here only in a limited fashion in relation to human beings. Moreover, the workers were linked to the employer in a "compulsory community" under the employer's command. Given the exclusion of employees from any entitlements to participation in property in its first and third functions, the plant-community constituted for them only a community of losses but not of profits.

52 In this case the recognition of a plant-community favored plaintiff-employee.
53 RAG was formed from the third civil senate of the Reichsgericht, which had decided the two aforementioned cases.
54 See Neumann, Bedeutung, pp. 31-32. Cf. his even sharper criticism in Behemoth, p. 420.
Towards the end of the Weimar Republic, Otto Kahn-Freund, himself a trial court judge in a labor court in Berlin, published two global and systematic critiques of the adjudication of RAG in which he devoted considerable attention to the plant-community. For him, once it became clear that plant councils were not associated with any micro- or macro-economic tendencies toward socialization, the plant, as an impartial third party standing above and uniting employer and employees, became a fiction with a reified purpose.65

By the time the Nazis came to power, statute and common law, scholarship, industrial welfare practice and perhaps reformist trade union practice as well 66 could all look back on a solid tradition of acceptance (and in part of active involvement in the furtherance) of the existence of a plant-community. It remains, then, to be seen how the Nazis adopted the plant-community for their own purposes.

III. The Plant-Community under the Nazis

Crucial to an understanding of the evolution of the plant-community under the aegis of the Nazis is the strict observation of the distinction between its ideological, propagandizing and mobilizing role on the one hand and the functions that were assigned to the individual plants within the framework of a national economic policy that shifted its orientation, in particular under the pressure generated by the transformation of the labor market, from the individual plants to more centralized planning agencies.

65 Otto Kahn-Freund, "Der Funktionswandel des Arbeitsrechts." 67 AfSwSp 146-74 (1932); cited here according to republication in Arbeitsrecht und Politik, ed. Thilo Ramm (Neuwied, 1966) pp. 211-46 at 239-42. Kahn-Freund argued that with the rejection of legal formalism and natural law the courts were compelled to make use of fictitious, reified purposes in order to be able to operate on the basis of general concepts of value and ethical ideas. Since the judiciary in a bourgeois Rechtstaat could not resolutely play off one social interest against another, it had to protect certain fictitious objective principles instead. The court's need to blind itself to the tensions of social classes stood, of course, in contradiction to the modified equilibrium of social classes that constituted the basis of the stand-off of Weimar collectivism. Ibid., pp. 224-26, 228-32, 241-42. Cf. Kahn-Freund, Das soziale Ideal des Reichsarbeitsgerichts (Mannheim, 1931), pp. 8-48. Kahn-Freund argued that although the notion of a plant-community was in principle antagonistic to working-class interests, it was concretely used by RAG to favor employees in connection with the employer's welfare duty. But see the undocumented opposing view advanced by Neumann, Behemoth, p. 421.

66 Clemens Nörpel, a trade union jurist, commented in his review of Kahn-Freund's book that it was unfair to criticize RAG for developing a line of precedent that was in fact an accurate reflection of the peaceful practice of the trade unions. Clemens Nörpel, "Ein Sozialideal des Reichsarbeitsgerichts," 8 Die Arbeit 561-66 (1931).
A. The National Labor Regulation Law

The National Labor Regulation Law (AOG), which was enacted one year after Hitler’s assumption of power,\(^57\) authoritatively signaled that collective bargaining would not be resumed.\(^58\) Once the trade unions had been destroyed and the employers’ organizations had been formally merged into the German Labor Front (DAF)\(^59\), the virtually untrammeled authority of the individual capitalist was not so much restored as created for the first time under developed capitalist relations.\(^60\)

The plant-community occupies a prominent place in several provisions of AOG.\(^61\) § 1 provides that the entrepreneur as plant-leader and the salaried and wage workers as the Following (\textit{Gefolgschaft})\(^62\) shall work in the plant in concert to promote the goals of the plant and for the commonweal of \textit{Volk} and State. § 2 vests complete decision-making authority in the plant-leader vis-a-vis the Following in all plant affairs to the extent that they are regulated by AOG. § 2 also requires the plant-leader to provide for the welfare of the Following, which, in turn, owes him a duty of loyalty, which is rooted in the plant-community. § 6 stipulates that the confidence council (\textit{Vertrauensrat}), which § 5 creates as employee advisory boards in all plants with more than twenty employ-


\(^58\) § 69 para. 2 AOG abrogated § 152 GewO (21 June 1869), which had eliminated all prohibitions on and punishment for agreements and organizing for achieving more favorable working conditions, especially by work stoppages or discharges.

\(^59\) VO des Führers und Reichskanzlers über die Deutsche Arbeitsfront, 24 October 1934, \textit{2 DAR} 348 (1934).


\(^61\) Pace Neumann, "Ordnung," p. 164, it is not \textit{per se} senseless to analyze the ideology of this law.

\(^62\) This term, which could also be translated as "vassals" or "retainers," was a conscious imitation of feudal terminology. Cf. Robert Koehl, "Feudal Aspects of National Socialism," \textit{54 American Political Science Review} 921-33 (1960).
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ees, has the duty to intensify mutual confidence within the plant-community. Finally, the sections establishing a system of social honor courts (especially §§ 35-36) impose on all members of the plant-community responsibility for the conscientious fulfillment of all duties devolving on them within this community. Gross violations of these social duties are to be prosecuted before these courts. (See ch. II § VI above.) In order to evaluate the intentions that motivated this restructuring of the legal framework of capital-labor relations, it is necessary to examine the Nazi view of the plant-community before 1933.

B. The Nazi View of the Plant-Community before 1933

Although the Supreme Court was praised by jurists after 1933 for its recognition of the legal role of the plant-community during Weimar,63 the Nazi party itself was of course suffering from no illusions concerning the presence of class struggle as an organizing principle of Weimar society. Indeed, the Nazi party's pseudo-struggle against classes and class struggle among Germans constituted a significant element of its political program.64 What is noteworthy, however, is the fact that after the Nazi takeover writers conceded, by implication, that the judicial doctrine of the plant-community could never have possibly reflected social reality adequately during Weimar; consequently, that doctrine must have functioned to impose on capital-labor relations a judicially sanctioned structure that served goals other than those appearing on the face of the decisions.65

Thus, for example, Werner Mansfeld, under whose aegis AOG was drafted and enacted,66 in underlining the fundamental differences between the new confidence councils and the old plant councils, noted that the latter, even according to the conception of BRG, were designed to be the antagonist of the employer and in practice often became the extended arm of the unions as organizations of class struggle. In this way, the plant councils became the advocates of the employees' interests only towards the goal of establishing formal economic democracy.67 Johannes Denecke, an appellate court judge who later served on RAG,

64 See Neumann, Behemoth, pp. 186-92.
67 Mansfeld and Pohl, Kommentar, p. 22.
declared that if BRG was intended to create equality of status between employer and employees, then this was a dream. Brimming with Schadenfreude, Denecke asserted that the clearest demonstration of the fact that the trade unions had been lacking in the communitarian spirit based on ties of natural necessity was their failure to resist their takeover by DAF.

But perhaps the most systematic discussion of the reality-content of the plant-community during Weimar from a legal perspective took place in the context of an uncharacteristically straightforward attempt to confront the problems bequeathed the Nazis "at the end of the late-capitalist epoch." Erich Fechner traced the root problem to the opposition between the plant and the enterprise as economic entities, on the one hand, and the plant-community as a new social form on the other. Since the former were foreign to, but also necessarily the given basis of, the latter, a tension arose between reality and the demands of the statute. Fechner then listed a number of difficulties standing in the way of the realization of a plant-community in a modern plant: 1. the plant as a rational means for creating profit was not coordinated with any community; 2. the position of the individual employee within the plant was also not a communitarian one; 3. originally there was also no "common pursuit of the same goal": whereas the entrepreneur endlessly strove for profit, the worker merely sought a livelihood; 4. although the individual worker became increasingly fungible as the division of labor was refined, precisely this unskilled laborer was supposed to feel like an "indispensable link in the whole"; 5. the increasing objectification of the labor process and the pace of modern production deprived plant relationships of the warmth and intimacy that were peculiar to emotional communities such as the family; and 6. membership in a plant was normally limited in time and bore a secular character, thus lacking the timeless, eternal significance on which the most profound and enduring communities were founded.
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Fechner perceived that creation of a plant-community presupposed the elimination of the technological and organizational basis of alienation among employees in large technical works. Given the structure of technological progress in Nazi Germany and Fechner's view of the interfusion of technology and socio-economic relations, it comes as no surprise that he was sceptical about the possibilities of stemming the dehumanization of work. Whereas those authors who sought to treat the issues of the distribution of income and power frontally displayed none of Fechner's realism, Fechner himself tried to escape from his dilemma by seeking refuge in militarily romanticized imagery. Just as front combat, by directly threatening man's existence, tearing apart all veils and smashing all ideologies, forced man to reflect on the foundation of his existence and thus to rediscover the community, so AOG sought to transfer this kind of experience from the sphere of the uncommon into everyday life. Although World War II transferred front combat into everyday life, this may not have been the model envisaged by Fechner.

C. The Plant-Community as Ideology

Although it was admitted that antagonistic interests still obtained between entrepreneurs and employees, their precise nature and ramifications were not explicated. Instead, the community of interests was evoked in a hortatory manner without any explanation as to why the motives and consequences of entrepreneurial decisions and actions should have changed since Weimar – or tautology was invoked. Thus, for example, the head of the DAF office in fascist Italy, in contrasting the conception of the plant there with that in Nazi Germany, characterized the community among all the productively active (Schaffenden) as the "necessary consequence of the plant-community which necessarily exists between both sides." Whereas the Italian fascists affirmed the

74 Fechner, Führertum, pp. 19-20.
75 Ibid., p. 16.
76 Heinz Rohde, Arbeitsrecht-Sozialrecht – Gemeinschaftsrecht (B., 1944), pp. 90-91, adduced the SA as exemplary.
77 Mansfeld and Pohl, Kommentar, p. 22; Hueck, Arbeitsrecht, pp. 31-32.
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plant-community because they considered it necessary and useful, the Nazis affirmed it because all the productively active had to live and work together even if they did not want to; as a result, the German plant-community was "ultimately a fact that exists independently of our will and is grasped emotionally."79 This image of the plant-community as an irrational entity to which mental access could be gained only by a quasi-mystical experience will be recurred to below.80

More decisive than apodictic statements on behalf of the new community of interests between labor and capital81 were efforts to demonstrate that, in spite of the virtually dictatorial powers that AOG granted the plant-leader vis-a-vis his Followers, the statute was "anything but a return to the obsolete standpoint of the 'master-in-one's-own-house.'" The new Nazi plant-leader did not wish "blind obedience," but rather to convince and persuade on the basis of his "inner authority."82 The reported decisions of the honor courts and Mansfeld's running commentary on them indicate that at least some segment of the Nazi ruling circles took this program seriously enough to devote time and resources to it. Yet the stereotypically recurring transgressions by small employer-defendants83 reveal that the plant-is-my-castle attitude was as virulent as ever. To be sure, the relatively innocuous nature of the infractions and the de facto immunity of large-scale industrial enterprises from persecution confirms the view of the honor court system as a sham.84 But the fact that workers were rarely defendants indicates that the Nazis took the sham more seriously than did emigre commentators, who

81 Lersch, "Neue Rechtsgedanken im Urlaubsrecht," 7 DAR 122-25 at 122 (1939), quotes from Hitler's speech of 2 April 1939 in which he declared: "We have founded a new economic system, a system: that is: capital is labor."
82 Mansfeld and Pohl, Kommentar, p. 13.
had predicted that the honor courts would constitute still another instrument of blatant Nazi-capitalist oppression of the working class.\textsuperscript{85}

No uniform approach to the task of articulating a moral as well as a socio-economic and political justification for the distribution of decision-making authority between capitalists and workers prevailed. Thus, for example, whereas for Mansfeld the demand for the greatest possible paternalism in the relationship between leader and Following was basically the demand for a deepening of confidence between them,\textsuperscript{86} Wolfgang Siebert denied that the legal position of the Follower could be grasped on the basis of such paternalistic or capitalist ideas as the entrepreneur’s right to dominate (\textit{Herrschaftsrecht}) or his power to control (\textit{Verfügungsmacht}) the employee’s labor power. But when he sought to ground this claim, Siebert, too, had recourse to tautology or bald assertion. For him leadership was not domination and the Follower did not follow by virtue of subjection, but rather by virtue of his being personally bound to the plant-leader by a pledge of allegiance.\textsuperscript{87} The fact that the new plant-community accorded leader and Follower equal value by engendering in them a “feeling of equal value” as “labor delegates of the whole \textit{Volk},” sufficed to make it doubtful in Siebert’s view whether the unequal distribution of authority transformed the plant-community into an authoritarian organization (\textit{Herrschaftsverband}).\textsuperscript{88}

In contrast, little effort was devoted to camouflaging the distribution of power within the so-called confidence council. In interpreting § 5 AOG, which placed the council under the management of the plant-leader, the authors of the standard commentary declared that the leader-principle ruled within the council as within the plant-community itself. The council, to which no autonomous functions were assigned, was


\textsuperscript{86} Werner Mansfeld, "Organisierung des Vertrauens," 1 \textit{DAR} 78-80 at 79-80 (1933). In mid-1935 DAF was complaining that many small plants were insufficiently characterized by patriarchal relations; see BA R 22/2063, fol. 21.


reduced to the role of an organ of the plant-community which the courts had tried to impose on the plant council in Weimar. Indeed, it was transformed into a mere "phenomenal form of the plant-community."\textsuperscript{89} If § 6 AOG assigned the council the task of deliberating on measures serving the fashioning and implementation of general working conditions, the commentators noted that the council could never be built in as a factor in the decision of the plant-leader. If a TO required the understanding (\textit{Einvernehmen}) of the confidence council, this did not mean that it had to have agreed (\textit{einverstanden}) to the leader's decision, but merely that the decision had to have come about on the basis of a deliberation in the council.\textsuperscript{90}

§ 6 para. 2 AOG accorded the majority of the council the right to appeal to the trustee of labor against decisions by the plant-leader pertaining to the shaping of general working conditions where the decisions appeared inconsistent with the economic or social relations of the plant; in the interim the decision remained in force. Interestingly enough, the fifteen pages on this provision in the leading commentary do not cite to one labor court case. In the one honor court decision cited, which, however, did not reach the merits, Mansfeld commented that the labor trustee's statutory authority to intervene was not intended as a regimentation of the plant-leader – even at the risk of occasionally permitting an unsocial decision to remain uncontested. (REG EV. Arb. II 23/36, 31:86-96, No. 1, 24 July 1937.)

RAG adjudication pertaining to the confidence council was very sparse. Most of the relevant cases dealt with discharges of confidence councillors.\textsuperscript{91} The first case, dealing with an issue peculiar to the transition period, held that a collective bargaining agreement was not, after the abolition of the plant council, to be interpreted in such a manner that the new confidence council would take the latter's place. Rather, until the collective bargaining agreement was modified to take the new situation into account, it could only be assumed that the plant-leader would make the relevant decision (concerning the wages of a partially disabled employee) in accord with the conscientious use of discretion,

\textsuperscript{90} \textit{Ibid.}, p. 129.
\textsuperscript{91} See RAG 263/34, 24:142-54, No. 23, 20 July 1935; RAG 79/35, 26:297-300, No. 61, 27 November 1935; RAG 248/37, 33:85-90, No. 16, 23 April 1938; RAG 88/38, 34:282-95, No. 45, 26 October 1938 (confidence councillor can be dismissed only for violations of duties flowing from employment relationship, not for violations of duties of his office alone); RAG 131/38, 35:231-37, No. 47, 25 January 1939; RAG 194/38, 36:24-27, No. 6, 26 April 1939.
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which, if need arose, could be reviewed by the court. (RAG 278/35, 26:279-83, No. 58, 8 April 1936.)

The court appeared to take its role seriously in enforcing the statutory requirement that the plant-leader formally consult with the council before making certain decisions. Thus where the statute (§ 28 para. 2) provided that the plant-leader had to consult with the council before imposing a fine on an employee, the court determined whether the formal prerequisite had been met. (RAG 167/41, 44:228-34, No. 38, 14 April 1942 [case decided against plaintiff-employee on merits].) Three days later the court revealed that even this farcical formality was a charade. Plaintiff submitted that the fines imposed on him were impermissible because the plant-leader had not consulted with the council beforehand but merely with the delegate of the NSBO represented on the council. Although the trial court had held in favor of plaintiff, RAG declared that § 6 para. 3 AOG, which provided that the council could transfer its tasks individually to certain confidence councillors, applied to this instance. (RAG 171/41, 44:285-90, No. 50, 17 April 1942.)

This judicial acknowledgment that the confidence councils were merely empty shells was consistent with the method by which candidates were selected by the plant-leaders, the NSBO delegate and the labor trustees, as well as with the fact that the results of the elections in 1934 were so disastrous for the Nazis, and those of 1935 so implausible, that Hitler forbade all further elections.

D. Plant-Risk

The doctrine of plant-risk marks the point at which the notion of the plant-community, supported by the paternalistic welfare-duty imposed by statute and court on the now virtually absolute dictatorship of the

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92 See RAG 38/39, 37:213-18, No. 33, 27 September 1939, where, however, it is unclear whether the plant was large enough to have been required to elect a confidence council.
93 § 9 AOG; arts. I and II Zweite VO zur Durchführung des AOG, 10 March 1934, RGBI I, 187.
95 Mason, Sozialpolitik, pp. 205-206.
96 G. über die Verlängerung der Amtsduauer der Vertrauensräte, 31 March 1936, RGBI I, 335; the statute was extended on 9 March 1937, RGBI I, 282 and 1 April 1938, RGBI I, 358. See the admission by Werner Mansfeld, "Zehn Jahre Gesetz zur Ordnung der nationalen Arbeit," 12 DAR 17-21 at 20 (1944), that the procedure for forming councils had proved unsuccessful.
plant-leader, transcended the sphere of ideology and was interpreted at times in favor of employees. During Weimar the courts had developed the doctrine of plant-risk in connection with the aforementioned mythologized conception of the plant-community. But from the Nazi point of view, the distribution of risk as between employer and employee by means of the creation of distinct spheres of risk for each side bore too clearly the stamp of class antagonism.97 Much earlier than RAG the literature recognized that the demise of the plant council logically implied the disappearance of a sphere of risks for which the employees collectively bore responsibility. Once AOG granted the plant-leader full responsibility and authority, the plant-community ceased to be a profit and loss community; and "[i]n this sense National Socialism has made him [the entrepreneur] master in his plant."98

In its decisions during the early Nazi years, RAG adhered to the rule that, unless the continued existence of the plant were endangered, economic losses could not justify reduction of pensions, etc. (RAG 4/33, 18:153-57, No. 35, 24 May 1933; RAG 110/33, 18:300-302, No. 69, 26 July 1933; RAG 133/33, 19:163-69, No. 39, 8 November 1933; RAG 240/33, 19:239-43, No. 58, 9 December 1933.)99 The court also applied its theory of the spheres of risk in deciding a case — in favor of plaintiff-employees — involving coffee-house musicians who were prevented from working for six days because of public mourning on the occasion of the death of president von Hindenburg. (RAG 235/34, 23:219-27, No. 47, 27 March 1935.) As late as early 1940, in a case that arose in the wake of Kristallnacht, the court held against a Jewish defendant-employer on the basis of theory of spheres of risk. (RAG 152/39, 38:214-17, No. 43, 31 January 1940.)

Although by the middle of that year the court acknowledged that, as a result of the wider authority granted the entrepreneur by AOG, he in principle had to bear the plant-risk, it articulated its decision within the traditional conceptual framework. In dictum the court referred to the extraordinary possibility that the Following would be required to bear responsibility for risk to the plant that could be traced back to its behav-

97 Hueck-Nipperdey-Dietz, Kommentar, § 2 n. 25 at p. 58.
99 Cf. RAG 84/34, 22:5-17, No. 2, 26 September 1934; RAG 210/37, 34:273-82, No. 44, 9 November 1938.
ior even where the individual Follower did not contribute to the disturbance. (RAG 17/40, 39:407-12, No. 71, 12 June 1940.)

By the end of 1940 RAG programmatically abandoned the theory of spheres of risk, which it declared to be inconsistent with the plant-community. In view of the authority granted the plant-leader by § 1 AOG and the welfare-duty imposed by § 2 AOG, it was also justifiable to impose on him responsibility for the progress of the plant. In this generality, the court would have upheld the lower court’s decision in favor of plaintiff-employee whose employment contract was terminated before he could begin work on 1 September 1939 because the owner had been conscripted into the armed forces and because employment had become impossible as a result of a war-induced decline in business. (The court held that modern war, which gripped the whole Volk, constituted a plant-risk.) However, under the circumstances the court remanded for further fact-finding because, on the basis of ties to the plant, loyalty to the plant-leader and the general interest of the Volk in maintaining plants, it might be necessary for the Following to share a part of the consequences of plant-risks where the existence of the plant itself was jeopardized. (RAG 104/40, 41: 43-54, No. 8, 26 November 1940.)

The court’s accommodation to the new spirit of authoritarian-paternalistic capital-labor relations, which denied the Following a special sphere of responsibility because such a view would have recognized it as a cohesive entity pitted against the entrepreneur, was not destined to bear many fruits for the ward-class. For the remaining years of Nazi rule witnessed an ever intensifying “total war,” which presumably increasingly triggered the ‘modification’ of the general rule of the leader’s responsibility for plant-risks. Moreover, the court soon held that the general rule itself could be undercut by a sufficiently unambiguous expression of wills in an employment contract or TO/BO. (RAG 89/41, 43:21-29 at 24, No. 4, 2 September 1941 [TO not sufficiently clear to sustain defendant-employer’s position].)

100 The authors of Entwurf eines Gesetzes über das Arbeitsverhältnis (H., 1938), p. 65, reported that for “pedagogic reasons” alone they were of the opinion that all Followers—and not only those with fault—should forfeit their wage claims where the unauthorized behavior of the majority had led to the closing of the plant. But they did not include such a provision because they did not want to create the impression that a special rule for partial strikes—which were no longer conceivable—was considered necessary.

101 Hueck-Nipperdey-Dietz, Kommentar, § 2 n. 25 at p. 58. Cf. Wolfgang Siebert, Die deutsche Arbeitsverfassung (2nd ed.; H., 1942), p. 38, who denied that the Following was a legally autonomous component of the plant-community because the plant-leader was a necessary component of that community.
E. The Political Function of the Plant-Community

A dilemma confronted the Nazis as they set out to reconstruct the political economy of Germany. If they adopted a conservative-fascist-corporativist approach, which involved self-determination by means of the autonomous representation of the interests of labor and capital, they incurred the risk of a recrudescence of the class antagonism that characterized Weimar.102 On the other hand, destruction of the unions unaccompanied by the creation of plausible successor organizations would have been “dangerous, at least inexpedient” since it would have deprived precisely the best workers of “the satisfaction of a healthy feeling of community.” Moreover, such a move would have “atomized the German working class [Arbeiterschaft] just in a revolutionary, dangerous span of time and thus placed it at the mercy of hard-to-control influences.”103

In view of the fact that by the summer of 1933 representatives of heavy industry had declared that worker organizations were tenable only at the plant level,104 whereas the ministry of labor was conscious of the shift of equilibrium in favor of employers in terms of collective bargaining that would have resulted from establishing so inexperienced an organization as NSBO as the national trade union,105 the notion of the self-contained plant-community appeared to be a politically viable compromise. For it promised the controlled atomization of the working class while effectively precluding the emergence of a potentially anti-capitalist mass organization.106

F. Supra-Plant Economic Regulation

Timothy Mason, one of the leading social historians of Nazi Germany, has suggested that the choice of the plant as the focus of regulation of class relations rested in part on the economic needs of small plants

103 Mansfeld and Pohl, *Kommentar*, p. 4.
owned by the petty bourgeoisie as well as the need of the uncompetitive or labor-intensive branches of industry to reduce their wage costs; in part it also rested on the new plant-level social policies – associated with the new wave of industrial rationalization – that were applied in the economically strong and technologically advanced firms. Mason regards this latter aspect as paradoxical because it was precisely such advanced firms that preferred uniform collective regulation of wages. This paradox Mason seeks to resolve by reference to the fact that by 1933 collectively bargained-for wage rates had been reduced to such a low level that they were acceptable to all parts of industry.107

Mason sees recourse to such economic explanations as necessary because AOG, though ideologically stringent and one of the most comprehensive and consistent statutes of the Nazi period, does not reveal specifically Nazi ideological origins or organizational influence.108 But given the contradictory class interests that the Nazis purported to represent and the Nazi party's own vague and pragmatic economic program,109 it would be difficult to imagine a rigorously Nazi labor code. Nevertheless, although various models of control of the working class would have been conceivable in terms of the distribution of control within the capitalist class and between it and the Nazi State, the virtually complete economic-industrial disenfranchisement of the working class contained in AOG belonged to the core of Nazi goals that astute observers had uncovered long before 1933. What is ideologically interesting about AOG is that the de facto and de jure subjugation of the working class was clothed in communitarian symbols.110

Moreover, in spite of Mansfeld's intention to reverse the untoward impact of supra-regional wage rates on underdeveloped economic regions in Germany by shifting the locus of wage-determination to the individual plants, he not only emphasized the government's refusal to relax the obligatory nature of the wage rates of the old collective bargaining agreements as minima until mass unemployment disappeared, he also hinted that significant local plant-level deviations from the underlying trends of the aggregate economy would also not be permitted during subsequent conjunctural upswings. Although the discipline and understanding of the plant-communities – and not “external measures”

109 Neumann, Behemoth, pp. 228-34.
110 Cf. Paul Merker, Deutschland. Sein oder Nichtsein?, I (Mexico City, 1944), 351.
were conceived as the primary instruments of maintaining national economic equilibrium.\textsuperscript{111} AOG itself (§ 32) conferred extensive powers on the trustees of labor (as supervised by the ministry of labor [§ 18]) to issue guidelines for the content of individual employment contracts and BOs as well as to promulgate their own regional TOs superseding BOs containing provisions less favorable to the employees. The minister of labor was also authorized (§ 33 AOG) to appoint special trustees of labor to act supra-regionally.

In point of fact, "the demands of a highly rationalized and industrialized society proved stronger than the ideas of" AOG.\textsuperscript{112} As a result of the progressive absorption of the unemployed and the increasing competition among employers for (skilled) workers, upward pressure on wage rates and widespread disruptive practices of enticing employees away from competitors, supra-plant-level wage-setting by the trustees of labor became more rigorous in order to eliminate obstacles to the implementation of the four-year-plan.\textsuperscript{113}

Although wartime conditions accelerated the tendencies toward national economic regulation, even as late as 1944 a retrospective account of the evolution of Nazi labor law characterized AOG as a narrow product of its time which would be inadequate to the demands of the post-World War II period for greater involvement of the Volks-community at the expense of the plant-community. AOG had emerged from a mentality that foresaw the successful struggle against unemployment as occupying the energies of an entire generation and that vividly remembered the epoch of class struggle. Chief among the ideas that emanated from the excesses of the revolutionary period of Nazi labor law, the limitations of which social reality had demonstrated, was the plant-community. The obsolescence of AOG was seen in the fact that, for example, in order to facilitate the workers' political reorientation, the statute pro-


tected employees against unjust dismissals (§§ 52-62), but did not protect the entrepreneur against unjustified quits.114

The failure of the plant-community to accommodate itself to the needs of the aggregate economy once full-employment was achieved, resulted, on this view, not from the entrepreneurs’ atavistic adaptation to the rules of supply and demand, but from adherence to AOG, which made that entrepreneur appear as the most socially minded who offered the greatest benefits to his Following. Although this perspective idealistically distorts the wellsprings of entrepreneurial behavior in Nazi Germany, it validly underscores the dangers generated by self-contained economic units for a regime with relatively well developed centralized planning goals.115 Such a view has the further virtue of taking the ward-status of the Follower to its logical conclusion in terms of plant-risk. Since the plant-community was a labor- and performance-community rather than a profit- and loss-community, only nationally supervised wage rates could ensure that the choice of an employer116 would redound neither to the advantage nor the disadvantage of the employee.117

To the extent that this program was realized during the war years, it was true that the worker had no material interest beyond his claim to wages in the maintenance of the enterprise – and hence plant-community – because the larger, Volk-community would provide him with work elsewhere.118 In light of the fact that this tendentially ever more tenuous bond between the Follower and his plant-community inhered in AOG as a Sisyphean effort to contain the socially and politically destabilizing ramifications of the private, uncoordinated accumulation of capital without removing the foundation of autonomous profit-producing economic units, it appears more appropriate to locate the failure of the plant-community within the “domain of the historically necessary” than the origins of AOG itself.119

114 Rohde, *Arbeitsrecht*, pp. 6-21. Rohde was a member of the Arbeitswissenschaftliches Institut of DAF.
118 Ibid., p. 116. Michael Stolleis, *Gemeinschaftsformeln im nationalsozialistischen Recht* ([West] B., 1974), p. 138, argues that communitarian welfare formulas benefited employees during the period in which unemployment was being overcome but later imposed a burden on them.
119 Mason, “Entstehung,” pp. 349-50. Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus* (Munich, 1976), p. 135, commits the same error on a higher level of abstraction without making any effort to document her claims in terms of decisional law. For late and coded confirmation of the fictitious nature of the plant-community, see Wilhelm Herschel,
G. RAG-Adjudication

Since most of the decisions centrally involving or grounded in the doctrine of the plant-community deal with substantive issues (such as discharges, vacation rights, etc.) treated elsewhere, discussion will focus on aspects on cases or aspects of cases not covered in other chapters.

Neither a chronological periodization nor a classification in terms of substantive areas of law reveals a principled application of communitarian ideology by the court. While RAG adhered to the line of decisions originating in Weimar that sub rosa identified the interests of the plant-community with those of the plant-owner and in some instances expanded the scope of that tradition, it also generated certain outcomes favorable to employees that might not have been possible on the basis of the available non-communitarian judicial doctrines.

In one of its early decisions in this area the court sought to identify the practically acceptable outer limits of a communitarian litigational strategy. In a case involving a two-fold appeal to the general welfare and the plant-community, plaintiff was the widow of an employee whose employer’s failure to make contributions to an insurance fund led to plaintiff’s not being entitled to a pension. Plaintiff’s tort suit was bottomed on § 823 para. 2 BGB, which provides for tort recovery where a party violates a law intended for the protection of another party. In accord with precedent the court ruled that the social insurance law that required defendant to make contributions was not intended for the protection of individuals but rather to secure the orderly management of the insurance system as a whole. Rejecting plaintiff’s submission that such a viewpoint was appropriate in an earlier liberalistic-individualistic system but was inconsistent with the new Nazi legal principles, RAG cautioned that in order to avoid a slippery slope (will man nicht ins Uferlose geraten) it was necessary to define a law designed to protect individuals as one the primary purpose of which was to do so. Once the court had distinguished such a law from one which primarily served the general welfare and only incidentally individual protection, it found no


120 Cf. RAG 194/38, 36:24-27, No. 6, 26 April 1939; RAG 3/1944, 28 April 1944, BA R/22, 4025.
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difficulty in reconciling its decision with Nazi legal thought, which placed the welfare of the *Volk* before that of the individual.

When plaintiff, in an alternative motion tried to rest her claim precisely on this principle by arguing that a decision in favor of defendant would shift the burden of her support from the individual employer to the public welfare authorities, the court detected a new slippery slope down which it was still more important not to embark. Characterizing plaintiff's line of argument as "impossible" because it would lead to a "poor party['s]" being able to base any financial claim on a reference to the general welfare, the court emphasized that the latter was not involved in the case; rather, two individual *Volk*-comrades with opposing interests were litigating each for his or her own benefit.

In dictum, however, the court left open the possibility that under certain circumstances the new view of the plant-community and the employer's welfare-duty could create a rebuttable presumption in favor of the existence of a tacit ancillary agreement from which a contractual tort claim could be derived. (RAG 6/1935, 24: 84-92, No. 12, 3 April 1935.)

Several months later the court reversed itself in an important area of the law pertaining to collective bargaining agreements. Whereas during Weimar it was permissible to waive a claim to wages under such an agreement that had been earned but not yet paid, the court held that § 22 AOG rendered such a waiver null and void as a contravention of an order of a labor trustee. In Weimar, the court declared, such a waiver arose from economic distress of the plant that affected the employee only in the case of coincidentally parallel interests. Under the new regime, however, such distress had become a common concern of the entrepreneur and the Following, who were bound together in a plant-community as a community of fate. Moreover, the basis on which the common concern rested here was not the outcome of the power struggles of interested parties, but rather the expert wage-determination of the labor trustee — "an objective State authority." (RAG 16/35, 24: 93-98, No. 13, 13 July 1935.)

Although this ruling would doubtless have been welcomed by trade unions during Weimar and doubtless served in some measure to protect employees after 1933 from rapacious employers, it is worth noting that the court was unwilling to eliminate this tactic from the employers' arsenal until it ran afoul of Nazi national economic regulations.\(^{121}\)

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\(^{121}\) Cf. Hueck-Nipperdey-Dietz, *Kommentar*, § 32 nn. 208-15 at pp. 494-96. The court limited its holding to that part of plaintiff's suit covered by AOG.
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The court expressly upheld its pre-AOG precedents concerning whether the plant-community had been continued; and here, in turn, the chief indicator was whether the bulk of the Followers continued in the employ of the new entrepreneur. (RAG 44/35, 26:52-58, No. 14, 1 June 1935.) As seen in other contexts, the court applied the plant-community doctrine to block an employee’s claim to a pension fund that had been depleted by inflation (RAG 220/35, 26:108-15, No. 23, 18 January 1936); to block the claim to a prorated vacation by an employee who had given notice (RAG 82/1936, 27:337-42, No. 59, 8 August 1936); but to enforce the claim of a travelling salesman to inclusion of his probable commissions in his sick pay in a case of first impression (RAG 219/36, 29:6-12, No. 2, 20 January 1937). Although it ruled that a migratory worker employed (for six years) in a charitable enterprise was not a Follower linked to the plant-leader by virtue of the purpose of the plant and was thus ineligible for the wage provided for in the TO because he was merely an object of social welfare (RAG 207/36, 29:121-23, No. 25, 9 January 1937), it subsequently held that one employed only temporarily as an unskilled laborer was a member of the Following within the meaning of a holiday pay provision (RAG 115/38, 34:324-27, No. 51, 7 December 1938). The court over time imposed a heavier burden on the plant-community with regard to supporting the reproductive choices of female Followers (compare RAG 112/37, 31:204-207, No. 35, 20 October 1937 with RAG 78/41 42:389-97, No. 61, 29 July 1941).

Where employees worked outside and in addition to their normal work schedules in order to free a Saturday for an excursion by the whole plant, such working time was not considered overtime within the meaning of an hours statute. The court rejected as irreconcilable with the Nazi conception of life and law plaintiff’s view that the excursion be regarded as work-time. Participation in such an excursion was, on the contrary, an ethical obligation originating in the plant-community. The court feared that acceptance of plaintiff’s loss of control over his free time as a criterion for determining whether an activity occurred during working time would lead to such palpably unacceptable results as forcing the employer to pay overtime for attendance at evening plant meetings. (RAG 84/1938, 34:125-28, No. 21, 12 October 1938.)

122 The court does not appear ever to have expressly adopted Hueck’s view that the labor community was the only form within which a dependent employment relationship could be grounded; Hueck, Arbeitsrecht, p. 38.
The court made an uncharacteristic use of the plant-community doctrine in a case involving the length of a notice-period. Absent a TO or BO, the two weeks provided for § 122 GewO were controlling. But where an employee upon being hired was aware of the plant-custom of a one-day period, he was considered as having tacitly accepted this situation. But where he did not hear about this custom until later, his agreement could be deduced from mere silence. RAG remanded for further fact-finding, but criticized the appeals court’s view that plaintiff had violated the spirit of the plant-community by availing himself of defendant-employer’s failure to mention the custom in order to secure an advantage vis-a-vis his co-workers or even to become a pacesetter for them by creating a legal precedent. RAG alluded to the “incontestable fact” that interests existed on the part of Followers and of the plant-leader that “to begin with, at least, seem to be antagonistic.” Although the whole point of Nazi labor regulation was to avoid or remove such antagonism within the framework of the community interest, which dominated the interest of each side, it did not follow that the individual Follower, in asserting a legally founded claim arising out of his employment contract, was required to place the plant-leader’s interest before his own. (RAG 40/38, 34:180-86, No. 32, 7 September 1938.)

The antagonistic nature of capital-labor relations may have been “incontestable,” but the court virtually set a precedent during these years by mentioning the fact, particularly within the context of the plant-community. The court’s sharp rebuke to the lower court may well have been motivated by concern that the latter’s approach, by further restricting the domain of actionable behavior, obstructed an avenue of judicially legitimated social and political protest that served as a safety valve.

In a case involving the interpretation of an hours statute, the court held that the expediency-standard, which a ministerial decree imposed on decisions by the plant-leader with regard to structuring the workday, was further subject to the requirement that it remain within the bounds set by the plant-community. (RAG 46/39, 37:34-38, No. 6, 27 September 1939 [held against employee because requirement met].) The court also recurred to the doctrine in order to thwart attempts by employers to exclude employees who had given notice from receipt of a Christmas bonus. (RAG 135/39, 37:273-78, No. 44, 15 November 1939; RAG 148/39, 39:49-55, No. 7, 3 April 1940; RAG 79/42, 45:288-92, No. 59, 16 October 1942.) In a decision decorated with an atypical and unmediated encomium on the Nazi Volk-community as the reversal of the liberalistic...
mentality of the Second Reich and class struggle of Weimar, the court interpreted a provision concerning loyalty bonuses to longtime public employees so that the latter had to have completed their jubilee year after the regulation had gone into effect. By relieving the budget and placing the interests of the whole plant before those of individuals, this approach was said to be in accord with the Nazi plant-community. (RAG 170/39, 39:250-56, No. 45, 27 February 1940.)

After the court enriched the notion of the plant-community by grafting onto it a Germanic dimension in order to expel Jewish employees from it (RAG 71/40, 39:383-91, No. 67, 24 July 1940), several discipline-related cases came before it. Plaintiff in the first case managed the plant canteen. He was reprimanded for leaving the canteen on private errands to which he allegedly had no time to attend in his free time. After he refused to sign a contract obligating him to request permission to leave for such purposes, he was finally discharged when he also refused to accept employment elsewhere in the plant. RAG reversed the appeals court's decision declaring the discharge null and void and remanded. It held that a discharge was not *per se contra bonos mores* because it stood in contradiction to the duties flowing from the principles of the plant-community or because it represented an abuse of the plant-leader's position of power. Rather, special circumstances – such as being motivated by feelings of revenge – were necessary to reach an outcome favorable to plaintiff, especially where the confidence council, DAF and the labor trustee all approved of defendant's behavior. (RAG 273/39, 40:78-86, No. 14, 31 August 1940 [defendant called plaintiff a “communist” but retracted the “insult” before the council].)

Later that year the court was presented with an appeal by plaintiff-business manager who was dismissed without notice because he had told other employees that the owner could not have children as a result of earlier sexual excesses. He sued his employer for his pro-rated year-end bonus which he was entitled to receive in monthly instalments in advance. Stating that such a bonus need not be purely consideration-based, but was rather to be regarded as special compensation grounded in the plant-community and the entrepreneur's duty of loyalty and welfare, the court held that where an employee grossly violated his own duty of loyalty, the employer was justified in withholding the bonus. (RAG 145/40, 41:32-36, No. 6, 18 December 1940.) Similarly, the court upheld a discharge without notice of an employee who had written a sarcastic letter to her employer in connection with a dispute concerning the length of her vacation. Overturning the lower court for having mis-
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conceived the juridical notion of good cause, the court held that an employee's misconduct could be so serious that her further presence in the plant, even for the duration of the notice-period, could be inconsistent with the essence of the plant-community. (RAG 44/42, 45:135-36, No. 26, 3 July 1942.)

These cases transparently identified the plant-community with management's prerogative to demand a certain kind of demeanor, deference and obedience from the Followers. Such cases put workers on notice that the courts were willing to enforce such authority by abrogating semi-vested rights. The court indicated the weight it attached to this disciplinary aspect of the plant-community when it denied plant-fines the character of contractual penalties (within the meaning of § 343 BGB). Instead it classified them as *sui generis*: "means of coercion peculiar to the plant-community, which, because they were designed to maintain order and security in the plant, possess plant-police or at least police-like character." (RAG 167/41, 44:228-34, No. 38, 14 April 1942.)

The only disciplinary matter in which the court manipulated the doctrine to the benefit of an employee involved a works foreman who supervised one hundred employees. Plaintiff, who had worked for the plant for fifteen years, was a Nazi party member and a war invalid with a fifty per cent disability, was dismissed without notice because he had caused one of his subordinates to circumvent the guard at the outside gate of the war-related plant in order to take his wife two radishes. The court held that he had not violated the ethical foundations of the plant-community. (RAG 63/41, 42:397-402, No. 62, 12 August 1941)

The court was prepared to define communitarian interests very narrowly in terms of maintaining the plant-leader's control over the income generated in his plant. RAG had shown this willingness with regard to a widow's inheritance of her husband's vacation pay rights (RAG 159/41, 44:185-89, No. 30, 20 March 1942), and to an employer's obligation to find less strenuous employment for a disabled Follower (RAG 149/40, 41:219-23, No. 29, 14 January 1941). Where a BO provided for a compulsory contribution to the treasury for the *Kraft durch Freude* program, the court ruled that an individual Follower had no legal claim to partici-

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123 According to *Entwurf*, p. 54, the leader-principle of § 31 AOG dictated that the Follower's tone vis-a-vis the entrepreneur be more respectful than that of the latter to the former.
124 Defendant-employer had fined another employee only fifty pfennigs for the same transgression because she had been trying to provoke a discharge in order to take a better job.
pate in a particular trip; consequently, he was not entitled to a refund upon leaving the employ of the plant. Contradicting the appeals court, which had characterized this measure as one-sidedly plant-egotistic, RAG chose to call it a donation to the plant-community. (RAG 18/42, 45:119-23, No. 22, 29 May 1942.) But the court did find it inconsistent with communitarian notions for a plant-leader not to set a fixed amount for the damage a Follower negligently caused, but rather to burden him with repeated monetary demands that might reduce his standard of living to a minimum and make it impossible for him to provide his children with an adequate education. (RAG 201/39, 41:259-68, No. 35, 14 January 1941 [defendant was army headquarters administration].)¹²⁵

¹²⁵ The court gave an expansive interpretation of the legal scope of the broader Volk-community with respect to discharges of employees who had been called up for military service. See RAG 157/40, 41:206-15, No. 27, 4 February 1941; RAG 134/40, 41:330-35, No. 44, 11 February 1941.
Appendix to Chapter 3

Plant-Custom and “Concrete Order”

In connection with the court’s pronounced orientation towards acknowledgment and promotion of the plant-community, RAG began about 1938 to develop a body of decisional law based on the presence in plants of discrete but relatively informal customs. This notion of a common law of the plant was clearly associated with a Nazi juridical tradition introduced by Carl Schmitt – thinking in terms of concrete order (*konkretes Ordnungsdenken*). Although the court adopted the term “concrete order” to describe configurations of plant-custom, it neither referred to Schmitt expressly nor discussed the methodological underpinnings of the notion. Nevertheless, it will be useful to outline very briefly Schmitt’s innovation.

Schmitt distinguished three kinds of legal thinking: 1. normativism; 2. decisionism; and 3. *konkretes Ordnungsdenken*. Normativism (or legal positivism) was characterized by impersonal, objective justice, which was achieved by the judge’s quasi-automatically applying a closed system of rules and norms, thereby unambiguously translating the will of the legislature. Decisionism was characterized by the personal arbitrariness of the decisionmaker. Order, which existed in concrete communities, was not created by norms and rules; rather, these latter exercised only a certain regulating function within the framework of the order, which was viewed in terms of feudal or corporativist orders.\(^{126}\)

For Schmitt, AOG was the best example of *konkretes Ordnungsdenken* undertaken by the Nazi legislator. By leaving behind “a whole world of thinking in terms of individualistic contracts and legal relationships,” and by basing itself on the common aims of leader and Following, the statute viewed both as members of a common order and community in which loyalty, discipline, honor, etc., did not function as detached rules and norms but as ontological elements.\(^{127}\)

It is difficult to resist characterizing this conception as mystical. But given the social reality of the Nazi plant-community, mysticism may have been the adequate methodological approach. It is, in any event,


revealing that even so prosaic a thinker as Mansfeld was moved to caution against trying to "capture this great idea of the community juridically." Instead he proposed trying to gain access to it by "listening intently to living life [dem lebendigen Leben abzulauschen]" and to understand it on the basis of its concrete forms of existence.  

Although this quasi-institutionalist approach to law served obvious apologetic ends by inverting the meaning of virtually every aspect of capital-labor relations, it has also been interpreted as having fulfilled a somewhat more subtle corporativist function. If the Nazis were to recreate conditions under which capital could control its own process of social reproduction, then it was necessary to set certain limits on the politicization of capitalist society. Once the decisionistic *deus ex machina* excluded trade unions from the universe of communities and concrete orders, *konkretes Ordnungsdenken* could serve to legitimate the foundation of "non-political," corporativist enclaves of sovereignty.  

It remains to be determined whether such were in fact the functions served by custom and concrete order in RAG adjudication.

The first occasion on which the court adopted a position with regard to a concrete order it was reviewing the decision of an appeals court that had grounded an employee's claim to a pension on the existence of a plant-custom. To be sure, RAG adhered to its precedents to the effect that not every individual duty on the part of the leader that could conceivably be derived from his duties of welfare and loyalty and that fostered the realization of the plant-community could, without more, create a corresponding contractual claim for a given Follower. But the court

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128 Werner Mansfeld, "Vom Arbeitsvertrag," 4 *DAR* 118-30 at 120 (1936). At the same time Mansfeld was expressing in internal ministerial correspondence his concern regarding the potential consequences for the legal and social system of the unchecked growth of general clause jurisprudence based on a communitarian interpretation of § 2 AOG. His chief antagonist in this dispute was DAF as counseled by Wolfgang Siebert. See BA R 22/2063, fol. 181-82. Karl Llewellyn appears to have embraced something very much like *konkretes Ordnungsdenken*. Cf. Karl Llewelyn, *The Common Law Tradition* (Boston, 1960), p. 122; and the analysis by Richard Danzig, "A Comment on the Jurisprudence of the Uniform Commercial Code," 27 *Stanford Law Review* 621-35 at 624 (1975) ("Llewellyn saw law . . . as a crystallization of a generally recognized and almost indisputably right rule [a 'singing reason'], inherent in . . . existing patterns of relationships.")  


130 Ironically, Schmitt's most enduring bon mot, written before 1933, was that "the best thing in the world is a command." Carl Schmitt, *Legitimität und Legitimität* (Munich, 1932), p. 13.  

conceded that a different situation existed where concrete orders had already arisen within the life of the plant-community even if they expressed themselves only in a "settled, de facto practice [feststehenden tatsächlichen Handhabung]" without having assumed the shape of definite institutions or standing rules. Consequently, if, after having fulfilled certain requirements, some Followers received certain benefits, then it became the right of the remaining Followers - a right that became part of their labor contract - to be treated in the same way if they fulfilled the same requirements. Thus even absent an express or implied agreement, and absent regulation by AOG of the private law consequences of a violation of general duties by the plant-leader, the court held that violation of the precept of equal treatment was actionable. (RAG 153/37, 33:172-82, No. 29, 19 January 1938.)

Soon after this decision the court repulsed an attempt to apply custom against an employee who had not been informed of its existence in the plant (see ch. 3 above). The next year (1939) the court marked off one outer limit of the concrete order in a case characterized by a rather unusual factual situation. Plaintiff was employed by one governmental body but also worked for another agency that was independent of his employer but located in the same office. The personnel of each were drawn upon by both agencies. Plaintiff sued for the Christmas bonus offered by the other agency but not by his employer. The court held that the doctrine of the concrete order was unavailable where no labor contract existed at all of which it could become part. (RAG 248/38, 36:385-92, No. 69, 17 June 1939.)

In the course of time RAG decided a number of pension and vacation rights cases on the basis of custom or concrete orders. Thus it upheld a claim to a paid vacation based on a concrete order (RAG 76/39, 37:365-73, No. 55, 15 November 1939) as well as a pension claim (RAG 64/40, 40:363-69, No. 64, 19 November 1940). This latter decision, however, casts doubt on the claim of a critic of the doctrine that the court's use of it proceeded from an effort to create a legal claim to plant-level benefits for Followers otherwise lacking one.132 For in the pension case the court also held that a plant-custom to exclude certain discrete, similarly situated groups from pension benefits was enforceable against an employee. Earlier in 1940, too, RAG ruled that where it had been the custom for fifty-five years that a plant was closed on Corpus Christi day

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(Without pay), such a practice tacitly became part of the employment relationship without requiring express mention in a labor contract. To be sure, the court acknowledged that in a period of great change in Weltanschauungen it was necessary to inquire into whether the Following predominantly regarded this practice as outmoded. Although the court placed it in the plant-leader's discretion in the first instance to make this inquiry, it reserved for itself the authority to review his action. (RAG 2/40, 39:233-38, No. 42, 21 May 1940.)

At about this time a number of different kinds of criticisms of the court began to appear. One branch of this literature, which may be regarded as more positivistic, denied that the plant-community could create law in any form other than the autonomous form conferred on it by AOG – namely, the written BO. Although these authors agreed with the outcomes of the cases decided by the court, they considered the use of concrete orders at best superfluous since tacit agreements, duties of loyalty and welfare and the principle of equal treatment could have achieved the same results.\(^{133}\)

The other, ultra-autonomist, extreme of criticism was also not in principled disagreement with the outcomes achieved by the use of the doctrine. Rather, it objected to the court's assertion of jurisdiction over this area of capital-labor relations altogether. On this view, plants – that is, owners and managers – that offered the kinds of benefits at issue in such cases wanted the Followers to experience them as what they were – namely, voluntary extra-benefits and not legal obligations. Judicial interference undermined this psychological effect on the plant-community.\(^{134}\) Moreover, the loss of the psychological effect would bring in its wake the loss of the material benefit altogether; for, it was argued, if the leader were deprived of his freedom to grant benefits voluntarily without binding himself in perpetuity, he would lose his incentive to offer such benefits at all.\(^{135}\)

This wing was further troubled by the fact that this autonomous plant-level common law was lacking in one indispensable prerequisite:


\(^{134}\) Reuss, "Die konkrete Ordnung der Betriebsgemeinschaft als Rechtsquelle," p. 35.

the conviction of all participants of the generally binding character of the practice. In particular this criticism raised the possibility that the court was headed down the slippery slope towards recognition of concrete orders that arose not only without but against the will of the plant-leader. On the other hand, it was noted that the doctrine was a two-edged sword; for if custom could unilaterally alter contractual rights, then this meant in practice that the economically stronger party could introduce a custom against the will of the weaker party. Consequently, the court, which had originally sought to protect Followers, would be compelled to decide cases against them on this principle.136

It is noteworthy that the leading proponent of this criticism was an attorney for the Reichsgruppe Industrie, one of the major corporativist organizations of large German industrial capital.137 Yet he squarely rejected the opportunity to use this allegedly corporativist legal conception par excellence even while in effect warning the court that if it chose to persist in this line of adjudication, capital was strong enough to turn it against its intended beneficiaries. To be sure, he indicated that capital looked favorably on the strategic application of informal, non-binding, unilaterally promulgated and revocable benefit programs; but these were to remain sovereign enclaves immune from judicial interference. If this is what is meant by corporativism, then it is perhaps a mere semantic quirk that he opposed recognition of concrete orders. It is instructive, however, that early in 1940 he interpreted wartime economic legislation as forbidding the creation of autonomous plant-law not subject to State control and approval.138

Later that year, Johannes Denecke, a judge on the court, responded to the criticism by Reuss, the attorney. Although the tone was conciliatory, Denecke emphasized the continuing need for concrete orders and their judicial recognition. In an effort, presumably, to allay employers’ fears, he underscored the fact that not only could a concrete order or an unwritten plant-law not arise without the will of the leader, but that the Following had no more influence on such customs than it had on the formulation of a written BO. In implicit rebuttal of Reuss’s charge that the court would force employers to cease offering supplementary benefits for fear that they would become legally binding, Denecke called

136 Reuss, "Die konkrete Ordnung im Betrieb.”
attention to two facts of modern industrial life: first, management of a 
plant called for the creation of uniform, typical working conditions: indi­
vidual treatment was permissible only where the purposes of the plant 
made special demands on individual Followers; and second, the princi­
ple of equal treatment, which was "an essential element of the notion of 
justice and of every legal order," created in the Following an expectation 
- rising to the status of a legal conviction (Rechtsüberzeugung) - that, 
absent unique circumstances, similarly situated Followers would be 
treated similarly. If employers wished to avoid disappointing such 
expectations, they were required not only expressly to reserve the right 
to revoke the benefit, but actually to make use of that right.139

Seen from this perspective, the controversy appears not so much 
jurisprudential as one in the techniques of effective Nazi plant manage­
ment and personnel relations. The judge was cautioning capitalists and 
managers against undermining one of the few remaining mechanisms 
that suggested a semblance of institutionalized worker resistance to the 
overwhelming authority of employers. The industrial association was 
insisting that the court was depriving its members of the flexibility they 
needed to induce their employees to produce more.

For the remainder of its existence RAG recurred to the doctrine of the 
concrete order only sparingly and even then often not to the advantage 
of a plaintiff-employee.140 Thus, a month after Denecke's article 
appeared in the major labor law journal, the court held that where an 
employer voluntarily contributed sums to a pension fund in excess of 
that required by the fund's statute, the latter and not the voluntary con­
tributions constituted the concrete order. (RAG 124/40, 41:36-43, No. 7, 
19 November 1940.) The next year RAG ruled that a plant-custom 
according to which salaried employees' vacation pay did not reflect over­
time work created a concrete order in the absence of controlling written 
regulations. (RAG 29/41, 42:287-93, No. 45, 22 July 1941.) In a case involv­
ing piece-rates, the court held (in favor of plaintiff-employee) that a few 
months did not suffice to create a custom out of which a concrete order 
could arise. (RAG 100/41, 44:12-19, No. 2, 21 October 1941.)

On the other hand, the court continued to decide cases on the general 
basis of plant-customs without mentioning concrete orders. In a Christ­

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139 Johannes Denecke, "Die konkrete Ordnung des Betriebes als Rechtsquelle," 8 DAR 141-46 (1940).

140 Hugo Seiter, Die Betriebsübung (Düsseldorf, 1967), pp. 29-32, 35-36, 48-49, appears to 
underestimate the degree to which the court subscribed to this doctrine.
mas bonus case, for example, the court significantly relaxed the knowledge requirement to the disadvantage of plaintiff-employee. Arguing that the legal basis for a claim to the bonus was not an individual agreement but a standing practice, which in turn could only be uniformly relevant for all Followers, it concluded that only the same legal claim could be relevant for all. Consequently, it was not decisive whether every Follower or new hiree was aware of the existence of the practice. Those who were hired later simply had to accept the fact that the practice in this plant was that the bonus was conferred only on those who performed a certain amount of overtime. (RAG 70/40, 40:215-21, No. 35, 2 October 1940.) This case, which was criticized for the uncertainty it generated, was followed by a case in which the court was very solicitous of the certainty of expectations and appeared to revert to a more realistic appraisal of the importance of knowledge of the existence of a custom. It noted that a Follower in a plant with a regular Christmas bonus not only adjusted his household budget accordingly, but took it into account in determining whether to enter or remain in the employ of the plant. Moreover, the parties had already adapted their behavior to the court’s precedents in this area. The entrepreneur did not render the bonus revocable merely by calling it a donation, he was required to stipulate clearly that he was reserving the right to revoke it. Although in quantitative terms granting a bonus two years in succession did not indicate a will to be obligated whereas five years did, this term referred to the plant as a whole and not to the individual plaintiff. (RAG 106/40, 40:369-76, No. 65, 19 November 1940.)

RAG decided in favor of an employee in a dispute over night wage rates by rejecting the lower court’s acceptance of the existence of a permanent practice as based on the testimony of other plants that they had or would have handled the matter as defendant had. (RAG 53/41, 43:176-82, No. 24, 4 November 1941.) But two weeks later, ruling in favor of a construction worker whose clothes had been destroyed in a fire at his workplace, RAG held that a plant-leader was required to obtain fire insurance if this was customary in his industry (and if the cost could reasonably be borne by him). (RAG 70/41, 43:261-68, No. 34, 18 November 1941.)

RAG implicitly refused, against the weight of scholarly opinion and the appeals court, to ground the common law right of every German

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141 See Hueck’s annotation (RAG 40:221). The court nevertheless adhered to its precedent in its unreported decision, RAG 83/43, 14 January 1944, BA R 22/4024.
worker to an annual vacation in (presumably) the *Volk*-community at large. (RAG 17/42, 45:98-108, No. 18, 17 July 1942.)¹⁴² In a case that was remanded on other grounds the court held that changed circumstances resulting from the war did not suffice as grounds for ceasing to conform to a longtime custom of giving free trolley-car tickets to plaintiff-employee’s family. Absent plaintiff’s consent, defendant-employer would be required to discharge plaintiff and rehire him under new contractual conditions in order to achieve the desired change. (RAG 109/42, 46:97-105, No. 19, 15 January 1943.)

Finally, in two pension cases decided later in 1943 RAG refused to rest claims on plant customs that were either too vague or insufficiently specified for the court. Where, for example, the custom of granting widows a pension was so limited by the employer’s discretion that employees during the course of their employment were never able to know whether the pension would be granted, the practice did not create a legal claim. (RAG 77/43, 47:113-20, No. 21, 12 November 1943.) Similarly, the mere fact that pensions had been granted to Jewish employees during the course of aryanization of the plant did not suffice to support a finding of a permanent practice. (RAG 54/43, 47:120-22, No. 22, 23 November 1943.)¹⁴³

¹⁴³ Defendant was Deutsche Bank; see the opinion in BA R 22/4025. Reuss, "Die konkrete Ordnung der Betriebsgemeinschaft als Rechtsquelle," p. 31 n. 10, adduced as a problem in applying custom the difficulty of knowing whether, for example, all Followers – including Poles – were entitled to a Christmas bonus.
Chapter 4

The Labor Relationship: The Movement from Contractually mediated Domination back to Communitarian Status

The attempt by the Nazis to suppress the tradition of class conflict in Germany by combating and abandoning the juridical nomenclature that had been adopted from Roman law to meet the economic and ideological needs of the capital-labor relationship was implemented by resurrecting feudal terminology. In an important sense this tactic was politically so transparent and socio-economically so ahistorically deracinated that it scarcely merits systematic analysis. Worthy of study, however, are two related issues: 1. the jurisprudential tradition on which the Nazis could rely for intellectual support in reconceptualizing capital-labor relations; and 2. the tensions generated for the court by the direct and indirect drafting of the neo-feudal terminology onto modern industrial contractual relations.

I. The Germanic Reaction against the Romanist Labor Contract

The conflicting legal interests engendered by the development of industrial capitalism, in particular after the unification of Germany, by means of its differential impact on industrial capitalists, large landowning agricultural employers and industrial, agricultural and artisanal workers as well as proletarianized strata, came into focus in the debates surrounding the drafting and enactment of the German Civil Code (BGB). The first draft, which was the product of deliberations conducted in the 1870s and 1880s, had its first reading before parliament in 1888. Its treatment of the labor contract, which it called a service contract (Dienstvertrag), was very brief – encompassing only eight sections – and gave rise to voluminous critical comment. With one principal

144 See point 19 of Nazi party program of 24 February 1920. Denecke, "Vermögensrechtliches oder personenrechtliches Arbeitsverhältnis?" 2 DAR 219-24 at 223 (1934), opined that Marx’s doctrine of class struggle would probably have been impossible without the Roman law doctrine of the synallagmatic employment relationship.
146 See Thorstein Veblen, Imperial Germany and the Industrial Revolution (NY, 1939); Alexander Gerschenkron, Bread and Democracy in Germany (Berkeley, 1944); Hans-Ulrich Wehler, Bismarck und der deutsche Imperialismus (Cologne, 1969).

The service contract, modeled after the general contract of purchase and sale of things, obligated the employee to perform the services agreed upon and the employer\footnote{The draft referred to the employee as \textit{Dienstverpflichteter} (one obligated to service) and the employer as \textit{Dienstberechtigter} (one entitled to service). See the remarks by the SPD member of parliament, Stadthagen, in the session of 22 June 1896 in \textit{Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich}, ed. B. Mugdan, II: \textit{Recht der Schuldenverhältnisse} (B., 1899), 1329.} to pay the agreed upon compensation.\footnote{§ 559 in Mugdan, \textit{Materialien}, II, bxxv.} Although the draft provided for a two-week notice period to terminate the service relationship in the absence of express stipulation (§ 563), it, unlike the French Civil Code of 1803 (§ 1780), sanctioned lifelong service contracts. In its most significant deviation from the general law of contract,\footnote{In particular from what became § 323 para. 1 BGB.} the draft provided that a full-time employee was not deprived of his contractual claim to compensation by the fact that he had been prevented, for a not considerable length of time, from performing for a reason peculiar to his person for which, however, he bore no responsibility (§ 562). The drafters justified this provision on the basis of social policy and reasons of "humanity." They also noted that it was known to the common law.\footnote{See "Motive," Mugdan, \textit{Materialien}, II, 258.}

Criticism of these provisions of the draft came from many quarters. The SPD parliamentary fraction, which engaged in 'constructive' debate, ultimately voted against the draft that became law.\footnote{The SPD aspired to create a unified labor law that would also have applied to farm laborers on the large landed estates. § 95 Einführungsgesetz zum BGB, 18 August 1896, RGBI p. 604, preserved the control of the individual states over the \textit{Gesindeordnungen}, which was not abolished until 1918; see Aufruf des Rats der Volksbeauftragten, 12 November 1918, RGBI p. 1303. For a survey of the positions adopted by the SPD in the parliamentary debates, see Martin Martiny, \textit{Integration oder Konfrontation?} (Bonn-Bad}
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socialist whose critique found favor in socialist circles, Anton Menger, stressed the anti-social tenor of the code in general and its blindness to the relations of domination inherent in the service contract in particular.\footnote{153}{Anton Menger, Das Bürgerliche Recht und die besitzlosen Klassen (4th ed.; Tübingen, 1908 [1890; first appeared in Archiv für soziale Gesetzgebung und Statistik (1889)]), pp. 164-65 and passim.}

But by far the most prominent critic of the draft was Otto von Gierke. He, too, adverted to the domination that was camouflaged by contractual conceptualization. For Gierke, however, this was not a new theme created by the draft. As early as 1868\footnote{154}{I.e., one year after Marx published the first volume of Das Kapital, in which he presented a sustained analysis of the labor contract as masking a relationship of exploitation and domination.} Gierke had bemoaned the fact that capitalist commercial enterprises had become modern organizations of internal domination (\textit{Herrschaftsverbände}) in which the workers were mere objects or tools and the representative of capital the absolute master. With labor deprived of all rights within such organizations, its only choice was where it would subjugate itself.\footnote{155}{Otto Gierke, Das deutsche Genossenschaftsrecht, vol. I: Rechtsgeschichte der deutschen Genossenschaft (B., 1888), pp. 1038-36.}

In a number of publications\footnote{156}{E.g., Otto Gierke, Die soziale Aufgabe des Privatrechts (B., 1889).} Gierke engaged in a comprehensive critique of the first draft of the code toward the end of the 1880s. With regard to the sections under review,\footnote{157}{For a detailed but unenlightening survey of Gierke's contribution to labor law, see Friedhelm Jobs, "Die Bedeutung Otto von Gierkes für die Kennzeichnung des Arbeitsverhältnisses als personenrechtliches Gemeinschaftsverhältnis," Zf Arbeitsrecht 305-43 (1972).} he declared that with the exception of § 564 – which permitted termination of service contracts stipulating a duration of more than ten years with a six-month notice period – none of the provisions was capacious enough to limit contractual freedom. Indeed, the service contract, conceptualized as the free purchase and sale of the commodity labor, made possible submission to any kind of servitude including that related to slavery.\footnote{158}{Otto Gierke, "Der Entwurf eines bürglichen Gesetzbuches und das deutsche Recht," JGVVw, vol. 13, fasc. 4, pp. 109-95 at 130-31 (1888).} Recapitulating his argument of two decades earlier and anticipating the work of Max Weber, Gierke pointed out that the individualistic schema of private law prevented it from recognizing the need to protect the personality of individuals in all forms of the modern bureaucratic \textit{Herrschaftsverband}.\footnote{159}{Ibid. at p. 131.}
In particular, the draft ignored the fact that once a contractual obligation transcended isolated exchanges and was directed toward permanent activity, it “takes hold of the personality as such and therefore displays an element of the law of persons.” Critical of the draft for being grounded in the fiction of autonomous and self-ruling contractual parties, Gierke objected that it provided the weak with less protection against the economic-superiority of the strong than any other code. Finally, he found it “strange” that the draft took the locatio conductio operarum of Roman law as its foundation since the latter was built on slave labor.

As a result of public and parliamentary criticism, a second commission was called into being, which amended the existing service contract provisions and drafted new ones. The change that Gierke regarded as the chief advance was the obligation that the new draft imposed on the employer to maintain machines and rooms and to organize work processes so as to protect the health and life of the employee. Tort recovery claims arising out of violations of this obligation could not be contractually limited or waived. Gierke, to be sure, expressed his disappointment that this was the only new provision infused with a “social spirit.”

At the same time that the German parliament was engaged in the debates leading to the eventual enactment of the code (mid-1890s), Gierke published the first volume of his monumental work on German private law. In it he developed the category of communities with legally sanctioned power over the persons of their members (personenrechtliches Gemeinschaftsverhältnis). As a subset of such communities he singled out those that existed by virtue of sovereign power (kraft herrschaftlicher Gewalt) as expressed in a personal relationship of superordination and subordination. Gierke detected the communitarian component of this relationship in the fact that internally mutual rights and duties bound the ruler (Gewalthaber) and the ruled (Gewaltunterworfene), while externally the ruler represented the ruled as well.

160 Ibid at p. 189: “die Persönlichkeit als solche ergreift und darum ein personenrechtliches Element entfaltet.”
161 Ibid. at p. 191.
163 § 558 in Mugdan, Materialien, II. lxxxv. This provision then became § 618 BGB.
166 Ibid. at p. 697.
Gierke located the roots of this particular type of community in Germanic family law out of which various Germanic feudal communitarian relations then evolved. Although these were destroyed over time, and although the law in the nineteenth century, even where it recognized relations of domination outside the family, regulated them only as contractual relations among unconnected persons, Gierke was convinced that modern industrial enterprises were in fact nothing but the old "personenrechtliche Gemeinschaften kraft herrschaftlicher Gewalt." His insistence that the communitarian ruler owed protection and welfare-care to the ruled, who in turn owed him service and obedience, placed Gierke at odds descriptively and prescriptively with Maine's claim "that the movement of the progressive societies has hitherto been a movement from Status to Contract".169

It is crucial to understand the dual nature of Gierke's critique of the code's approach to modern capital-labor relations. On the one hand, Gierke pointed out that the very formality of contractualism incapacitated it from perceiving the personal relations of domination that lay beneath the surface phenomena of free and equal exchange of property.170 On the other hand, Gierke was not satisfied with establishing the existence of structural domination between contracting parties. He also maintained that the individualist standpoint of private law precluded any insight into the de facto community that bound the ruler and the ruled to each other.

Towards the end of his life Gierke began more systematically to seek (and find) the roots of the contemporary German industrial capitalist-wage labor community in Germany's feudal past. The voluntarily created mutual obligations of loyalty and obedience of the vassal and protection and care of the lord became romanticized exemplars of modern-day capital-labor relations.171 What is important to realize here is that the two strands of Gierke's critique are historically, conceptually and analytically distinct and separable. That is to say, acceptance of the thesis that wage labor involves domination does not necessitate acceptance of

167 Ibid. at p. 698.
168 Ibid. at p. 701.
169 Henry Maine, Ancient Law (L., 1931 [1861]), p. 100; cf. ibid., ch. V.
170 Cf. Karl Marx, Das Kapital, vol. I (H., 1867 [reprint]), pp. 140-41, who characterizes the sphere of commodity exchange - including the purchase and sale of labor power - as a Garden of Eden of freedom, equality, property and Bentham.
the thesis that a re-feudalized industrial-paternalistic-welfare-capitalist community exists – let alone that it is to be valued positively.¹⁷²

Indeed, in an important sense Gierke’s critique of the code was unnecessarily circuitous because the Roman law distinction between *locatio conductio operarum* and *locatio conductio operis* already contained within it the notion that he who rented his labor power to another personally subordinated himself, whereas he who contractually obligated himself to produce a specified object did not – even temporarily – forfeit his autonomy.¹⁷³ The virtue of Gierke’s critique consisted in its emphasis on the structurally determined inability of Romanist contractualism to transcend the view of those who rented out their labor power as isolated juridical subjects. By failing to develop the features peculiar to the domination characteristic of modern capital-labor relations, however, and working instead within a suprahistorical Germanic framework, Gierke prepared the way for the polar opposite view of wage workers as isolated objects of entrepreneurial welfare.¹⁷⁴

II. The Rise of a Contractualist-Domination Synthesis in the Scholarship of Emerging Labor Law in the Weimar Republic

The SPD was (at least verbally) committed to Marx’s conceptualization of freedom of contract as masking and inverting the social significance of the underlying political-economic relations of exploitation and


domination.\textsuperscript{175} To the extent that the views and programs of the SPD contributed to the shape and texture of Weimar legislation on the one hand and capital-labor relations on the other, the new discipline of labor law was bound to be influenced.

Chief among those advocating the structural incorporation of at least some of Gierke's insights into theorizing about labor law during Weimar was one of its pioneers, Hugo Sinzheimer.\textsuperscript{176} Most striking about Sinzheimer's approach is that he did not formulate a concept of property specific enough to capitalist relations of production to enable him to mediate the latter with his perception of private law as oppressing and coercing the working class.\textsuperscript{177} In this sense he reproduced Gierke's ahistoricism. Thus it was consistent for him to see the juridical core of the old \textit{patria potestas} and the feudal Germanic relations of vassalage as living on in the new forms of dependent labor.\textsuperscript{178}

The achievement of Weimar labor law scholarship in this area may be reduced to the long overdue structural recognition of the fact that the \textit{locatio conductio operarum}, unlike the sale or rental of objects, involved a commodity that was inseparable from its owner.\textsuperscript{179} Thus it became commonplace in the literature to underscore the personal exposure and subordination inherent in labor contracts.\textsuperscript{180} Even some authors who expressly distanced themselves from the positions associated with


\textsuperscript{178} Sinzheimer, \textit{Grundzüge}, p. 11; cf. in general \textit{ibid}, pp. 7-121.


By the end of the Weimar Republic, then, labor law scholars by and large fell into two groups: the Romanist contractualists and those who stressed the elements of domination inhering in the employment relationship, regardless of whether they derived this domination from modern industrial capitalism or Germanic feudal origins. What is significant here is that the communitarian component, whatever its strength in other areas of labor law,\footnote{183 See ch. 3 above. Potthoff, "Ist das Arbeitsverhältnis ein Schuldverhältnis?" came closest to effecting this integration.} was not logically integrated into the theory of the labor contract. As a result, Gierke's historical-doctrinal structure disintegrated, scattering bits and pieces to be adopted or adapted by various schools.


\begin{itemize}
  \item For express recognition, see Joseph Kausen, "Das Treuverhältnis als Ausgangspunkt des neuen Arbeitsrechts," 2 DAR 71-74 (1934); Walther Oppermann, "Deutsche Rechtsgedanken in der neuen Arbeitsverfassung," 2 DAR 332-358 at 356 (1934); Herbst.
\end{itemize}
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The statutory construct was underscored by the appearance in the same year (1934) of a study demonstrating that Gierke had erred in locating the origins of the German service contract in feudal personenrechtliche Gemeinschaftsverhältnisse. The fact that the personenrechtliche view survived the empirical refutation of its historical derivation has been analyzed as an indication that it had assumed an autonomous systemic status: it became a first attempt by labor law scholars to escape the intellectual and social crisis that resulted from the recognition that legal equality and formal contractual freedom were not only consistent with, but necessarily mediated and masked economic inequality and coercion.

Such an analysis is undifferentiated insofar as it fails to distinguish between the communitarian and the law of persons traditions. For it is possible to offer a rigorous critique of the labor contract as mediating and masking domination without having recourse to romantic notions of a community embracing the ruled and the ruler. The advocates of the personenrechtliches Gemeinschaftsverhältnis were the theoretical spokesmen of an historically specific German social-conservative, paternalistic response to the revolutionary-disruptive consequences of industrial capitalism. As such they presented a variant of the reaction by the British ruling classes a century earlier to the social disorganization caused by the vast commodification of social relations generated by the industrial revolution.

The tutelage that employers were statutorily required to exercise over their employees in Nazi Germany did not constitute a continuation of this older paternalistic class regimentation in the sense that it did not...

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represent an instinctively protective response of self-preservation by the traditional social order to the ravages inflicted on the working class. Rather, this wardship was a component of a political program designed to insure that the working class did not organize itself in self-protection so as to obstruct a political-economic recovery from Germany's catastrophic depression. In this context the resurrection of Gierke's *personenrechtliches Gemeinschaftsverhältnis* could no longer be regarded as a relatively spontaneous way out of the crisis of freedom of contract. Rather, the neo-Germanic imagery transparently obscured the creation of legal categories adequate to the sublation of the originally fictitious conditions of freedom of (labor) contract to a higher level. For now, not only did much larger and political-economically stronger employing units confront a mass of economically immiserated and organizationally atomized employees and potential employees, but an unprecedentedly ruthless State was prepared to compel worker and capitalist to conform to the new structures.

That the Nazis did not intend to recreate conditions more favorable to substantive freedom of contract but rather ones that revealed with all imaginable brutality the integumentary fiction that freedom of contract was becoming was expressed by a future RAG judge. Several months after the promulgation of AOG he commented that the latter's provisions conferring sole decision-making authority on the plant-leader in general and requiring him to issue a set of regulations governing working conditions in particular (§§ 2 and 26 AOG) could not be reconciled with the traditional notion of the employment relationship as based merely on mutual contractual obligations:

Even if in practical life the will of the one contracting party as the economically more powerful one may be more or less decisive, none the less, in terms of juridi-

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cal concepts, he never has the right to be the sole decision-maker, in particular the right to make changes in contract conditions unilaterally.193

Under the circumstances of the tendential socio-economic and political abolition of freedom of labor contract,194 the jurisprudential differences between the compromising and compromised supporters and the more radical opponents of contract-based labor relations assume only subordinate significance.195 Thus even those labor law scholars who insisted that a contract, based on the will of the parties, still underlay the employment relationship,196 accepted the overarching significance of the *personenrechtliches Gemeinschaftsverhältnis*, to which contractual obligations yielded.197 A leading contractualist announced in effect the bankruptcy of his school by conceding that working conditions were agreed upon only formally, while in fact they were unilaterally dictated by the entrepreneur.198 The more cynically realistic authors, who were prepared to adapt theory wholesale to the ideological needs of the Nazis and to the changes on the labor market and at the workplace brought about by the transformation of the constellation of class forces, spoke of the (voluntary) "incorporation" (*Eingliederung*) of Followers into a plant-community, which did not rest on a contractual basis (although it was willed).199 This wing of scholars took the re-feudalization of labor relations seriously. Thus it protested against the notion that the Follower placed his labor power at the entrepreneur's disposal eight hours a day; for the whole employment relationship rested on this availability which was not interrupted the other sixteen hours a day (merely actual performance was interrupted). Those who objected to this loss of autonomy were still caught up in the illusions of the free labor contract proclaimed by liberalism: "In today's Germany there is no room for such


194 See ch. 5 below.


199 Siebert, *Arbeitsverhältnis*, was the pioneer in this area.
feeble resentments. For it is precisely National Socialism that... has made the ethos of serving honorable again.\footnote{Arthur Nikisch, \textit{Arbeitsvertrag und Arbeitsverhältnis} (B., 1941), p. 39. Labor law scholars were preoccupied with denying or justifying the unequal status of plant-leader and Following. See Hilmar Westpfahl, \textit{Die Nichtigkeit von Arbeitsvertrag und Arbeitsverhältnis auf der Rechtsgrundlage des AOG} (Weimar, 1938), p. 50.}

It remains to be determined whether the court joined in this anti-synallagmatic campaign.

IV. RAG-Adjudication

Since most of the relevant decisions deal with substantive issues (in particular, vacation rights) that are treated in greater depth elsewhere, discussion of the factual settings will be brief.

In one of the earliest decisions dealing with AOG, the court overturned a lower court ruling that vacation rights could be derived from the welfare duty imposed on employers by § 2 AOG. RAG agreed that the old view of the employment relationship as purely contractual had given way to a \textit{personenrechtlich} relationship within the plant-community. And although the court also agreed that the statutory and contractual conditions of the individual employment relationship had, after the promulgation of AOG, to be interpreted from this new standpoint, RAG appeared to fear the consequences for legal certainty if the welfare duty of § 2 AOG were sanctioned as a general clause conferring arbitrary discretion on judges to formulate sweeping generalizations enforceable on all employers and employees without an examination of the concrete situation. (RAG 264/34, 23:170-74, No. 35, 23 March 1935.)\footnote{RAG 250/35, 26:175-79, No. 33, 5 February 1936, expressly held that the first sentence of § 2 para. 2 AOG did not imply that all doubtful legal questions were to be resolved in favor of the Following. Cf. RAG 153/37, 33:172-82, No. 29, 19 January 1938. Ironically, had § 2 been interpreted as so implying, legal certainty would presumably have been enhanced.}

A year later, in holding in favor of a female employee who had been discharged for refusing to undress for an in-plant medical examination, the court insisted that the general clauses pertaining to \textit{bonos mores} and good faith (§§ 138, 157 and 242 BGB) were the appropriate vehicles by which to introduce Nazi communitarian notions into private law. But, absent special statutory limitations, the labor contract still formed the basis of the employment relationship to which the general norms of BGB applied. (RAG 218/35, 26:125-43 at 135, No. 28, 7 March 1936.)

Until RAG abandoned its consideration-based view of vacation rights, it maintained that the recently adopted view of the employment relation-
ship as predominantly *personenrechtlich* could not alter the nature of those rights. (RAG 203/36, 30:70-73, No. 11, 16 January 1937.) Although the court reversed itself the next year, declaring that the predominantly *personenrechtliche* nature of the employment relationship was inconsistent with a consideration-based view of vacation rights (RAG 254/37, 32:316-23, No. 45, 16 March 1938), RAG not only continued to use the *personenrechtliche* aspect to deny claims to vacation rights on occasion (RAG 279/39, 39:326-32, No. 59, 28 May 1940), it also refused to the end of its existence to recognize a universal claim to paid vacations.202

Presented with its first opportunity to adopt a position concerning the theory of “incorporation” by an employee who claimed that he was entitled to a Christmas bonus from an employer for which he had worked while being formally employed by another employer,203 RAG avoided a direct confrontation by noting that even adherents of the theory conceded that a community relationship had to be grounded in a meeting of the minds (*Willensübereinstimmung*), which was lacking in the case at bar. It added, however, that it was upholding its precedents according to which the employment relationship – even with its altered (i.e., *personenrechtlich*) content – had to be founded on a contract containing private law obligations (i.e., *schuldrechtlich*). (RAG 248/38, 36:385-92, No. 69, 17 June 1939.) Even the contractualist theoreticians found that the court was out of touch with Nazi reality.204

In a later case RAG rejected the “incorporation” theory in favor of the labor contract theory. Plaintiff, who had been a relatively highly paid salaried railway employee, was called up to the army before he was to begin working (1 October 1939). Although defendant-employer continued to pay the salaries of its conscripted employees, it excluded plaintiff from this arrangement because he had not yet begun working for it.205 Reversing the lower courts, RAG ruled that the employment relationship became effective on 1 October 1939; a *de facto* incorporation into the plant was not required. However, since the payments were voluntary, defendant could determine the conditions under which they would be made provided that he treated similarly situated employees similarly.

202 See the appendix to this chapter.
203 See ch. 3 above for a more detailed account.
204 Hueck-Nipperdey-Dietz, *Kommentar*, § 1 n. 17 at p. 13. Mansfeld (RAG 36:392) objected only to the outcome, not to the legal reasoning. See RAG 15/42, 45:140-48 at 148, No. 28, 29 May 1942, for a cryptic reference to the status of the labor contract.
205 See RAG 260/38, 36:437-39, No. 79, 21 June 1939, on the continuation of an employment relationship during a vacation after the termination of an employee’s work.
As Hueck noted, both theories could have generated this outcome (RAG 40:224).

Immediately after the start of World War II the court held that the provisions of BGB governing impossibility of contractual performance (§§ 323-326) were not applicable to the employment relationship as a **personenrechtliches Gemeinschaftsverhältnis** grounded in duties of loyalty and welfare. In an appeal brought by a Jewish employee, RAG ruled that the BGB provisions frequently precluded an equitable and socially justifiable balancing of the interests of the entrepreneur and the Following. Although the court seemed merely to be maintaining a tradition of realistic jurisprudence (and legislation) that sought to mitigate the harshness of several of the societally abstracted provisions of the Romanistic BGB governing the formation, performance and termination of contracts, this specific ruling favored the employer. This outcome underscores the uncertainty attendant upon the discretionary use of general clauses to avoid what seem to be statutorily predetermined undesirable social results. (RAG 8/39, 37: 230-45, No. 36, 13 September 1939.)

Such uncertainty reappeared the next year in a case involving § 616 para. 1 BGB, which provides that employees remain entitled to their wages when they are prevented from working for a relatively not considerable length of time for a personal reason for which they bear no responsibility. This is one of the BGB provisions originally designed to mitigate the rigors of the provisions controlling impossibility. The court held that since these latter provisions no longer applied to employment relationships as predominantly **personenrechtliche Gemeinschaftsverhältnisse**, § 616 para. 1 could no longer be regarded as an exception to them. Rather, the social policy expressed in § 616 para. 1 had in the future to be regarded as an emanation of the entrepreneur’s duties of loyalty and welfare to the employee. Where, as in the case at bar, the employer did not violate these duties by treating hourly and salaried employees differently, the statutory provision ceased to require protec-

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206 See the discussion in ch. 11 below.
207 See, e.g., §§ 616 and 626 BGB.
208 Rüthers, *Die unbegrenzte Auslegung*, pp. 394-97, misunderstands this decision, which overruled the appeals court, which had applied §§ 323-326 BGB in favor of plaintiff-employee. RAG arrived at a result only partly favorable to plaintiff on other grounds.
tion of the former. (RAG 187/39, 40:282-92, No. 50, 30 October 1940.) In a late decision the court finally reached the issue that had triggered Gierke’s original interest in the personenrechtliches Gemeinschaftsverhältnis – domination. In holding against an employee who had argued that a fine exacted by his employer exceeded the statutory limit on wage garnishment, the court characterized the plant-leader’s power to levy such fines as arising not from an agreement between the parties, but from absolute powers (Machtvollkommenheiten) connected with the personenrechtlich aspect of the employment relationship and the leader-principle. As such, the fines did not constitute contractual penalties but flowed from the police-like powers statutorily conferred on the plant-leader in order to maintain order and security. (RAG 167/41, 44:228-32, No. 38, 14 April 1942.)

On the whole, then, the court proved much more resistant to the inroads of the personenrechtliches Gemeinschaftsverhältnis than did the contractualist theoreticians. Not only did the court delay drawing substantive conclusions from its initially more cosmetic adoption of the new view, but when it integrated the latter into its holdings it often reached results that could have been produced by synallagmatic principles as modified by the pre-Nazi general clauses of bonos mores, good faith and reasonableness. If it was true even before 1933 that RAG had “broken the record” for the use of these clauses,210 the proliferation of decisions grounded in the duties of loyalty and welfare after 1933 opened new vistas for judicial discretion.211 Although the leading Nazi jurists regarded the general clauses as an appropriate vehicle for introducing Nazi policy into the resolution of private law conflicts,212 their unsystematic and irregular application to the personenrechtliches Gemeinschaftsverhältnis revealed the failure of the Nazis to impose a coherent pattern of adjudication on this residual area of individual labor law.213

210 Justus Hedemann, Die Flucht in die Generalklauseln (Tübingen, 1933), p. 16.
212 See ch. 1 above.
Appendix to Chapter 4

The Impact of Nazi Communitarian Ideology on Adjudications concerning Working Conditions: The Example of Paid Vacations

In Germany, as elsewhere, few hourly production workers received paid vacations before the First World War. Although the growth of trade unionism and the proliferation of collective bargaining agreements during Weimar meant that millions of German workers were able to achieve a modicum of success in this area of so-called fringe benefits, no general statutory regulation of vacations rights was ever enacted.

The labor court adjudication during Weimar was thus restricted to interpreting the relevant provisions of employment contracts and collective bargaining agreements. Within the framework of the debates that would occupy RAG during the Nazi period, the most important controlling principle enunciated by the court related to its consideration-based view of vacation pay: it was part of the compensation paid by the employ-


215 See Wolfgang Daubler, Das Arbeitsrecht, II (Reinbek, 1979), 98-99.

216 In 1922, four-fifths of all employees covered by collective bargaining agreements received a paid vacation; half of these workers received a maximum of six to twelve days off, with one-quarter receiving a maximum of fewer than six or more than twelve days respectively. In that year over fourteen million employees worked in plants covered by agreements. See Emil Lederer and Jakob Marschak, "Die Klassen auf dem Arbeitsmarkt und ihre Organisationen," Grundriß der Sozialökonomik, div. IX, pt. II, pp. 205, 213. By the beginning of 1929, collective bargaining agreements covering 97.8% of all employees covered by such agreements contained vacation provisions. At the beginning of 1928, two-thirds of such workers received a minimum of three days or fewer, while one-third received a maximum of three to six days. The maximum length among hourly workers amounted to no more than six days for about two-fifths of the employees, six to twelve days for about one-half, and more than twelve days for the remainder. Salaried employees received considerably longer vacations. See Alfred Hueck and H.C. Nipperdey, Lehrbuch des Arbeitsrechts, II (3rd to 5th eds.; Mannheim, 1932 [1929]), 58-59.

217 Several leading labor law scholars drafted a general labor contract statute, which in §§ 93-104 provided for three to nine days of paid vacation, but the draft never became law. See Der Arbeitsvertrag und der Entwurf eines Allgemeinen Arbeitsvertrags-Gesetzes, ed. Erich Molitor with the cooperation of Alfred Hueck and Erwin Riezler (Mannheim, 1925).
er in exchange for services rendered by the employee.\textsuperscript{218} A number of corollaries flowed from this contractualist point of departure. First, the issue of the waiting period arose. Since paid vacations presupposed performance of labor, and since vacations were generally granted only once annually, complicated technical problems developed with regard to the length and character of the waiting period\textsuperscript{219} and pro-rated payments. Second, in order to deal with the problem of the employee who left a firm before he had received his vacation in natura, the court developed the notion of two distinct but co-existing entitlements to time-off on the one hand and monetary compensation on the other. Third, at least as to individual employment contracts, the fiction of free, equal and autonomous contracting parties dictated that the employee himself was the best judge as to whether and how to use his vacation.\textsuperscript{220} Finally, in spite of the do ut facias perspective of the court, which viewed this year's vacation pay as compensation for labor performed during the previous year, RAG tended to deal with the issue of short work weeks during an employee's vacation by allowing the employer to pay the vacationing employee only what he would have earned had he worked that week.\textsuperscript{221} Although the court was aware of the conflicting principles, it reasoned that it would be unfair to pay a vacationing employee more than his working colleagues, and that the economic situation of the firm had also to be considered.\textsuperscript{222}

Although Nazi ideology was to transform the socio-economic and legal conceptualization of the vacation, the leading labor law scholar of the period extending from Weimar to Bonn captured the essential character of the vacation common to all these societies\textsuperscript{223} when he defined it as "the liberation from the obligation to work that is granted to the employee for a certain time for the purpose of recovery."\textsuperscript{224}

\textsuperscript{218} The drafters of the labor contract statute also adhered to a contractualist view; \textit{ibid.}, p. 46.
\textsuperscript{219} E.g., whether a waiting period was a so-called restrictive year (\textit{Sperrjahr}).
\textsuperscript{220} He could, for example, choose to engage in other paid employment during his vacation. Hueck cites only scholarly, but no decisional authority for this principle. See Alfred Hueck and H.C. Nipperdey, \textit{Lehrbuch des Arbeitsrechts}, I (3rd-5th eds.; Mannheim, 1931 [1927]), 273 n. 34.
\textsuperscript{221} See \textit{ibid.}, I, 272 n. 29. RAG's view was controversial.
\textsuperscript{222} Several of the key decisions during the Weimar period were: RAG 305/30, 11:358-63, No. 80, 21 January 1931; RAG 182/30, 10:128-33, No. 34, 4 October 1930; RAG 538/28, 6:196-203, No. 47, 24 April 1929; RAG 177/32, 17:166-70, No. 31, 6 July 1932.
\textsuperscript{223} All belong to the "realm of necessity": see Karl Marx, \textit{Das Kapital}, vol. III, in Marx-Engels \textit{Werke}, vol. 25 (B. [GDR], 1964), p. 828.
\textsuperscript{224} Hueck/Nipperdey, \textit{Lehrbuch}, I, 267. During the Nazi period another scholar of similar longevity defined the vacation as the "temporary renunciation by the entrepreneur of the...
In view of the catastrophic proportions that unemployment attained during the waning years of Weimar and the first several years of the Third Reich, vacations rights temporarily ceased to be a vital social or legal issue. But as unemployment declined, the volume of litigation reaching RAG increased noticeably. Nevertheless, no statutory regulation of vacations was enacted during these years either. A group of prominent scholars under the aegis of the Academy for German Law published a draft of a statute regulating the employment relationship in 1938 which provided for mandatory annual vacations; but it failed to become law. The following analysis of the court’s adjudications focuses on the ideological transformation of the juridical foundations and character of vacation rights and of the socio-economic functions of vacations.

In two cases in 1933 the court tersely upheld its consideration-based precedents. (RAG 159/33, 18:434-37, No. 96, 9 September 1933; RAG 107/33, 19:29-31, No. 10, 23 September 1933.) Not until AOG officially sanctioned the authoritarian-communitarian principles of Nazi labor law ideology did the court see itself forced into justifying its traditional position. By 1935 it was squarely presented with the issue by a part-time tailor who in part based his claim to vacation pay on § 2 para. 2 AOG, which imposed on the plant-leader the duty to provide for the welfare of his Followers. The appeals court, in overturning the trial court, conceded that the provision contained nothing about vacation entitlements, worker’s services.” Arthur Nikisch, *Arbeitsrecht* (2nd ed.; Tübingen, 1944 [1936/1938]), p. 111.

Indeed, vacation rights may have been the most litigated issue during the Nazi period, certainly for the years after 1936. The last years of Weimar witnessed successful attempts by employers to attack the gains unions had made in securing the adoption of vacation provisions in collective bargaining agreements. See Ludwig Freiler, *Sozialpolitik in der Weimarer Republik* (Stuttgart, 1949), p. 483.


Entwurf eines Gesetzes über das Arbeitsverhältnis (H., 1938), §§ 73-84 and pp. 80-89. Among the drafters were Denecke, Dersch, Hueck, Nipperdey and Richter. Mansfeld was also a member of the labor law committee. § 149 Entwurf einer Regelung der Arbeit (September 1942) continued to provide for a minimum of six days of annual vacation; BAR 61/115, fol. 68-69. On the development of vacation provisions in TOs, see Günther Schelp, "Die Entwicklung des Urlaubsrechts durch Tarifordnungen," 4 *DAR* 190-95 (1936); Kurt Klingensfuss, "Der Erholungsurlaub der Gefolgschaft" (Diss., Heidelberg, 1937).
but stated that the manifold nature of employment relations made it necessary to leave regulation of such issues to judicial determination. RAG agreed that all statutory and contractual conditions of employment relations had to be interpreted in the light of the new view of the employment relationship as one involving personal relations peculiar to the plant-community rather than merely as consideration-based claims. But the approach suggested by the appeals court could never guarantee the certainty required by employment relations since it lacked a fixed standard and was tantamount to arbitrariness. The court thus rejected the general clause of AOG as an insufficient basis in itself for creating an entitlement. (RAG 264/35, 23:170-74, No. 35, 23 March 1935.)

A year later a case was decided in which plaintiff, who had worked for defendant for two weeks short of one year, was sick for two weeks and then returned to announce that she was quitting; immediately thereafter she began her new job. RAG held that she was entitled to her vacation pay regardless of how the employment relation had been terminated. Recognizing the progress made by the new view of vacation as a means of strengthening the worker, the court nevertheless insisted that the entitlement – to free time and/or vacation pay – was still juridically based on work performed in the past. (RAG 9/36, 26:321-26, No. 64, 11 March 1936.) Mansfeld's comment to the effect that the relationship between vacation and labor performed was becoming more and more tenuous (ibid) was a self-fulfilling prophecy rather than a careful reading of the decision.

The next year the court held that where a TO created an entitlement to vacation after eight months of work if a Follower left without being at fault, but also specified that other paid employment during the vacation was prohibited, the entitlement was not affected by the fact that the Follower immediately entered new employment after legitimately having given notice. Where, as here, the court stated, time-off was no longer possible, the prohibition on other employment became meaningless; and, it added, AOG did not alter the fact that the time-off and the compensation were not a gift, but consideration. Once again the commentator criticized the court for persisting in its old construction of the employment relationship. (RAG 203/36, 30:70-73, No. 11, 16 January 1937.)

228 Mansfeld expressed shock at the lack of progress of the communitarian idea (RAG 23:174).
Towards the end of 1937 RAG programmatically defended its refusal to deviate from its traditional principles. Despite the possible justification for the claim that every worker was entitled to vacation after a certain period, the court stated that it was not authorized to accord that justification the status of a generally valid legal principle because the competent State agents, which had introduced vacation provisions into so many TOs, alone had the statutory authority and expertise to regulate the multifarious relations on an individual basis. (RAG 113/37, 32:147-53, No. 21, 10 November 1937.)

In the beginning of 1938 RAG for the first time made a vacation rights case turn on the use of the loyalty and welfare duties of AOG. It held that a TO that in effect required two years of employment before plaintiff could become entitled to six days of vacation was incompatible with the aforementioned duties; the latter required in the court's view a period of rest and recovery after considerably less than two years. (RAG 180/37, 32:210-16, No. 31, 16 February 1938.)

RAG finally articulated its definitive abandonment of the consideration-based view of vacation rights in the same year. In what it now declared to be the only possible view of the labor relationship as based on a personal relation of loyalty, vacations were to serve to maintain and restore the labor power of the working man not only in the interest of the individual, but equally in that of the Volk as a whole. (RAG 254/37, 32:316-23, No. 45, 16 March 1938.)

As the court itself obliquely admitted, it had been subject to frequent and intense scholarly criticism for its adherence to the purely consideration-based view. Indeed, some scholars were still not satisfied with the position adopted by the court in this decision. In particular, they objected that the court had not recognized that vacation rights derived in the first instance from community and not personal interests. Their disappointment was so much the greater as they themselves in their abovementioned draft specifically provided for a minimum of six days of

230 It was referring to the trustees of labor.
vacation annually based on the employer's welfare duty and designed to maintain the strength of the *Volks*. And although the court continued to underscore the crucial nature of the plant and *Volks*-community as determinants of vacation rights, until the very end of its existence it refused to acknowledge the existence of a common law right of every working German to an annual vacation. Conceding that developments tended in that direction, it nevertheless insisted that achievement of that goal depended not only on a commendable need, but also on the labor and economic situation. (RAG 17/42, 45:98-108, No. 18, 17 July 1942.) Neither contemporaries nor postwar scholars forgave RAG its insistence on a legal basis independent of the welfare duty in order to sustain a claim to vacation.

At a time, however, when reportedly the six-day vacation had already become generalized in fact, the court's acceptance or creation of a common law right to an annual paid vacation based on the general clause of § 2 para. 2 AOG would not have resulted in the unambiguous gain for the working class that critics appeared to attribute to it. For in numerous areas the court and contemporary critics agreed that elimination of the contractualist-consideration grounding of a vacation claim in favor of the welfare/loyalty-duty approach would have precluded pro-employee decisions.

The anti-liberal components of Nazi ideology dictated that labor power cease to be and be considered the *dominium of the individual*

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234 Entwurf eines Gesetzes, §§ 74-75.
236 The court did use plant custom to interpret labor contracts with regard to vacations; see RAG 76/39, 37:365-73, No. 55, 15 November 1939; RAG 29/41, 42:287-93, No. 45, 22 July 1941. The outcomes were opposed to each other.
240 E.g., with respect to terminations of employment and inheritance from a deceased employee.
worker. In this regard it echoed the treatment accorded property by the Weimar constitution, art. 153 para. 3 of which obligated property to be used for the general good. But not only in the Weimar view of property, in that of labor power, too, must be sought the antecedents of Nazi ideology. The Law on Socialization, which in an attenuated form represented the anti-capitalist consciousness of large segments of the German working class in 1918 and 1919, declared in its first section that every German had the moral duty to use his mental and physical powers as required by the general welfare. It also placed labor power, as the greatest economic good, under the special protection of the national government. The constitution, promulgated several months later, repeated these formulas.

In his contribution to the standard commentary on the fundamental rights of the second part of the Weimar constitution, Gustav Radbruch, a legal philosopher and former SPD minister of justice, explained that by means of this constitutional guarantee labor power became a legal good – of the individual or of the society. A passage in Das Kapital even served Radbruch as authority for his claim. Whereas earlier drafts of the constitution and of the Law on Socialization had articulated the protection explicitly in aggregate social terms, Radbruch interpreted § 157 para. 1 of the constitution not as restricting but as extending protection to the individual as well. As an individual legal good, labor power was protected against its buyer and third persons; as a national legal good it was in addition protected against its own holder – the worker himself. Thus the protection of the individual disposition of labor power was limited by the protection of the national labor power.

In the practical realization of the Nazi critique of liberal capitalism the pseudo-communities of plant and Volk virtually absorbed the individual elements protected formally by contract law and, at least in the-
The regimentation and quasi-militarization of labor under the Nazis was in part legitimated by the authoritarian-paternalistic allocation of benefits, the scope of which was controlled by judicial interpretation of the general clause of AOG. To the extent that the court refractorily adhered to a modified contractualist or positivist conception of vacation rights, it may or may not have protected workers' rights or employers' profits depending on the concrete facts of the case; but it surely acted at cross-purposes with the Nazi regime, which, as the authoritative macro-socio-economic planning agent and creator of a binding State ideology, had understood and set forth as a practical precept that the statutorily unchallenged power of the Nazi leadership on the one hand and of the individual capitals on the other would be undermined by a failure to mitigate absolute power by means of a welfare duty that was not an empty shell. The court's failure to accommodate itself to this dictate of social control and cohesion is even more remarkable in view of the fact that it was, at least facially, motivated not by some independent notion of a juster substantive outcome, but by the weight of precedent and deference to (the absence of dispositive) positive law.

According to this interpretation, then, the court was neither a champion of progressive social policies or traditional employers' interests nor a pliant tool of the Nazis. Rather, without intending to oppose the latter, it may, in a dysfunctional and disintegrative fashion, have influenced social life merely because it refused to abandon an abstract legal principle.

247 See, e.g., Arbeitsgesetzbuch, cited at n. 13 above, which stresses throughout the goals of creating socialist individuals.
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).
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

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\(^6\) 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," *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 capitalist\(^9\) 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.
\(^{11}\) Gesetz zur Regelung des Arbeits einsatzes, 15 May 1934, RGBI 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, RGBI 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.
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. 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. Although aggregate unemployment still exceeded one million in 1936, 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. 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.

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. 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. Whereas this measure was designed to insure the supply of labor for tasks of particular importance

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, RGB 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, RGB I, 710.
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to the State (especially for the construction of the West Wall\textsuperscript{21}), a further decree the same year extended the service obligation to combating public emergencies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{26} By 1942,

\textsuperscript{21} See Mason, Sozialpolitik, pp. 289-90.

\textsuperscript{22} Dritte VO zur Sicherstellung ..., (NotdienstVO), 15 October 1938, RGBI I, 1441.

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

\textsuperscript{24} Zweite DurchführungsAO zur VO zur Sicherstellung ..., (Beschränkung des Arbeitsplatzwechsels), 10 March 1939, RGBI I, 444.

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

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, RGiI I, 126, exempted government agencies from the consent requirement.
27 Sechste DVO über die Beschränkung des Arbeitsplatzwechsels, 29 September 1942, RGiI I, 565.
28 VO über die Meldung von Männern und Frauen für Aufgaben der Reichsverteidigung, 27 January 1943, RGiI 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

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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. 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 wartime 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 distinc-
tion 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.)

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 statuto-
ry provisions designed to protect employees against the loss of entitle-
ments associated with their assignment to new employers. RAG held, for
example, that a provision 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 perma-
nent 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-Durchfüh-
rungsAO).
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, 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.)

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. 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 provision 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

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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. 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, 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

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,

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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 administra-
tors 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 low-
er 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 jurisdic-
tion)? 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 admin-
istrative 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 legisla-
tion. Thus in a relatively straightforward case, the court ruled that
where one party contested superannuation, the consent of the employ-
ment 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 deploy-
ment 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 characteri-
pp. 139-83. On the Weimar period, see Friedrich Dessauer, Recht, Richtertum und
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 provision\textsuperscript{44} 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,

\textsuperscript{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.) Whereas in this case both the granting and the retraction of consent occurred before the expiration of the notice to terminate period, 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 1 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. 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).
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.)

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.) 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. 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 Echterholter, _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. 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, 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, totaled more than seven million. 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. From this vantage point, 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.


53 Eichholtz, Geschichte, I, 82-102; Edward Homze, Foreign Labor in Nazi Germany (Princeton, 1967); Jurgen 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 adminis-
trative 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 Kirchhei-
mer 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 disci-
pline in the lower ranks of the bureaucracy . . . and among the popula-
tion 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 loop-
holes that the government then closed. Unless the cases bear no repre-
sentative 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.
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.\textsuperscript{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 decisions\textsuperscript{62} and presumably enhanced the legitimization 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,\textsuperscript{63} it was very unlikely that RAG would bring about that result.

\textsuperscript{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).


\textsuperscript{63} See U.S. Strategic Bombing Survey, \textit{Effects}, passim; Alan Milward, \textit{The German Economy at War} (L., 1967 [1965]), passim.
Chapter 6

Discipline, Obedience and Entrepreneurial-Managerial Authority

The virtually dictatorial rights of control which AOG conferred on employers vis-a-vis their employees, the organizational atomization of the working class and the powers of supervisory intervention reserved by the State (in the form of the trustees of labor) reveal that the Nazis attributed great importance to restructuring class relations within the process of production. The general clauses that empowered the courts to insure that individual employees were justly benefited by entrepreneurial benevolent despotism represented one safety valve used by the Nazis to forestall and contain unrest. The cases in this chapter are discussed with a view toward exploring the nature of this paternalism. In particular, attention is focused on the extent to which statutorily conceded judicial intervention interfered with managerial control of employees as well as on whether the court exhausted its possibilities for curtailing the expanded powers of individual employers.

A cautionary word is in order regarding the representativeness of the cases. More so than cases in other areas, they are likely to present a skewed picture of the universe of actionable acts. Given the transparent bonds between all fractions of the capitalist class on the one hand and the Nazi State apparatus on the other, plant-level worker opposition assumed an immediately political character for the Nazis. As such it was subject to suppression by the Gestapo. Consequently, employers did not sue on the contract or in tort in the politically most interesting instances of insubordination. The labor courts' jurisdiction was also restricted by the establishment of the independent system of social honor courts, which were empowered to mete out punishment to employers who abused their position of power and to employees who disturbed the (labor) peace or consciously interfered with managerial functions.

Many of the most egregious examples of entrepreneurial domination of employees were thus also eliminated from the civil court.65

As a result, the cases that were litigated in the labor courts were the politically least destabilizing and – with the exception of those arising under special wartime statutes – thus approximated the situation in Weimar as well as everyday industrial life in Nazi Germany could.66

I. Weimar Adjudications

During Weimar the court constructed a modern pluralist version of what has, for the era of Anglo-American labor law antedating collective bargaining, been termed the prerogative contract: “By the end of the nineteenth century the employment contract had become a very special sort of contract – in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion.”67 The first American treatise on the law of master and servant, published in 1877,68 summarized the state of the decisional law as guaranteeing the master’s “right to manage his own affairs” and the servant’s obligation “to obey all the master’s lawful and reasonable commands . . . unless they require the doing of acts outside the line of his engagement, and expose him to dangers not contemplated in the service for which he was hired”.69 That this relationship was viewed as contain-


66 The cases in this chapter should be read in connection with those discussed in ch. 7 on dismissals.


ing elements that antedated the rise of capitalist rationality emerges from the author's statement that:

It is no excuse for disobeying the master's orders that such disobedience resulted in no loss to him, nor even that obedience thereto would have involved him in loss, or that such disobedience really resulted to the master's benefit. It is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation . . . .

RAG approved of this extra-economically grounded claim to discipline in 1930.

Although in nineteenth-century Anglo-American law the master was "not bound to consult the interest, convenience or wishes of the servant, but his own," "a servant must not be over fastidious about slight or casual departures from the usual service, but must have due regard for the Masters necessities. . . ." Whereas a farm laborer, that is, one regarded as not being specially employed, could be dismissed for refusing to carry mortar, those hired to exercise special skills could not be treated fungibly. But in all such cases, "if the worker sees fit to put himself upon his strict legal rights, a standard of reasonableness was used to determine whether he had committed a breach of contract." Similar considerations applied to refusals to work more than a certain number of hours per day. Finally, the master was subject to "an implied obligation to treat the servant humanely . . . ."

Virtually all of these rules and general clauses have analogues in RAG's Weimar adjudications. Thus the court held in a series of cases that every employer was, on the basis of entrepreneurial and managerial functions and prerogatives (Direktionsrecht and Weisungsrecht), entitled to assign an employee another job where he considered such a change required by or desirable in the interest of the plant; and every


70 Wood, Treatise, p. 225.
73 Ibid., pp. 180-81.
74 Ibid., p. 181.
75 Ibid., pp. 171-72.
76 Ibid., p. 165.
77 The controlling statute was § 121 GewO, which obligated employees to obey their employers' orders concerning the work assigned to them.
employee had to put up with (sich gefallen lassen) such a reassignment provided that it was not associated with a reduction in wages and did not constitute an unjustified disciplinary measure. (RAG 191/29, 7:253-58, No. 57, 30 January 1929; RAG 555/29, 8:504-509, No. 104, 1 March 1930.)

What is remarkable about these decisions is that the semi-official commentators were in accord with the radical critic Otto Kahn-Freund. Characterizing the demarcation of the employer's sphere of domination from that of contract, that is, the issue of the scope of the employee's obligations absent express contractual provision, as one of the most difficult in labor law, Kahn-Freund noted that the court had construed the sphere of domination very expansively. Thus one of the commentators, Hermann Dersch, believed that the employer's prerogative had to be subject to the general clause of good faith (§ 242 BGB), which would limit reassignments to jobs that employees of the same kind customarily assumed according to the usages of the trade (RAG 7:257-58). H.C. Nipperdey, another commentator, also adhered to this position, which he illustrated by reference to the proposition that one employed to do skilled work need not perform unskilled work, or that one employed on a salaried basis need not assume the job of an hourly employee (RAG 8:508-509). The commentator Alfred Hueck added that in the absence of express provisions, managerial prerogatives concerning reassignments would have to be limited by reference to that which could reasonably be expected of an employee; this issue, in turn, had to be resolved in the context of contractual interpretation guided by a standard of good faith (§ 157 BGB). The court's position would be justified only where an employee had obligated himself to perform work generally without more detailed substantive specifications. Hueck viewed this possibility as unlikely to occur in practice except among unskilled workers. (RAG 242/30, 11:85-88 at 87-88, No. 20, 26 November 1930.)

By the end of the Weimar period, then, the court had created a solid precedential tradition in support of what even mainstream labor law scholars understood to be an extraordinarily broadly conceived set of entrepreneurial/managerial rights and a correspondingly broadly con-

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78 Alternatively, the court held that an employee was required to submit to an employer's instructions in the interest of the preservation of order and smooth (reibungslos) management. (RAG 297/29, 7:476-82, No. 107, 16 November 1929; RAG 8:508.)
received duty of employees to obey. A favorable point of departure thus existed at the outset of the Nazi period.

II. Adjudication during the Nazi Period

AOG began where RAG had left off. It made the employer the sole decision-maker vis-a-vis his employees, subjecting the exercise of that right only to a paternalistic welfare duty (§ 2). As an illustration of the employer's powers, §§ 26-27 provided that in plants with at least twenty employees the employer was required to promulgate a set of plant rules and regulations (Betriebsordnung) including, inter alia, information concerning working hours, mode of compensation, reasons for discharge and provisions for fines, which § 28 permitted the employer to levy for infractions of the order and security of the plant.

The same commentators who had adopted a relatively critical position towards the expansive adjudications of the Weimar years declared in their standard commentary on AOG that these entrepreneurial rights had to be interpreted more expansively and elastically than had previously been the case. In this connection the shift from the synallagmatic view of the employment relationship to anchoring the latter in the plant-community was regarded as justifying a new framework for the employee's duty to obey.


81 Indeed, it was Kahn-Freund's thesis that the court had adopted a fascist social ideal that triggered the most hostile critiques of his book. See Anthes, "Das soziale Ideal des Reichsarbeitsgerichts," 1931 Der Arbeitgeber 524-26, 557-58; Clemens Nörpel, "Ein Sozialideal des Reichsarbeitsgerichts," 8 Die Arbeit 561-66 (1931); Heinz Potthoff, review of Das Soziale Ideal des Reichsarbeitsgerichts, 17 Arbeitsrecht cols. 539-42 (1931); Lutz Richter, "Bemerkungen zu Kahn-Freunds Sozialem Ideal des Reichsarbeitsgerichts," 11 Neue Zf Arbeitsrecht cols. 657-66 (1931).

82 For an example of the Betriebsordnung of a very large plant (IG Farbenindustrie Frankfurt-Höchst), see Wolfgang Hromadka, Die Arbeitsordnung im Wandel der Zeit am Beispiel der Höchst AG (Cologne, 1979), pp. 126-49.


84 Ibid., § 2 n. 24 at p. 57.
The cases that reached RAG in this area of capital-labor relations will be dealt with under the following headings: A. disciplinary infractions; B. refusal to work; and C. job reassignment.

A. Disciplinary Infractions

The court uniformly decided against employees in cases involving serious acts of disobedience. Where an easily excitable handicapped employee of twenty-four years hit the plant-leader and was fired on the spot,85 the court was unimpressed by the employee's argument before it that, "today managers and workers have the same rights." On the contrary, the court found that order and discipline had to prevail in the plant. (RAG 135/37, 31:218-21, No. 38, 6 October 1937.) Also fired on the spot was an engineer who had gravely insulted the plant-leader. In the course of litigation it was discovered that he had been schizophrenic at the time. Appealing the overturning of the favorable judgment of the trial court - plaintiff had sued for six months' salary - the employee protested that LAG's decision was at odds with the Nazi Weltanschauung, which protected the economically weaker party especially where he, his wife and child were being made to bear the consequences for statements for which he could not legally be held responsible. The court formulated a balancing-cum-reasonableness standard taking into account the disadvantages and dangers for each party; in this calculus the general and special prerequisites of the orderly continuation of work in a plant with numerous Followers were accorded the highest priority. Although RAG conceded that the justification for the dismissal depended on the actual state of affairs as revealed by hindsight and not on the false perceptions at the time of the dismissal, plaintiff's insulting remarks made continued employment unreasonable; for defendant-employer's prestige would have been undermined to an intolerable degree among the other Followers. (RAG 12/40, 40:3-10, No. 1, 19 June 1940.)

Where discord between two employees (physicians) made it necessary that one leave, the court authorized the employer to exercise his reasonable discretion (verständiges Ermessen) in selecting one for discharge. Provided that the discharge was not an inappropriate measure, the employer was not required to dismiss the predominantly guilty employ-

85 See § 123 no. 5 GewO.
The court's notion of the employer's discretionary powers led it to hold that an employer's toleration of minor infractions did not justify an employee in committing greater ones. In a case where the employer and employee were relatives, the court upheld docking the latter a whole day's wages for several hours' lateness even if the employer had merely been using this opportunity to punish the employee for his continual unpunctuality in an effort to educate him. (RAG 112/42, 46:42-45, No. 8, 20 November 1942.)

The only case in which the court significantly relativized the employee's duty to obey involved an employee who managed his employer's business in the Netherlands and who was fired on the spot for refusing to speak to defendant-employer when he was called on the telephone. The court held that disobedience on the part of an executive employee was in general not so serious a matter as it was among more subordinate employees. (RAG 36/35, 24:140-41, No. 22, 25 May 1935.) But late in the war the court was not inclined to apply this principle to the very highly paid technical director of an armaments plant who was fired on the spot for having forbidden the manager-owner entry to his department without his permission and the employees direct contact with the owner. (RAG 1/44, 47:229-32, No. 42, 6 June 1944.)

A worker who was fined for unexcused absence from work (as provided for in the *Betriebsordnung*) sued because the amount deducted from his wages had exceeded the statutory limit on garnishment. Referring to the statutory words, "order and security" (§ 28 para. 1 AOG), the court concluded that the plant-leader's power to fine derived from his right to preserve order and security and not from a contractual agreement with his Followers. Since the court imputed police-like character to this coercive means peculiar to the plant-community, it rejected the quantitative limit on garnishment because it would have made it impossible to punish workers in certain cases. (RAG 167/41, 44:228-34, No. 38, 14 April 1942.)

That the court sanctioned a return to the structure of capital-labor relations that had prevailed in Germany before World War I emerged from its rejection of a claim – that had been accepted by both lower

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86 Controversy concerning the legal source of the employer's penal power continues to the present in German juristic literature. For a summary of the discussion before 1933, see Carl-Heinz Dittmann, "Das Strafrecht des Arbeitgebers" (Diss., Erlangen, 1931). Werner Mansfeld, "Die Buße," *DAR* 273-76 (1934), adopted the contractarian view, which had predominated during Weimar. See also Hueck-Nipperdey-Dietz, *Kommentar*, § 27 at pp. 379-89.
courts – by an employee that the fines levied on him were impermissible because he had not had a prior hearing. Noting that AOG did not expressly provide for such a hearing, RAG pointed out that the corresponding sections of the Industrial Code also required no hearing. It thus ratified the Nazis’ repeal of the power of partial intervention which BRG had conferred on the plant council. It also paternalistically justified its holding on the grounds that no conscientious plant-leader would impose a fine without first having determined whether a hearing could be dispensed with; alternatively, the preservation of order and security could in some instances require immediate action that would make hearings intolerable. On the other hand, the court did remand the case for determination as to whether the fine was objectively founded, a criterion that was subject to judicial review. The court thus considered it necessary to provide the affected Follower with a kind of due process in order to secure him not only against “arbitrary” but also innocently erroneous measures of a plant-leader for which the social honor courts would not have offered a remedy. (RAG 171/41, 44:285-90, No. 50, 17 April 1942.)

B. Refusal to Work

Although the decisions in this area were generally favorable to employees, they did not go beyond making explicit what the court had already implied during Weimar. Thus a handicapped worker was justified in refusing to do work constituting an immediate danger to his life. (RAG 59/33, 19:19-21, No. 6, 24 May 1933.) In the case of a plant foreman (who also shared in the profits of the company) who was fired for refusing to perform work he considered technically impracticable, RAG remanded to LAG, which had held against him. RAG held that in order to trigger a discharge, a refusal to work had to be associated with a consciousness of the possibility of the existence of a duty to obey. (RAG 137/36, 28:273-75, No. 55, 7 November 1936.)

The most interesting of these cases turned on the court’s evaluation of the underlying facts. As a result of technical problems in a mine, a
supervisor sought to induce plaintiff and other employees to work part of an additional shift in order that the entire mine could be fully operative the next day. Plaintiff, who refused, was denied entry to the mine the next day. Had the plant faced an emergency, the court ruled, then the situation would have been different; but the fact that the supervisor had not issued an order, but had merely sought to persuade plaintiff to work, constituted forceful evidence that no such emergency had been at hand. (RAG 17/40, 39:407-12, No. 71, 12 June 1940.)92

C. Job Reassignment

The court tended to apply a much stricter standard to an exercise of entrepreneurial authority in this area that required an employee to move his place of residence. The court so held in the case of an estate overseer whose new employer, having purchased the estate from a non-aryan, dismissed him without notice because he had refused to work on another estate. Referring to this stricter standard, the court held that absent express agreement to the contrary, such an overseer was not subject to dismissal without notice for refusing geographic reassignment. (RAG 38/40, 40:68-74 No 11, 24 July 1940.)93

Generally the court upheld employers who reassigned employees within one plant. (RAG 268/39, 39:167-76, No. 31, 21 May 1940; RAG 241/39, 39:198-206, No. 36, 24 April 1940; RAG 273/39, 40:78-86, No. 14, 31 August 1940.) Although the court had held during Weimar that an employee could be reassigned to a lower-paying job where such reassignment was expressly permitted in a contract or collective bargaining agreement (RAG 21/32, 15:631-34, No. 152, 7 May 1932), it had also held that such a reassignment presupposed an orderly termination and rehiring (which in the case of a member of a plant council required the latter's approval [RAG 8:504-507]). In holding now that such a termination was no longer a prerequisite, the court explicitly abandoned its previous view that such an expansive entrepreneurial right was intolerable as creating too much uncertainty and opportunity for covert disciplinary

92 In RAG 68/39, 37:387-92, No. 59, 21 November 1939, the court ruled that a university instructor had the right – pursuant to §§ 273 and 320 BGB – to withhold performance where his compensation had been unjustifiably reduced.

93 While stressing the sacrifice inherent in being forced to abandon one's Heimat, Hueck stated that the notion of allegiance could justify such a sacrifice in the presence of very important entrepreneurial interests (RAG 40:73). Cf. RAG 299/38, 35:264-68, No. 49, 15 March 1939 (highly paid branch manager need not change his place of residence when requested by employer to move to town in which he has accepted a new assignment).
measures. The court now characterized that right as indispensable for plants in which the flow of work in various departments depended on different treatment of raw materials and the various work methods required various methods of compensation. If the employer were denied this right, he would be forced to shorten the notice periods for dismissal; as a result, even greater uncertainty would be created for employees. The only requirement imposed by the court was that such a regulation be unambiguous and easily recognizable for employees. (RAG 12/41, 42:163-67, No. 25, 20 May 1941.)

In several decisions in 1942, however, RAG adhered to its traditional position according to which an employer could not, absent a provision in a contract or Betriebsordnung/Tarifordnung, reduce an employee’s wages in connection with reassigning him to a job for which he was neither hired nor previously trained. (RAG 83/42, 45:219-23, No. 43, 25 September 1942; RAG 32/42, 45:41-43, No. 8, 12 June 1942.)

In the most important of these cases the court ruled that where a Betriebsordnung spoke of an employee’s duty to accept a temporary transfer, there was no reason to interpret this clause expansively; for it constituted an exceptional legal provision imposing a burden on the Following. Absent a clear statement to the contrary, it could not be assumed that the parties desired to give the employer the unilateral right to impair the employees’ social conditions permanently. (RAG 139/41, 44:112-17, No. 17, 20 February 1942.)

This case was, to be sure, complicated by the fact that the court remanded for determination as to whether the wartime wage freeze applied to it. That decree provided that where plants were newly established or converted, or where employees performed other work after the decree went into effect, the prevailing wages for like plants or the new work were controlling. The court ruled that where the reassignment was necessitated by the war (kriegsbedingt), a wage reduction was permissible. (RAG 151/1940, 41:338, No. 46, 25 March 1941; RAG 98/42, 46:13-18, No. 3, 13 November 1942.) By 1942 it was difficult to deny the force of Hueck’s comment that such an interpretation accorded a very considerable scope to the provision in the decree since the war was influencing virtually all economic relations (RAG 44:117). Indeed, the

95 § 18 para. 2 KWVO, 4 September 1939, RGBl I, 1609.
96 § 18 para. 1 KWVO used such language.
question could be raised as to whether under these circumstances the warning issued in 1940 by the ministry of labor to employers not to abuse the decree to reassign workers *ad libitum* had not become moot.97

III. Conclusions

The court had gone to such an extreme in conceding unilateral authority to employers during the Weimar years96 that its precedents easily lent themselves to deciding cases arising under AOG. In fact, it was not until well into the war (1941-1942) that RAG articulated views that advanced significantly beyond those enunciated before 1933; chief among these were its holdings concerning the police-like character of employers' penal powers and the abandonment of the requirement of an orderly termination for a reassignment involving a wage reduction. In association with the court's conservative-paternalistic and statist tendencies during Weimar, RAG's decisions at least in this area of the law support Kahn-Freund's claim that it had judicially legislated fascism into existence in the 1920s.99

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97 Betr.: Auslegung des § 18 Abs. 2 der KWVO, 11 April 1940, RArbBl I, 187. Shortly after the warning was released RAG assumed for itself (and denied to the trustees of labor) jurisdiction over the question of whether the prerequisites for triggering § 18 para. 2 were present. (RAG 132/40, 41: 67-75, No. 10, 18 December 1940.)

98 For a fictionalized representation of the employer's position of strength that catches the legal niceties, see Hans Fallada [i.e., Rudolf Ditzen], *Kleiner Mann - was nun?* (B., 1932), pp. 299-301. The novel depicts an employer who dismisses one employee because her conduct outside of work allegedly harmed the company's image, and then, literally with the next breath, threatens another with discharge for tardiness, disclaiming any interest in the employee's private life that might exculpate him. Cf. RAG 70/39, 38:223-26, No. 46, 10 January 1940.

99 Kahn-Freund, *Das soziale Ideal*, passim. See ch. 1 n. 310 above for the holding of a case decided in the final weeks of the war in which RAG renounced judicial review of the substantive justification of plant fines on the grounds that discipline was no longer the right but rather the statutory obligation of the plant-leader. For inadvertent confirmation of the degradation that befell German workers under the Nazis, see Justus Hedemann, *Deutsches Wirtschaftsrecht* (2nd ed.; B., 1943 [1939]), p. 270.
Chapter 7

Dismissals

The Nazis did not introduce fundamental statutory changes regarding the conditions under which employees could be dismissed. The provisions of the Industrial Code, the Commercial Code and the Civil Code, which created a modicum of protection for salaried and hourly workers in the form of various notice periods for dismissals without cause, remained in effect. The statutory provisions for dismissals without notice for an "important cause" also remained unchanged. The one change effected after 1933 related to the heightened protection afforded employees in the Weimar period by the Plant Council Statute (BRG). It had permitted an employee to protest certain enumerated kinds of dismissals to the plant council; if the latter agreed with the

100 §§ 122, 133 GewO.
101 §§ 66-68 HGB.
102 §§ 621-25 BGB.
103 Salaried employees had long been favored in this regard. The gap in protection between these two groups was recognized in G. über die Fristen für die Kündigung von Angestellten, 9 July 1926, RGG 1, 399, which provided that salaried employees employed by the same employer for five years had to be given three months’ notice to the end of the calendar quarter; after twelve years the notice period was extended to six months. Like the notice period provisions mentioned in notes 100-102 above, this one, too, could be contractually bargained away. For an overview, see Alfred Hueck and H.C. Nipperdey, Lehrbuch des Arbeitsrechts, I (3rd-5th ed.; Mannheim, 1931 [1927]), 309-24.
104 In a number of potentially significant decisions during Weimar, RAG limited the employer’s traditional right to dismiss an employee for any or no reason or completely arbitrarily. It held that a dismissal was voidable where it was contra bonos mores (RAG 533/28, 6:96-103, No. 27, 24 April 1929 [trade union activity]); it also held that an employer’s refusal to state the real reason for dismissal could under certain circumstances lead to the conclusion that the dismissal was bottomed on an irrelevant ground and was therefore contra bonos mores (RAG 303/32, No. 60, 16:297-304, 2 November 1932 [apprentice]). Hueck sharply criticized this decision as eliminating the employer’s freedom to dismiss and change his personnel at will (RAG 18:303); cf. Hueck and Nipperdey, Lehrbuch des Arbeitsrechts, I, 305-306.
105 §§ 123-24, 133 GewO; §§ 70-72 HGB; § 626 BGB. Cf. Hueck and Nipperdey, Lehrbuch des Arbeitsrechts, I, 325-34.
106 Not discussed here is the protection afforded against mass layoffs. See VO über Betriebssstillegungen und Arbeitsstreckung, 15 October 1923, RGBI 1, 893; § 74 BRG; § 20 AOG. Cf. Hueck-Nipperdey-Dietz, Gesetz zur Ordnung der nationalen Arbeit. Kommentar (4th ed.; Munich, 1943 [1934]), pp. 283-314. RAG dealt with relatively few cases arising under § 20 AOG; see, e.g., RAG 149/41, 44:134-37, No. 20, 20 February 1942.
107 § 84 BRG: 1. justified suspicion that dismissal was based on consideration of employee’s gender, politics, trade unionism or religion; 2. no cause stated; 3. employee refused to perform work other than that for which he had been hired; and 4. dismissal was an unfair hardship not caused by the employee’s conduct or plant conditions.
employee and arbitration between employer and employee was unsuccesful, the employee or the plant council could bring suit in labor court. If the court ruled in favor of the employee, the employer was faced with the choice of either reinstating the plaintiff with backpay or indemnifying him or her.\footnote{89 §§ 84-90 BRG. The court could fix the sum up to a maximum of a half-year’s wages, depending on the length of employment. Cf. Hueck and Nipperdey, \textit{Lehrbuch des Arbeitsrechts}, I, 362-85.}

With the repeal of BRG\footnote{90 § 65 no. 1 AOG.} the basis for this mechanism in the collectivist structure of Weimar industrial relations was, to be sure, destroyed. But the new labor code (AOG) took BRG as a model\footnote{91 See Hueck-Nipperdey-Dietz, \textit{Kommentar}, pp. 673-74; [Hans Georg] Anthes, \textit{Kündigungsschutz} (Munich, 1934), pp. 46-47.} in preserving a measure of independent outside review of the exercise of entrepreneurial authority.\footnote{92 Cf. Hueck-Nipperdey-Dietz, \textit{Kommentar}, p. 673 for Hueck’s coded admission that this was the least that could be demanded of employers given their nearly autocratic position. Cf. the naive view of Ernst Scheld, “Das Direktionsrecht des Arbeitgebers im alten Arbeitsrecht, gegenübergestellt den Befugnissen des Betriebsführers nach dem Gesetz zur Ordnung der nationalen Arbeit” (Diss., Giessen, 1934), p. 54, who analogized between the permissibility of judicial review of governmental acts and plant-statutes.\footnote{93 The limit had been twenty under BRG. In May 1935 DAF submitted a draft of a Gesetz zur Erweiterung des Kündigungsschutzrechts, which proposed that § 56 para. 1 AOG cover plants with fewer than ten employees. DAF was actuated by the insight that, “The patriarchal relationship presupposed by the legislator is unfortunately not present in a large number of plant-leaders of small plants.” See Generalakten des Justizministeriums betreffend Arbeitsvertragsrecht, 22 October 1934-31 December 1937, BA R 22/2063, fol. 19-22. At a conference on 10 October 1935, a representative of the deputy Führer (Rudolf Hess) supported the amendment because there had been no end to the complaints, in particular concerning dismissals for political reasons. But when the ministries of economics and food and agriculture objected, Werner Mansfeld, in charge of labor law in the ministry of labor, stated that his ministry could not take any steps; rather, it was in the discretion of the deputy Führer to propose a \textit{Chef} conference at which the issue could be resolved. The files do not reveal whether the conference, which was scheduled for 4 December 1935, ever took place. See \textit{ibid.}, fol. 59-67. Robert Franke, a labor court judge, noted that it was precisely in the smallest business units that the power to dismiss was most abused. See Franke, “Notwendigkeit und Wege einer Unschädlichmachung des Kündigungsschutzes,” 2 \textit{DAR} 307-12 at 310 (1934).\footnote{94 “... wenn diese unhilf hart und nicht durch die Verhältnisse des Betriebes bedingt ist.” § 56 para. 1 AOG.} This general clause\footnote{95 See Hueck and Nipperdey, \textit{Lehrbuch des Arbeitsrechts}, I, 368; Hueck-Nipperdey-Dietz, \textit{Kommentar}, p. 695.} was interpreted to mean that a dismissal required by plant conditions was by definition not unfairly harsh; thus

\begin{quote}
\textit{... wenn diese unhilf hart und nicht durch die Verhältnisse des Betriebes bedingt ist.}\footnote{94 “... wenn diese unhilf hart und nicht durch die Verhältnisse des Betriebes bedingt ist.” § 56 para. 1 AOG.}
\end{quote}
ended the inquiry. Another obstruction to recovery by employees resulted from the very restricted ambit of review of entrepreneurial decisions concerning the economic necessity and expediency of technical and organizational measures.

Although an employee could not file suit until the confidence council had unsuccessfully conferred on the matter, its role was reduced to that of a formality compared to the role which the plant council had played in Weimar. The confidence council was, as the leading commentary formulated it, not suited to review the justification of an employer's decision to discharge an employee, for such authority would have disturbed the relationship of confidence between them.

Like the Weimar statute, the Nazi labor code offered the employer the choice of reinstating the successful plaintiff or indemnifying him or her. It too established a maximum of six months' wages, but in addition permitted the imposition of an entire year's wages in cases of obvious arbitrariness or abuse of the employer's power. Thus the employer retained the power to discharge any employee for any or no reason provided he was willing to pay a certain price; the law sought to avoid "unsocial" dismissals only indirectly. The large volume of litigation before the social honor courts testified to the widespread nature of abusive and arbitrary conduct by employers. As one labor court judge, speaking uncustomarily radical language but not ex cathedra, noted, the law did not adequately compensate for the economically weaker contractual position of the employee whose docility could be compelled by an employer who could be confident that the difficulties of obtaining new employment would keep his employees in check. The acute labor shortages that developed in the course of the militarization of the economy in the latter half of the 1930s and then during World War II itself modified this relationship significantly.

117 § 56 para. 2 AOG.
118 Hueck-Nipperdey-Dietz, Kommentar, p. 674.
119 § 58 AOG as amended by G. zur Erweiterung des Kündigungsschutzes, 30 November 1934, RGBI 1, 1193.
122 See Timothy Mason, Sozialpolitik im Dritten Reich (Opladen, 1977), pp. 246, 299 and passim.
In the context of the extraordinarily comprehensive State control of the assignment, distribution, hiring and firing of labor as well as in that of the new statutory provisions for, and judicial facilitation of, the dismissals of political, "racial" and religious opponents, adjudications regarding the traditional doctrines of dismissal assume a subordinate socio-economic and jurisprudential status for the historical observer. Within this restricted scope RAG did not transform the state of the law as created by the court during Weimar. But in a number of areas, particularly those governed (or potentially governable) by general clauses, the court did make some distinctive contributions.\textsuperscript{123}

Commentators, government officials and jurists directly and obliquely expressed fear of the consequences for the stability of the new order attendant upon arbitrary treatment of employees, who by law had already been deprived of many of the rights they had acquired since the latter part of the nineteenth century.\textsuperscript{124} Yet the cases present no uniform trend. Thus in a number of cases the court rejected equitable resolutions that were jurisprudentially available. It held, for example, that dismissal of an employee of thirty-two years' standing was not \textit{per se contra bonos mores} (RAG 139/40, 41:320-29, No. 43, 24 March 1941); similarly, the discharge of a long-time employee solely for reasons of profitability constituted no such violation. (RAG 78/42, 46:45-49, No. 9, 2 October 1942 [very highly paid executive employee with five-month notice period].)\textsuperscript{125} On the other hand, RAG did rule that dissolution of an at-will employment relationship merely in order to deprive an employee of a paid holiday was void (RAG 115/38, 34:324-27, No. 51, 7 December 1938); similar reasoning underlay the court's holding \textit{contra bonos mores} and void the dismissal of an employee who had been deprived of the heightened protection accorded confidence councillors\textsuperscript{126} by an employer who delayed his swearing in in order to prevent him from taking office.\textsuperscript{127}

\textsuperscript{123} Cases falling under a number of other rubrics - e.g., dismissal resulting from insubordination - will not be discussed again here.
\textsuperscript{125} In accord with its Weimar precedents, RAG 305/38, 39:91-92, No. 15, 13 March 1940, held that lifetime tenure did not preclude dismissal for an important cause. Cf. RAG 201/34, 23:190-94, No. 40, 9 March 1935 (unilateral contractual right of lifelong employee to give notice not \textit{contra bonos mores} where economically stronger employer not fettered). The court also held that although the employer's right to discharge without notice for important cause (§ 626 BGB) could be contractually limited to certain causes (RAG 228/38, 36:418-23, No. 75, 12 July 1939), it could not be eliminated (RAG 56/41, 43:100-107, No. 15, 30 September 1941).
\textsuperscript{126} § 14 AOG.
23:58-64, No. 15, 20 February 1935.) 27 But the court also declared that it was not unlawful for an employer to threaten to dismiss an employee in order to induce the latter to forego a future contractual right provided that he could reach the same result in the present by dismissing the employee. (RAG 21/41, 42:241-49, No. 38, 16 June 1941.) 28 Although the court approved psychological pressure in that case, it ruled in favor of another employee whose employer had used a more subtle and sophisticated “tactic” to manipulate him into resigning rather than submitting to a dismissal that would have redounded to his dishonor but that would have been materially less disadvantageous. (RAG 24/43, 47:29-37, No. 5, 11 November 1943 [employer also reproached him for his “Jewish manners”].)

Although the court ruled that denunciation of a co-worker (for work-related lapses) on the basis of well-founded suspicion rather than solid proof did not warrant dismissal (RAG 71/35, 25:49-53, No. 6, 14 September 1935), less substantiated charges of a sexual (RAG 304/38, 38:217-19, No. 44, 16 January 1940) or political nature (RAG 54/43, 47:136-42, No. 26, 8 October 1943) against a superior or plant-leader were held to suffice as grounds for discharge. But in light of the potential destruction of an employee’s existence by a discharge, insulting an employer – even in the presence of other employees – did not per se justify dismissal. (RAG 86/36, 28:51-56, No. 12, 22 July 1936 [balancing test applied].) 29

RAG considerably relaxed the standards under which an employer could dismiss an employee suspected of criminal activity. Although traditionally mere suspicion did not justify dismissal without notice, 30 and although the court continued to hold the employer liable for backpay in the event that the suspicion proved to be unfounded (RAG 19/41, 43:66-82, No. 12, 19 September 1941), it held that where the mine security police (Bergpolizei) demanded the removal of an employee who, the police were convinced, had committed sabotage at the mine, the employer was justified not only in removing him but in dismissing him without

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27 But see RAG 218/34, 23:183-87, No. 38, 23 February 1935.
28 This case came up from Austria.
29 Plaintiffs in the last three cases mentioned in the text were high-ranking executive employees. Where an older employee, who had been hired pursuant to Fünfte AO zur Durchführung des Vierjahresplans über die Beschäftigung älterer Angestellter, 7 November 1936, Deutscher Reichsanzeiger, no. 262, 9 November 1936, p. 3, was dismissed for swearing at the employer after he lost a promotion suit, the court upheld the employer on the ground that he was not trying to evade his statutory duty to employ an appropriate number of older workers since he might have to replace plaintiff with another older worker (RAG 119/38, 35:70-75, No. 13, 7 December 1938).
notice even where the employer lacked procedurally exhaustive proof; the employee carried the burden of proving the falsity of the suspicion. (RAG 114/35, 25:121-24, No. 23, 2 November 1935.) Perhaps the most far-reaching decision involved a school teacher of twenty-seven years' standing who spent two months in pre-trial detention while awaiting trial on charges that she had refused to permit people evacuated from Rostock to be housed in her apartment.131 While in detention she was dismissed without notice; when, later in 1942, she was acquitted by a special court (Sondergericht),132 defendant-employer converted the discharge into one with one month's notice. Both lower courts found in plaintiff's favor, awarding her backpay and declaring the discharge void. RAG, on the other hand, while upholding the award of backpay, held the dismissal valid. It rejected LAG's view that with the acquittal the matter was over and done with (erledigt), especially in light of the fact that everyone could come under unfounded suspicion once in his or her life. On the contrary, reasoned the court, defendant-employer did not act contra bonos mores when he decided that it was intolerable to employ as an educator someone who had failed to live up to the demands of helpfulness. For the court it was crucial that the acquittal had been based not on proof of innocence but on the failure of the prosecution to offer certain proof that plaintiff had seriously refused to provide the help demanded of her. (RAG 89/43, 47:143-51, No. 27, 14 January 1944.)

The court sought to fit the decision within its precedents, citing several post-1933 decisions that held that under special circumstances an unfounded suspicion or charge raised by a third party could justify a discharge without notice (RAG 47:148). Unlike the case at bar, however, these earlier cases133 all involved political pressure by the State or the

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131 She was specifically charged with having violated the Good Samaritan provision of the Penal Code (§ 330c StGB).
132 See Walter Wagner, Der Volksgerichtshof im national sozialistischen Staat (Stuttgart, 1974).
133 The court cites to these at RAG 47:148. This line of precedent can be traced back to the Weimar period. In one - in the light of later events, ironic - case, plaintiff, who was secretary of a steeplechase association that was authorized by the State to accept wagers, made a remark during business negotiations with a Jewish businessman that "objectively" appeared as an insult to the Prussian minister of agriculture, contempt for the republican form of State and an anti-Semitic insult to the Jewish businessman. Defendant-employer refused to accede to the businessman's demand that plaintiff be fired on the spot, whereupon the businessman carried out his threat to publish an account of the incident in a newspaper. When the ministry of agriculture made a similar demand on threat of revoking defendant's betting license, defendant did dismiss plaintiff. Like the lower courts, RAG upheld the discharge on the ground that pressure exercised by a third party could constitute "important cause" within the meaning of § 626 BGB even where the employer was not legally obligated to comply with the demand for dismissal, particularly...
Nazi party, failure to accede to which might have injured the employer’s material interests. Here, by contrast, nothing indicates that the employer had been subject to such pressure; moreover, the court did not use balancing-test language to weigh the employer’s duties of welfare and loyalty against the potential damage accruing to him and the Following. Still more significant is the fact that in this case the “third party” was another court. That RAG was unwilling to give full faith and credit, as it were, to a court that was notorious for its high conviction rate and disregard for traditional standards of procedure, may reflect the pervasive internally terroristic methods and spirit that prevailed in Germany as morale collapsed in the face of increasingly certain military defeat.

In its most extensive discussion of the standards by which to judge whether a discharge was contra bonos mores, the court both rendered transparent how conveniently elusive this general clause was and made the necessary obeisances to Nazi ideology in order to protect itself on its political flank. A discharge was contra bonos mores if in the view of all fair and just thinking Volk-comrades it contradicted that degree of regard for morality and decency which the average person demanded of it. Not satisfied with the task of divining the universal view of the average, the court proceeded to introduce a temporal element, conceding that only the currently prevailing Volk-consciousness and sense of decency were dispositive. At the same time it indicated that the general clauses of public morals and good faith (§§ 138, 157 and 242 BGB) had where the employee’s conduct led to the employer’s Hobson’s choice. (RAG 221/31, 13:484-87, No. 113, 14 November 1931.) The Nazi ideology of the plant-community purported to impose a reasonable duty on the employer to shield his employees even at some cost to his material interests. See n. 134 below.

Whereas a decade earlier Hueck had wanted to restrict thirdparty-pressure discharges to “extraordinary exceptional cases” (RAG 150/34, 22:209-14 at 214, No. 45, 28 November 1934), in his annotation to the 1944 case he apparently abandoned his belief in the mythology of the plant-community. By then he was constrained to concede that giving the employer a free hand to dismiss employees was not reconcilable with declaring the exercise of that right impermissible (RAG 47:150-51).


The case was decided in January 1944; the acquittal had taken place in October 1942. Earlier in the war, presumably in an attempt to maintain morale, the court gave retroactive effect to a decree protecting draftees against dismissal (RAG 143/40, 41:330-35, No. 44, 11 February 1941 [German people’s legal convictions in total war outweigh detriment to legal certainty]).
become vehicles to introduce Nazi communitarian ideology into the legal system. But even this concession was conditional because the court characterized as decisive (only) those Nazi goals that found expression in laws enacted since 1933. (RAG 218/35, 26:125-43, No. 28, 7 March 1936.)

Thus absent unambiguous Nazi statutes to the contrary, the court was as free as it had been during Weimar to apply the very capacious norms of the BGB. Even according to the court's own carefully articulated self-image, over a large range of social conduct its decisions were not quasi-autonomously generated by a faithful positivistic reading of a seamless web of codified Nazi will.

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137 Plaintiff in the case was a female employee with a one-day notice period. She was discharged because she alone among 125 female co-workers had refused to submit to an in-plant examination of her pubic hair for lice by a doctor. In a thematically related area the court halfheartedly attacked the employer's right to discharge female employees because of extra-marital pregnancy. Although the court in principle recognized that extra-marital pregnancy was – rightly – judged differently than it had been in the past, it left the door open for discharges and other discriminatory treatment where, for example, the employee's condition offended customers (RAG 90/37, 30:297-300, No. 49, 21 August 1937) or where she committed an egregious breach of loyalty such as engaging in extra-marital intercourse with a Jew (RAG 78/41, 42:389-97, No. 61, 29 July 1941).

Part IV

Enemies of the Regime

In order to understand the decisions involving politically motivated discharges, it is necessary to set forth the statutory basis for the discharges that gave rise to virtually all the litigation.

In connection with the alleged participation of Communists in the burning of the Reichstag building on 27 February 1933, Hitler induced President Hindenburg to sign an executive order "for the protection of the People and the State," which went into effect the next day. The order was based on art. 48 para. 2 of the Weimar constitution, which authorized the president temporarily to suspend certain enumerated guarantees (personal freedom, freedom of speech, assembly and association, secrecy of mail, and freedom from search and seizure in the home as well as the protection of property) in order to restore public security and order if seriously threatened or disturbed. The preamble to the order singled out the necessity of defending the State against Communist acts of violence.

During the month of March the police, under Göring's control, and the SA, under instructions as a Nazi private army and also spontaneously at the local level, seized, imprisoned, beat and killed numerous Communists. Those members of the Reichstag who were not imprisoned went into the underground. Thus of the eighty-one candidates of the German Communist Party (KPD) elected to the Reichstag on 5 March 1933, none was able to attend the session of 23 March 1933 when the Reichstag debated the enabling act demanded by Hitler. Against the background of art. 76 of the Weimar constitution, which provided for changes in the constitution to be effected by the Reichstag, since only two-thirds of the quorum of two-thirds were required for passage, and since only those Social Democrats who had not yet fled voted Nay, the Reichstag enacted the Law for the Relief of the Distress of the People

1 VO des Reichspräsidenten zum Schutz von Volk und Staat, 28 February 1933, RGB1 I. 83. On the whole period (1933-34) of the so-called legalization of the dictatorship, see Karl Bracher, Stufen der Machtergreifung (F., 1974 [1960]), pp. 119-236. All empirical information in this introduction to Part IV not otherwise documented is derived from this section of Bracher’s study. See also Konrad Heiden, Der Fuehrer, tr. Ralph Mannheim (book was not published in original German) (Boston, 1944), pp. 544-78.
2 11 August 1919, RGB1 p. 1383.
3 4,800,000 votes were cast for the KPD.
Enemies of the regime and Reich. The law, which was to expire after four years, enabled Hitler's cabinet not only to become the legislator, but to pass laws that deviated from the constitution.

On this basis Hitler enacted on 4 April 1933 a Law on Plant Representation and on Economic Associations, which provided that the highest officials of the individual Länder could extinguish the membership of those plant council members with a hostile attitude to the State or the economy (art. I). Art. II abolished the protection afforded by § 84 of the Plant Council Statute against politically motivated discharges of any employees. It also abolished the right to complain to the plant council if the discharge was motivated by the suspicion of anti-State leanings; instead, it remitted the discharged employees to the officials mentioned in art. I for their remedy in the form of a hearing.

Three days later the cabinet enacted the Law pertaining to the Restoration of the Professional Civil Service (BBG). It provided that civil servants could be discharged even where the prerequisites for such discharges according to previously existing law had not been met (§ 1). Those who had entered the civil service after 9 November 1918 (i.e., after the demise of the old regime) without the prescribed or customary training or other qualifications had to be discharged. Although they were to receive their salaries for a period of three months following discharge, they were to be deprived of their entitlement to a pension; a reduced but revocable pension could be granted in cases of great need (§ 2). Compulsory retirement was also imposed on those of non-aryan descent except for those who had become civil servants before 1 August 1914, or who had fought at the front or whose fathers or sons had "fallen" in World War I (§ 3). Civil servants whose previous political activity afforded no guarantee that they would at all times champion the national State without reservation could (but did not have to) be dismissed; they were also to receive three months' salary upon dismissal and three-quarters of their pension (§ 4).

Decisions concerning discharges were to be made definitively by the highest authorities of the Reich or Länder, subject to no judicial review, by 30 September 1933 (§ 7). Those dismissed pursuant to §§ 3 and 4

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4 RGBI I, 141.
6 RGBI I, 161. Arts. I and II were subsequently repealed by AOG.
7 7 February 1920, RGBI p. 147.
8 RGBI I, 175. On BBG, see Hans Mommsen, Beamtenum im Dritten Reich (Stuttgart, 1966), pp. 39-61.
received no pension unless they had ten years' seniority (§ 8). This provision also applied retroactively to those civil servants who had retired before the law went into effect insofar as §§ 2-4 could have been applied to them had they still been civil servants (§ 9). Non-tenured salaried employees and hourly workers in the State sector were subject to the same provisions (§ 15). Finally, the minister of the interior could grant higher payments than those authorized by the statute in cases of inequitable hardship (§ 16).

The first ministerial implementing order provided that all civil servants who belonged to the Communist Party or its auxiliary organizations were “unqualified” within the meaning of § 2 and were subject to mandatory dismissal. This provision, which served to deprive Communists alone among the political opponents of the Nazis of their pensions, reflected a general Nazi policy of singling out the KPD for especially severe treatment. Thus the third ministerial implementing order, in interpreting § 2 BBG, required the dismissal of a civil servant who had been an active Communist even if he no longer belonged to the KPD or its auxiliaries (ad § 2 no. 2). In its interpretation of § 4 BBG, however, the implementing order declared that membership in a political party — other than the KPD — did not in itself justify the assumption of national unreliability, even if the civil servant was a dues-paying and active member (ad § 4 no. 1).

On 20 July 1933 Hitler promulgated a supplemental law to BBG which included a new § 2a expressly requiring the discharge of KPD members or communist activists. An exception could be made for those who subsequently supported or joined a party or organization that had backed the so-called national upheaval. But those who remained active Marxists after 20 July 1933 — whether as Communists or Social Democrats — were subject to mandatory dismissal.

The third law amending BBG added to § 4 the provision that those who met the requirements of § 4 but who had already retired before its
enactment were to be deprived of their pensions. A fourth amending law appended to § 7 BBG the provision that decrees in accordance with §§ 2-4 BBG could be altered or withdrawn in favor of the affected civil servants until 30 September 1934.

14 22 September 1933, RGBI I, 655.
15 22 March 1934, RGBI I, 203.
Chapter 8

Communists

Very few cases involving Communists reached RAG. Apart from several cases in which Communist activity or attitudes played only a peripheral part, the decisions dealt with dismissals either in connection with BBG or effected by Communist employers.

In the first case, plaintiff, who had been employed by the state railway since 1919, was discharged on 31 March 1933 for alleged Communist activities; he was in protective custody for three weeks and criminal proceedings for attempted high treason were quashed. He sued for his salary for the duration of the ordinary notice of termination period. BBG, § 1 para. 4 of which empowered the state railway to issue appropriate directives, had not yet been enacted at the time of the dismissal. Nevertheless, on 27 March 1933 the director-general of the railway issued a directive providing for the immediate dismissal of all employees involved in communist politics. Not until 18 April 1933 did the railway make use of the enabling act which excluded judicial review. The purpose of the authorization was, on the basis of public security and general welfare, to create the possibility for an administrative body to intervene in vested rights if necessary to abrogate existing labor contracts without reference to the previously existing legal framework. The court saw itself confronted not with administrative rules operating merely as instructions for officials, but rather with prescriptive regulations that the officials were obligated to apply where the appropriate prerequisites were present. The court acquiesced in the determination of the railway that judicial review was precluded also with regard to the retroactive force of discharges effected before 18 April 1933. (RAG 106/34, 21:234-40, No. 48, 18 April 1934.)

Plaintiff in the next case, a railway conductor who had been employed by a local government since 1910, was dismissed without notice because he had belonged to the Revolutionary Trade Union Organization\(^\text{16}\) for five weeks in 1931. He brought suit to force defendant to certify that he, plaintiff, was not at fault; for if plaintiff was not responsible for his dis-

\(^{16}\) On the Revolutionäre Gewerkschaftsorganisation, see F. David, *Der Bankrott des Reformismus* (B., 1932), pp. 249-69.
missal, then defendant, pursuant to the statute of the pension fund, would have to reimburse the fund for the sums it paid out to plaintiff. The court held in favor of defendant because under BBG\(^\text{17}\) defendant did not have the legal option of not discharging plaintiff — a circumstance that could not have been foreseen by the pension fund statute. (RAG 165/34, 22:149-54, No. 32, 7 November 1934.)

In other words, the court held that it was better not to disappoint defendant’s expectation than plaintiff’s two-fold expectation: 1. that membership in the Revolutionary Trade Union Organization would carry with it no legal liabilities; and 2. that he would receive certification of his not being at fault when he was not responsible for his discharge.

In another BBG case from this period the court held that a discharge based on this law did not, without more, also include a dissolution of the contractual employment relation. Although the dismissal of a communist-minded civil servant constituted an interference of the Reich in the employment relation by virtue of State sovereignty, holding such views did not, without more, contravene the contract. The statutorily enforced discharge did not necessarily include the will to annul the contract absent State interference. Where the letter of termination did not express such a will, defendant could not subsequently substitute a termination with notice for one without a period of notice without paying plaintiff’s salary until the end of the calendar quarter (which was the period of notice for termination). (RAG 113/34, 22:154-57, No. 33, 22 September 1934.)

In the second group of cases both plaintiff and defendant were (alleged) Communists. Defendant in the first case was a joint-stock company owned by the Soviet Union. A ministerially appointed commissar installed to remove politically unreliable persons discharged plaintiff. Although this administrative act under public law terminated the labor contract, litigation between the contracting parties was to be treated according to the principles of civil law as if defendant itself had discharged plaintiff. RAG held that defendant could not resist plaintiff’s claim to his salary for the duration of the contractual period of termination by counterclaiming that it was compelled to acquiesce in the situation created by the State-appointed commissar. Not only was it the case that defendant’s own person created the suspicion of political unreliability leading to the installation of the commissar, but defendant could

\(^{17}\) No. I, RGBI I, 678 (1933).
not have used the suspicion of Communist activity as an important cause for a discharge without notice; since plaintiff's imprisonment had lasted but a few days, it was reasonable to demand of defendant that it wait that long in order to clarify the situation. (RAG 40/34, 22:164-71, No. 35, 17 October 1934.)

The same day the court decided a similar case similarly. There the company-defendant, also owned by the Soviet Union, had dismissed plaintiff – with the understanding of the commissar – because he was suspected of promoting goals that endangered the State. (RAG 19/34, 22:171-75, No. 36, 17 October 1934.)

Several years later RAG disallowed, on procedural grounds, defendant-employer's charges that plaintiff, who had been dismissed as an estate inspector before 1933, was a Communist. (RAG 199/37, 33:27-37, No. 7, 9 February 1938.) In two other cases the court also attached little or no importance to charges of Communism. (RAG 273/39, 40:78-86, No. 14, 31 August 1940; RAG 53/43, 47:136-42, No. 26, 8 October 1943.)

Given the high priority which the Nazi party placed on combating the KPD, it can come as no surprise that the court relied heavily on a legal-positivist approach to the interpretation of what was already an abundantly unambiguous statute. Where this type of judicial reasoning did not suffice to generate the expected outcomes, the court shifted into extreme judicial acquiescence in the administratively decreed exclusion of judicial review.

Whereas even this extreme self-instrumentalization of the courts for the avowed political goals of the regime still betrayed certain formal traces of familiar judicial activity, the intermediate appeals courts served straightforwardly and unabashedly if not as *vox populi* then at least as *vox viae*.

Enmeshed in a fact-pattern resembling those recurring in the foregoing RAG cases, plaintiff, who had worked on the railway since 1919, was a member of the KPD, chairman of the Communist caucus on the city council, and editor and publisher of a Communist paper. Dismissed because of his Communist activity, he requested certification from defendant that his discharge had been involuntary and without fault on his part so that he could receive his pension. Defendant refused on the grounds that plaintiff's Communist activity made him responsible for his discharge. LAG indignantly rejected the trial court's finding that

18 See also RAG 169/34, 23:84-88, No. 16, 12 December 1934, which was remanded.
plaintiff could not be made to suffer any contractual liability for having exercised his rights under the Weimar constitution. LAG declared that the German people had always been convinced that the KPD was an illegal party intent on violent revolution and high treason, and that its members were regarded as enemies of the State and noxious pests. This popular view, which had now become the view of the State and of the law, perceived the KPD as a criminal organization of public enemies who acknowledged neither God, nor fatherland, nor authority nor führership. Sound legal feeling revolted at the thought of granting a forty-one year-old Communist functionary a lifelong pension of 85 marks per month. Had a Communist revolution succeeded, the court explained, pensions for anti-Communist party leaders would scarcely have been on the agenda.

Plaintiff could not rest his claim on art. 118 of the Weimar constitution because it protected only freedom of opinion - not the freedom to participate in the pursuit of criminal goals. Only as to the trial court's dictum that a decision against plaintiff logically implied the denial to an enemy of the State of a claim to any contractual right, did LAG flinch at provocatively embarking down the slippery slope: here the court found it expedient to distinguish contracts the fulfillment of which was independent of fault. (LAG 6 II S 110/33, 19:207-11, No. 49, 27 November 1933, Frankfurt/Main, 1st Dept.) 19

A different judicial strategy unfolded in a case in which the trial court had ruled that the mere request by the district Nazi party leadership that defendant dismiss plaintiff constituted an important cause within the meaning of § 70 HGB because defendant would otherwise have suffered the most severe economic disadvantages. After recoiling at the ramifications of such a doctrine for the entire legal system, and reciting numerous State and Nazi party decrees prohibiting local Nazi party units from interfering with the private economy, LAG proceeded to generate the important cause for the instant discharge: "No employer in the National Socialist State could reasonably be expected to give a Communist-minded female person work and bread even for a day while thousands of deserving National Socialist old fighters and other nationally minded men lie unemployed in the street." (LAG 6. II 65/34, 22:16-18, No. 4, 17 September 1934, Frankfurt/Main.)

19 Although the court permitted an appeal, no decision was ever reported in ARS. See the somewhat more judicial-like grounding of the same result in LAG 181/33, 20:77-81, No. 19, 3 January 1934, Essen.
By adopting Nazi code-words and sacrificing the individual plaintiff, the court could imagine that it had succeeded in warding off the far worse evil of the uncoordinated intervention of local Nazi satraps into the sacred preserve of private law relations.

A measure of leniency LAG was willing to apply only to youth: the sins of the fathers were not, without more, to be visited on their sons. Thus a fifteen year-old apprentice whose father had, prior to his resignation from the KPD, been a Communist member of the city council, was adjudged to have had no independent mind and to have engaged in a stupid, little boy’s prank when he shouted, “Heil Moscow.” The court saw the boy’s salvation in re-education by his peers and subjection to corporal punishment at the hands of the master who could, however, discharge him if the continued propagation of such views proved to harm the master’s business. (LAG 9 S. 101/33, 19:132-33, No. 31, 21 September 1933, Gleiwitz.)

In two cases before the honor courts, the accused-employer/managers were convicted of having violated the social honor of employees in such a way as to offer propaganda to the communists. EG 1/34, 22:196-206, No. 19, 9 January 1935, Silesia; SEG 21/34, 22:208-16, No. 20, 18 December 1934, Brandenburg; the latter decision was overturned by REG EV. Arb. II 23/35, 26:155, No. 3, 18 February 1936.
Chapter 9

Trade Unionists and Social Democrats

I. Trade Unionists

Two groups of cases involving trade unions and their members from the pre-Nazi period came before the court. First, like some Social Democrats, a number of trade unionists were dismissed because of their past political affiliation. In both reported decisions concerning this issue, RAG held that such discharges, not having been the fault of the plaintiffs, did not justify the loss of a pension. (RAG 10/34, 20:241-47, No. 49, 21 March 1934; RAG 9/34, 21:119-24, No. 23, 21 March 1934.)

Second, in connection with the dissolution of the old trade unions and the formation of the German Labor Front, a question arose as to whether the latter was the legal successor to the former and to what extent it assumed the former's liabilities. In the first case decided in this area, plaintiff was an employee of a union who in May 1933 had been given notice that he would be terminated at the end of September but who was in June dismissed without notice. He then sued for his salary through September. The court held that the old union and DAF were not identical. The court took judicial notice of the fact that the organizational transformation of the unions had taken place without reference to their internal statutes, but rather by virtue of the intervention of the Nazi party as the holder of power in the State ("Inhaberin der Macht im Staate") with approval of the legal State power ("legale Staatsgewalt"). It also noted that the Nazi party combated Marxism and strove to eliminate all institutions based on the notion of class struggle; the Nazi movement perceived the free trade unions to be among the most important such organizations. Whereas power in the old unions lay in membership meetings, in DAF the Führer-principle prevailed. That the membership had remained unchanged as had many of the tasks of the unions was not deemed crucial. RAG also relieved DAF of any liability within

21 On the events leading to the physical occupation of the trade union buildings on 2 May 1933 and the early history of the German Labor Front, see Hans-Gerd Schumann, Nationalsozialismus und Gewerkschaftsbewegung (Hanover, 1958); Timothy Mason, Sozialpolitik im Dritten Reich (Opladen, 1977), pp. 42-123; Gerhard Beier, Das Lehrstück vom 1. und 2. Mai (P., 1975).
the meaning of § 419 BGB because it had not assumed the unions' assets by contract. (RAG 274/33, 20:102-14, No. 19, 28 February 1934.)

In further litigation the court held that an employment relationship was necessary to create liability on the part of the new organization (RAG 57/34, 21:72-82, No. 15, 6 June 1934), and that a contractual relationship did not exist if plaintiff had merely been continued to be employed by a representative of NSBO and had been in protective custody at the time DAF actually assumed control of union affairs. (RAG 287/33, 21:82-88, No. 16, 6 June 1934.) Where, in another case, plaintiff had been continued in employment for two months following the takeover by NSBO and was then summarily dismissed, the lower courts awarded him his salary for the duration of the six-month notice period.

Characterizing its aforementioned decision of 21 March 1934 as controlling, RAG overturned these decisions, holding that one could not speak of employment within a DAF-organization until June-July 1933. (RAG 77/34, 21:183-88, No. 36, 4 July 1934.) On somewhat different grounds RAG also held that a leading functionary of a former free trade union could be dismissed without notice: since the Nazi party could not realize its goals in the unions with leaders who did not agree with it, one could not reasonably demand of it that it continue to employ plaintiff. (RAG 44/34, 21:188-91, No. 37, 4 July 1934.)

Although the court denied that DAF was the legal successor to the free trade unions with respect to the assumption of their business liabilities, it did recognize a legal successorship in a less strict sense for the periods of notice for salaried employees. The crucial criterion here was not whether the plant or business was dominated by the same persons (or same capital), but rather whether the plant's technical-economic purpose (Zielsetzung) could be regarded as the continuation of that of the previous plant or business. Although the free trade unions and DAF adhered to different world-views, to a substantial degree their purpose was the same – to promote the workers' welfare by means of strict organizational unity. (RAG 68/34, 22:77-87, No. 16, 29 September 1934.)

In a case that it remanded for further fact-finding, RAG, widening the scope of judicial notice, pointed out that defendant-DAF had at its
inception faced a Hobson's choice in the sense that it needed experts in order not to injure the members' interests but that its old opponents, the Marxist union officials, monopolized this expertise. Since those concerned were said to have been aware of this situation, the Marxist officials were also said to have realized that they could count on further employment only to the point at which they had trained their Nazi successors to replace them. (RAG 100/34, 22:91-93, No. 18, 29 September 1934.)

Rooted in the transition period establishing Nazi domination by means of organizational \textit{Gleichschaltung}, these dismissals and their judicial after-throes soon ceased. Although the court for expressly articulated political-ideological reasons relieved DAF as an organization of liability for claims incurred against the old unions as well as for claims arising through the actions of subordinates during the 'uncoordinated' \textit{Gleichschaltung} in the spring of 1933, thus creating hardship for many discharged employees of the unions, once the DAF-organizations became institutionalized, the court interpreted statutorily and contractually protected rights positivistically unless prominent "Marxist" leaders were involved.$^{26}$

II. Social Democrats

With the same virtual uniformity with which RAG denied relief to Communist plaintiffs it decided in favor of Social Democrats. Since all the cases arise out of dismissals, they will be discussed chronologically.

Plaintiff in the first case was a master machinist who had served as a member of a plant council and as an SPD district delegate. He was dismissed with three months' notice and sued for the additional six months' salary which the collective bargaining agreement secured to those with a certain level of seniority who were dismissed involuntarily and without fault on their part. All three tiers of courts found in plaintiff's favor. RAG held that the exercise of constitutionally protected rights during the Weimar period protected plaintiff against loss of this entitlement. It specifically rejected the view that SPD membership and activity were to be judged after the fact from the standpoint of the national revolution: even as late as 23 March 1933, at a time when the SPD was under attack

$^{26}$ For judicial reflection of the more favorable treatment accorded Christian trade unions subject to \textit{Gleichschaltung}, see RAG 73/39, 21:192-98, No. 38, 4 July 1934.
from the national government, no liability could attach to plaintiff’s actions. (RAG 327/33, 20:196-200, No. 40, 14 March 1934.)

In the next case, plaintiff, who had worked for an SPD organization for invalids and widows that was subsequently gleichgeschaltet, was dismissed for alleged theft of an office typewriter. At a prior proceeding arranged to work out an amicable settlement, plaintiff characterized the SA as “wild hordes” from whom he had tried to protect the machine. Defendant adduced this remark as proof of plaintiff’s attitude as an enemy of the State justifying his dismissal. Although RAG acknowledged that disparagement of the prestige of the combat troops of the national uprising (i.e., the SA) would have to give rise to immediate dismissal of an employee of a Nazi organization, the particular circumstances indicated that plaintiff had not meant to implicate the SA per se; rather, he had had in mind merely that autocratic and irregular intervention of individuals which is in some measure inevitable at the beginning of every revolution but of which the Führer strongly disapproved. (RAG 17/34, 20:201-202, No. 41, 28 March 1934.)

Plaintiff in another case had been the regional manager of an association of socialized homebuilding firms but also SPD minister of the interior in Thuringia as well as a member of the state parliament there and of the Reichstag. He was dismissed without notice for being politically untenable. The court remanded the case for factual determinations concerning the reasonableness of demanding that defendant give plaintiff the ordinary period of notice. (RAG 179/34, 23:107-14, No. 21, 12 January 1935.)

In the next case plaintiffs had been bookbinders at the printing plant of the SPD newspaper Vorwärts the assets of which had been seized by the Gestapo and transferred to another firm. The latter continued to employ plaintiffs to whom it subsequently gave one month’s notice instead of the six months required by statute. In justifying its decision in favor of plaintiffs, RAG declared that it was the goal of National Socialism that the national revolution not affect the individual employee if at all possible. (RAG 249/34, 23:127-29, No. 24, 20 February 1935.)

27 The SPD and all other parties except the Nazi party were finally outlawed by G. gegen die Neubildung von Parteien, 14 July 1933, RGBl I, 479. Cf. Erich Matthias and Rudolf Morsey, eds., Das Ende der Parteien 1933 (Düsseldorf, 1960).
29 Since plaintiff had sued on the contract rather than for damages, the case did not fall under G. über den Ausgleich bürgerlich-rechtlicher Ansprüche, 13 December 1934, RGBl I, 1235.
30 Gesetz über die Fristen für die Kündigung von Angestellten.
Where defendant as the successor-employer knew at the time it decided to continue to employ plaintiff that the latter had previously been an SPD member, it forfeited the right to use that membership as cause for dismissal if it allowed a long time to pass before making use of it. (RAG 139/34, 23:212-13, No. 45, 9 March 1935.)

In one of two cases decided against a former SPD member, a non-profit homebuilding company managed by Social Democrats modified the business manager's contract shortly before the company's Gleichschaltung. The new management contested this extension of plaintiff's contractual rights as unconscionable since one had known that plaintiff would most probably be dismissed. (RAG 23/35, 24:155-61, No. 24, 18 May 1935.) Two considerations may have shaped this outcome: 1. plaintiff, as a top executive, did not fall within that group of SPD-oriented workers whose passive support the regime needed to gain; and 2. the fact that plaintiff had been "dispatched" to Dachau for nine months may have signaled to the court that caution was appropriate.

Plaintiffs in another case were employees of a freethinkers' organization that performed cremations for its members. The SA occupied its building, all employees were given three months' notice and the Gestapo, after having seized the organization's assets, released them on the condition that the organization not indemnify or reimburse its members. Plaintiffs sued for severance payments guaranteed by the collective bargaining agreement. They lost at all three levels because they were unable to produce the relevant addendum to the agreement. But they came before RAG once again on the basis of a restitution suit after they had found the missing document. RAG held that since both plaintiffs and the original employer were Social Democrats, it could not have been the will of the contracting parties that plaintiffs' political views might constitute cause for denying them severance payments. Despite different organizational functions, defendant was identical with the original employer and had to abide by the agreement. (RAG 299/35, 27:353-66, No. 61, 25 July 1936.)

The managing director of a local health insurance fund was dismissed because of financial management detrimental to the fund as well as his long association with the SPD. The court held the discharge void because plaintiff had not received the hearing prescribed for disciplinary discharges by the employment regulations of the Reich insurance

31 § 580 para. 7(b) ZPO provided for a new trial.
regulations. Here the violation consisted in informing plaintiff of certain grounds for dismissal but then adducing others when he was formally discharged. (RAG 41/36, 28:10-16, No. 2, 27 June 1936.)

The employment contract of a physician who worked part-time at a municipal hospital provided that, if plaintiff were dismissed without notice for an important cause, his entitlement to a pension would remain unaffected insofar as that cause did not inhere in his person. During the first half of July 1933 plaintiff was placed in protective custody because of his prior political activity as a Social Democrat. Shortly after his release defendant-employer dismissed him for an important cause (namely his political past and imprisonment), denying his entitlement to the pension. Thus began a five and one-half year litigational odyssey for plaintiff whose administrative petition was rejected on the grounds that the ordinary courts had jurisdiction of the case.

After the trial court had found for plaintiff and the appeals court for defendant, the case came up to RAG for the first time. It rejected LAG's view that judicial review was not available in cases involving political discharges pursuant to BBG. RAG declared that although judicial review was foreclosed in disputes involving the permissibility of discharges of salaried and hourly employees in the public sector and possible earnings due them, as to tenured civil servants judicial review was precluded with regard only to discharges. Since plaintiff was not contesting the discharge but only the loss of his pension, the courts had jurisdiction.

This overruling remained dictum insofar as the court held on the facts that the discharge was not based on BBG at all but on the contract. Specifically citing the guarantee in the Weimar constitution (art. 129 para. 4) of the inviolability of vested rights and the availability of the courts to civil servants seeking to secure their contractually defined financial emoluments, the court remanded with instructions to determine whether the discharge for a reason inhering in plaintiff's person was justified. (RAG 106/36, 28:253-58, No. 50, 14 October 1936.)

On remand LAG found that the discharge was unjustified since plaintiff's political activity as far back as 1929 had become "bourgeoisified" and plaintiff had never been a communist. But it was also revealed that between the time of discharge and the filing of suit defendant rested the discharge also on the claim that plaintiff was no longer qualified to per-

32 See no. 5 para. 5 Zweite VO zur Durchführung des BBG, 4 May 1933, RGBI I, 233.
33 See § 7 para. 1 BBG.
form his work. RAG held that an employer could subsequently extend the basis for an immediate discharge provided that one could not conclude from his behavior during the intervening period that he had waived the use of this new cause. Again RAG remanded for a determination as to whether the political sovereign, which according to defendant had demanded plaintiff's discharge, would not have been agreeable to a termination with the customary period of notice provided that plaintiff had been given immediate leave. In this connection RAG instructed LAG that the plant-leader's duty of loyalty dictated that he stand up for and shield his Follower insofar as that was reasonable. (RAG 79/1937, 31:37-43, No. 8, 21 August 1937.)

On remand LAG found in favor of plaintiff and RAG affirmed. Defendant's claim before the appeals court that plaintiff had been a leading Marxist as late as 1933 was disallowed on procedural grounds because it should have been submitted to the trial court and its consideration would have led to unnecessary delay in the appellate court. (RAG 66/38, 34:353-57, No. 56, 23 November 1938.)

The former chairman of the salaried employees' section of a plant council, who had also been an SPD member, was given six months' notice on 30 March 1933 without any indication of the reasons. Plaintiff filed suit for his pension which defendant had denied him because the cause of the discharge had inhered in plaintiff's person. Specifically, defendant claimed that plaintiff had agitated against the Nazis in such a manner that his continued employment after the national upheaval was impossible. The case was remanded - both lower courts had found in favor of defendant - for determination of defendant's attitude to plaintiff's activity before the Nazi ascendancy to power. For if defendant approved of plaintiff's activity, then it would violate good faith to revoke the pension. RAG instructed LAG that it must consider plaintiff's claim that both the plant and its management had been SPD-oriented, and that an order issued in 1930 requested information on Nazi party members for the purpose of dismissing them. Also to be considered was plaintiff's charge that eighty-five per cent of the plant's 6,000 employees had voted for the free (i.e., Social Democratic) trade union candidates in the 1933 elections.

34 See § 529 para. 2 ZPO.
35 In a subsequent case RAG held that even as to non-tenured public employees, the courts had jurisdiction over the question as to whether a Social Democrat dismissed for political unreliability had been discharged pursuant to BBG at all. (RAG 85/36, 31:361-67, No. 62, 22 July 1936.) The court was thus interpreting the provision referred to in n. 32 above.
plant council election in February-March 1933 while only eight per cent voted for Nazi candidates. (RAG 120/37, 32:303-307, No. 43, 16 February 1938.)

An employee of the employment office was discharged in 1933 with three months' notice. Three years later defendant conceded that plaintiff had not been politically active within the meaning of no. 4 of the second implementing order (issued pursuant to BBG), but claimed that the discharge fell under no. 6 because in light of plaintiff's long association with the SPD his continued employed could not be answered for. RAG overruled LAG - which had awarded plaintiff backpay - on the grounds that the discharge was valid because it could have been supported by no. 4 and in fact subsequently (1936) was. An amendment to no. 6 provided that a discharge pursuant to no. 4 could be sustained pursuant to no. 6 if the employee was thereby favored. But RAG held that not only was the administrative ruling of the employer not subject to judicial review, but that the court could also not inquire as to whether the ruling meant that no. 4 had been unjustly applied to plaintiff or even whether the ruling operated in plaintiff's favor. (RAG 95/38, 35:3-8, No. 1, 19 November 1938.)

On the whole the SPD cases reveal an effort by the courts to apply constitutional, statutory, contractual and procedural (including due process) standards to dismissal-related claims by former Social Democrats. So long as the plaintiffs had ceased being members or activists before such status or behavior was proscribed, the courts strictly rejected ex post facto applications of statutes. Although the court generally pursued a positivistic approach, it freely made use of general clauses as to opportunistic employers who saw the new regime's policy as a pretext for avoiding obligations as well as to successor-employers who at first knowingly assumed the contracts of Social Democratic employees. The court generally asserted its jurisdiction and even displayed a certain measure of civil courage in resisting attempts by the SA and others to engage in uncoordinated vigilante actions. To be sure, the judges were presumably aware of the fact that ultimately they could rely on the sup-

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36 No. 6 permitted the discharge of employees in the interest of administrative "simplification" and management.
37 Vierte VO zur Änderung und Ergänzung der zweiten VO zur Durchführung des BBG, 5 June 1934, RGBI I, 477. No. 5 para. 7 of the Zweite VO (see n. 32 above) permitted the retroactive application of the law.
38 As late as 1942 LAG found in favor of a former SPD editor who had been dismissed for not having responded appropriately to the plant-leader's greeting, "Heil Hitler." (LAG 24 Sa 21/42, 45:65-67, No. 12, 2 June 1942, Leipzig.)
port of the dominant Nazi leaders in controlling extra-legal spontaneous "revolutionary" acts.
Chapter 10

Other Politically Motivated Discharges

Especially during the early years of the Nazi regime, large numbers of employees perceived as opponents of the new rulers were discharged. Such discrete groups of enemies as Communists, trade unionists, Social Democrats and Jews are treated elsewhere. But others were dismissed on a more individualized basis for isolated acts of non-conformity or resistance. Since suit in virtually all of these cases was brought by plaintiffs seeking backpay, retention of pensions and other contractual benefits affected by their discharge, it must be assumed that the attitudes, statements or actions that occasioned dismissal were not politically grave enough to have led to imprisonment or execution. Many politically inspired dismissals, in other words, were not permitted to work their way through the judicial system; the representativeness of reported cases, then, is once again in doubt.

The first heading under which the discharges will be examined is recourse to the ordinary private law provisions governing unilateral termination of employment contracts. Next, discharges arising under the two statutes of April 1933 — dealing with enemies of the State and politically unreliable civil servants — will be reviewed. Finally, dismissals from DAF (as well as other employment-related disputes between DAF and its employees) will be discussed.

I. Private-Law Discharges

These discharges can be subdivided into three categories: A. those in which the Nazi party (or other Nazi organizations) exerted pressure on the employer to dismiss the employee; B. those in which the employee engaged in some subjectively or objectively anti-Nazi act; and C. those in which religion or a church organization was involved.

A. Third-Party Pressure

In a number of cases the Nazi party, at the local level, was clearly a moving force in the dismissal. It is not always so clear whether the
Enemies of the regime

employer complied eagerly or only halfheartedly.\textsuperscript{39} Even where reproaches from a third party were unjustified, the court held that it might be unreasonable to expect the employer to retain the employee where continued employment would involve self-sacrifice by the former in light of the government's views on the matter. (RAG 150/34, 22:209-14, No. 45, 28 November 1934.)\textsuperscript{40} With this decision behind it, the court had no difficulty several months later upholding the cancellation of an estate overseer's employment contract after authoritative Nazi party officials had complained of plaintiff's attacks on the party. Defendant-employer, who like plaintiff had been a member of the DNVP, was, the court held, justified in having avoided jeopardizing his own display of loyalty to the government by ridding himself of the politically suspect overseer. (RAG 254/34, 23:194-98, No. 41, 13 March 1935.)\textsuperscript{41}

But even after the war began, the mere fact that the Nazi party had failed to certify an employee as politically unobjectionable (\textit{Unbedenklichkeitszeugnis}) was held not to have justified a discharge. (RAG 86/39, 38:81-90, No. 18, 7 February 1940.)\textsuperscript{42} RAG also held that exclusion of a municipal employee from the Nazi party did not, without more, constitute grounds for dismissal without notice. In this factually interesting case even the presence of "more" did not decide the case without more still.\textsuperscript{43} Plaintiff had joined the Nazi party and the SA in 1926, but left both organizations the following year after having become unemployed.

\textsuperscript{39} In an interesting twist, RAG held for an employee whose contract had been terminated before he began working for a department store that the government had closed. The court ruled that defendant bore the risk since it had known of the Nazi party's opposition to department stores. (RAG 215/33, 19:159-63, No. 38, 25 October 1933.)

\textsuperscript{40} Hueck took the court to task for not holding the employer to his duty of loyalty, which Hueck would have set aside only in extraordinary circumstances (RAG 22:214).

\textsuperscript{41} The court ruled that the pressure exerted by the Nazi party did not constitute the justification for the cancellation but only evidence of the serious consequences of not canceling.

\textsuperscript{42} For more background on the political circumstances surrounding discharges in the Saar following its return to Germany, see RAG 66/39, 38:90-98, No. 19, 13 December 1939. This case reappeared on RAG's docket (RAG 10/1943, 8 October 1943). The court at that time held that although the Versailles \textit{Diktat} could not, without more, operate to set aside contractual agreements between German parties that had been entered into as a result of the \textit{Diktat}, an ordinary termination could subsequently be converted into one based on an important cause if the employee knew that the employer wanted to terminate the employment contract because he was faced with a Hobson's choice (\textit{Zwangslage}). The opinion, signed by Schrader, Besta and Schwegmann, was provisionally excluded from publication (and was in the event never reported). See BA R 22/4024.

\textsuperscript{43} Cf. RAG 150/38, 35:165-68, No. 35, 22 March 1939, in which a deceased employee - the medical superintendent of a hospital - was fired without notice because he had been excluded from the Nazi party for unspecified reasons pursuant to a temporary injunction. The highest Nazi party court later overturned the exclusion but issued the member a warning. RAG held that the dismissal had been unfounded.
He rejoined in 1932 and thus became eligible for the patronage jobs dis­
tributed to so-called old fighters by the Nazis after they came to power.44
Plaintiff received a job as superintendant of a municipal building. When
it was later revealed that he had been making instalment purchases at a
Jewish-owned clothing store, he was excluded from the Nazi party and
the SA and dismissed without notice. The trial court voided the dismis­
sal, but the appeals court ruled that both the exclusion and the pur­
chases supported the dismissal. RAG remanded the case insofar as the
latter charge was concerned.45

RAG rejected outright, however, LAG's ruling on the exclusion from
the Nazi party. Citing the official organ of the Supreme Party Court,46
RAG noted that the party courts had recently created three classifica­
tions of exclusion.47 The middle level, to which plaintiff had been sub­
ject, was not intended to affect the excluded member economically. The
court drew the conclusion that such an exclusion did not automatically
justify a discharge without notice although it was a factor to be weighed.
What is more significant: the court ruled that the ordinary civil courts in
general and the labor courts in particular retained jurisdiction over the
question as to whether charges leveled against excluded Nazi party
members justified dismissal. The court reproached LAG for not having
fulfilled this duty of independent judgment especially since the deci­
sions of the Nazi party and the SA courts had not been made available
to it; as a result, LAG had not been in a position to review the record in
order to determine whether those courts had taken into consideration
all the factors that were relevant to the economic consequences of a
discharge without notice. (RAG 156/37, 31:125-37, No. 22, 22 September
1937.)

Although the court acknowledged that a Nazi party block-warden was
authorized to uncover Marxist intrigues in a plant, where he made a
baseless charge against a plant supervisor, his dismissal without notice
could be lawful.48 (RAG 257/34, 23:187-90, No. 39, 13 March 1935.)49 RAG

44 See Timothy Mason, Sozialpolitik im Dritten Reich (Opladen, 1977), pp. 135-37.
45 See the discussion in ch. 11 below.
46 On the original grant of jurisdiction to these courts, see § 3 para.2 Gesetz zur
Sicherung der Einheit von Partei und Staat, 1 December 1933, RGBI I, 1016. Cf. Donald
47 Entlassung, Ausschluß and Ausstossung.
48 Within the meaning of § 123 no. 5 GewO. The block-warden had apparently been
motivated by family considerations.
49 An appeals court similarly rejected as inconsistent with the leader-principle the
interference of the salaried employees' plant council in management rights when it
demanded the discharge of an alleged enemy of the State. (LAG 15 a S. 164/33, 20:174-76,
also upheld the dismissal of a branch manager on the grounds that DAF had tried to rent for her the store housing defendant-employer's business. Characterizing DAF's interference as impermissible, the court ruled that a dismissal could be justified even in the absence of fault on the part of the employee where outside influences that directly threatened the employer exhibited a relation to the person of the employee. (RAG 12/36, 27:11-14, No. 4, 25 April 1936.) This case is distinguishable from others in that here the third party was not exerting pressure on the employer to dismiss the employee; on the contrary: it was virtually conspiring with the employee to supplant the employer. In view of these special circumstances and the clear lack of authority of DAF to act in this area, the decision is not surprising.\(^{50}\)

Although it is possible that third parties also intervened in these cases to urge employers to dismiss employees, such outside interference was not a legal issue. Moreover, if the act was sufficiently egregious, once it became publicly known, few employers were likely to have required external stimuli in order to overcome whatever duty of loyalty they may have felt towards the offending employee. The acts most frequently complained of were: negative comments about prominent Nazis; disregard or disrespect for Nazi symbols; and non-participation in elections or "voluntary" organizations.

No. 44, 26 January 1934, Breslau [citing speech by Rudolf Hess to effect that petty officials and employees who had been seduced by Weimar system should not be treated harshly]. In a spirited defense of the Rechtsstaat, the same appeals court in Breslau ruled in favor of a Czech worker who had been dismissed as a result of pressure by his German co-workers. (LAG 15 A.S. 132/33, 20:176-79, No. 45, 12 December 1933.) Hueck commented that the fate of Germans living abroad should have been dispositive of the case (LAG 20:179).

\(^{50}\) Cf. however RAG 79/41, 43:119-28, No. 17, 21 October 1941 (although discharge is void where it is in effect punishment for employee's having had recourse to DAF, if such recourse merely constitutes external occasion for discharge and determines its timing, it is valid). But two years later the court decided in favor of a plaintiff whose pension had been terminated by the Nazi Federation of Teachers because in a letter to DAF he had characterized defendant's rejection of his pension claims as embezzlement. One factor in the court's decision was plaintiff's long service and the short time remaining until his sixty-fifth birthday. (RAG 23/43, 46:397-403, No. 76, 16 July 1943.)

B. Acts of Resistance or Defiance

Although it is possible that third parties also intervened in these cases to urge employers to dismiss employees, such outside interference was not a legal issue. Moreover, if the act was sufficiently egregious, once it became publicly known, few employers were likely to have required external stimuli in order to overcome whatever duty of loyalty they may have felt towards the offending employee. The acts most frequently complained of were: negative comments about prominent Nazis; disregard or disrespect for Nazi symbols; and non-participation in elections or "voluntary" organizations.
1. Criticism of Nazi Leaders

In the earliest such case, plaintiff was a fireman who was a candidate for a position as a tenured civil servant. He served in a firehouse in which the firemen were split into two groups – one supporting the Nazis and the other the Center party and SPD. On 21 February 1933 – i.e., before Hitler's first major legislative demolition of Weimar and before the March elections – plaintiff commented that there had never been a "shabbier and more mendacious [schofelere und verlogenere]" government than Hitler's. When the municipality sought to fire him administratively pursuant to § 4 BBG, the minister of the interior of Baden declined to proceed against him. The municipality then decided to dismiss him pursuant to traditional private-law termination provisions. The trial court found for plaintiff, awarding him his salary for all of 1934; the appeals court affirmed, ruling in addition that the termination had been void. Although by the time RAG decided this case (1936) the outcome must have been a foregone conclusion, it is worth noting that the court judged plaintiff by the political-ideological standards prevailing in early 1933; for by those of 1936 plaintiff's fate would have been determined by officials other than labor court judges. Nevertheless, in language untypical of RAG, the court held that in the period between 30 January 1933 and the March election, when Hitler was seeking to restore the German people to their former position, it was the self-explanatory duty of every civil servant to support the government and to refrain from making harmful and hateful remarks. That plaintiff had conducted himself unexceptionably since that election and had even subscribed to the Völkischer Beobachter was deemed irrelevant to the issue of whether he had given sufficient cause for the dismissal. (RAG 11/36, 27:59-66, No. 14, 13 May 1936.)\(^5\)

Although the next case could also have been discussed under the rubric of third-party pressure, it is included here because the entire set of events took place within the judicial system. Plaintiff, who had been an officer in World War I and was an employee of the trial labor court in Berlin, in February 1935 told his co-workers – in the presence of the chairman of the local NSBO – that in an emergency Goebbels had

\(^5\) The court noted that these latter considerations would not have been irrelevant had plaintiff been dismissed pursuant to BBG. Freisler expressed interest in this case, which was decided by Linz, Obladen and Lersch. See BA R 22/2063, fol. 233-39.
forced a Jewish professor to attend to his daughter when she was very sick. Since plaintiff assumed that the NSBO chairman would inform against him, he took the initiative by informing the vice-president of the Landgericht in Berlin, who was in charge of the administration of the labor court. Apart from alerting plaintiff to the incredible character of the story and the danger in spreading it, the vice-president took no action even after the NSBO chairman informed him that he had instructed the Nazi party Gau. When, finally, in November of the same year the vice-president received a copy of the criminal charges pending against plaintiff, the latter was dismissed without notice. Plaintiff's suit was based on the collective contract for Prussian state employees, which provided that an employer forfeited the right to discharge an employee without notice where he waited more than a week after the time at which he first learned of the cause for which he was dismissing the employee. The case then turned on whether the criminal indictment constituted a new cause for dismissal, tolling as it were the contractual period of limitations.

The trial court gave plaintiff a declaratory judgment that the dismissal was void; the appeals court affirmed. Although both courts agreed that plaintiff could have been dismissed in February, they ruled that only a criminal conviction – not a mere indictment – would have created a new cause for dismissal. RAG's contrary reasoning appears circular: since plaintiff's remarks were so reprehensible, had the vice-president understood their import, he would have fired plaintiff on the spot; since he did not fire him, he must have been unaware or unconvinced of their import; hence the indictment, which for the first time alerted him to the seriousness of the remarks, constituted a fresh cause. (RAG 102/36, 28:64-70, No. 15, 8 August 1936.)

The court's reasoning cannot be denied a certain logic. Had the vice-president believed that criminal charges would eventually be brought, retaining plaintiff during the interim would presumably have required a

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52 The statutory warrants were § 3 para. 1 VO des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung, 21 March 1933, RGBl I, 135; § 1 para. 1 G. gegen heimtückische Angriffe gegen Staat und Partei und zum Schutze der Parteiumformen, 20 December 1933, RGBl I, 1269. On the special courts established to try these offenses, see VO des Reichspräsidenten über die Bildung von Sondergerichten, 21 March 1933, RGBl I, 136.
53 The decision does not address the anomaly that the trial court was plaintiff's de facto if not de jure employer.
54 While the appeal to RAG was pending, plaintiff was fined 200 marks in lieu of a two month sentence.
measure of courage and self-sacrifice. On the other hand, his realpolitcal naivete seems astounding. Both possibilities, however, point to a case of third-party pressure. Since RAG was inclined to presume the latter possibility (the former might have made the judicial officer involved an accessory to concealing a crime), it paradoxically created a safety valve for relatively loyal employers who were thus entitled to cover for their imprudent employees – until the point at which criminal charges were brought – without jeopardizing their own security.

Even more bizarre, however, was the approach of the lower courts. For they implicated themselves or their colleagues in the concealment of what they knew to be a punishable offense. But since they too acknowledged that plaintiff could be dismissed without notice once he was convicted, they in effect offered him nothing more than his salary for the period that elapsed between indictment and conviction.55

The last case involving criticism of a Nazi leader occupied the court three times between 1937 and 1940. Plaintiff, who had worked for a municipal electric company for more than twenty years, was discharged without notice in 1936 for comments she had made concerning a crowd of SA and Nazi party members who had demonstrated against a Catholic clergyman who had been arrested for allegedly having urged his parishioners to vote "No" in the election of 29 March 1936. She was also accused of not having used the "Heil Hitler" greeting. The trial court held in her favor, but the appeals court overturned that decision; RAG set aside the judgment and remanded, in part on grounds relating to the invalid use of BBG. The remaining part of the opinion turned on the status of an evaluation by the Nazi party that plaintiff was politically unreliable. RAG interpreted the relevant statute66 as not conferring a general political right of control on the Nazi party authorizing it to intervene directly in municipal administrative entities. Although it conceded that, even in the absence of special statutory provisions, the political judgment of a Nazi party county leader had to be accorded great weight, neither the employing municipality nor the court was relieved of the duty of exercising its own independent judgment. Since the lower court had not fulfilled this duty, and had also failed to inquire into whether the Nazi party evaluation had been viewed by defendant as the

55 Many such accused persons were placed in preventive detention or protective custody. See, e.g., RAG 213/34, 23:188-70, No. 34, 29 February 1935.
56 §§ 6, 33 and 41 Deutsche Gemeindeordnung, 30 January 1935, RGBI I, 49.
kind of charge or suspicion that would justified dismissal, the court remanded. (RAG 284/36, 30:22-34, No. 3, 14 April 1937.)

By the time the case came up again, defendant submitted that plaintiff had committed a punishable act by making certain remarks about Goebbels. LAG held against defendant, but RAG remanded once again. Although it emphasized that only special circumstances – not adduced by defendant – would warrant upholding a discharge based on unjustified suspicion even from authoritative quarters, it this time criticized LAG for not having attributed enough importance to the Nazi party's evaluation of plaintiff. (RAG 158/1938, 35:269-77, No. 50, 4 January 1939.)

In the third and final round LAG again ruled against defendant, but RAG dismissed the suit. Here it was finally revealed that plaintiff had been charged with insulting Goebbels by comparing Nazi and Catholic charitable activities and claiming that Goebbels had been educated by the Jesuits.\(^{57}\) RAG held that it was unreasonable to expect a municipal employer to employ someone who had reviled one of the first men of the State and the movement. Since the leadership of a municipal administrative organization had to conform to the goals of the Nazi State leadership, an employee could give cause for dismissal without having the convictions of an enemy of the State; political unreliability sufficed. That plaintiff had spoken in good faith was irrelevant, for it was the external effect as much as her subjective attitude that counted. (RAG 13/40, 41:27-32, No. 5, 30 October 1940.)

Thus despite the court's postulation and observance of a separation of powers as among the court, administrative bodies (qua employers) and the Nazi party, and despite its willingness to entertain this case three times, involving itself in ambiguities and tergiversation,\(^{58}\) it ultimately relaxed the requirements considerably for politically motivated discharges.

2. Disregard for Nazi Symbols

Although failure to observe the forms of daily intercourse introduced by the Nazis could be interpreted as an expression of rejection of the Nazi State, such neglect was not uniformly an occasion for the court to

\(^{57}\) The court noted that a clergyman had served three months in prison for having made this assertion.

\(^{58}\) Cf. Volkmar's annotation (RAG 35:276-77).
rule against plaintiff-employees.\textsuperscript{59} Thus RAG agreed with the lower courts that the head of a department of a “public corporation” with sixteen years’ seniority could, regardless of his other merits, be dismissed without notice for having slighted the “symbols of the new era”—to wit, for having failed to stretch his arm out to its full extent at the proper angle for the singing of the Horst Wessel song.\textsuperscript{60} (RAG 305/36, 30:127-31, No. 24, 26 May 1937.) Equitable considerations were used, however, to save the pension of a teacher who had been deprived of it because she had not given the “Heil Hitler” salute. RAG ruled that the lower court’s factual determination was not appealable according to which plaintiff’s conduct was sufficiently mitigated by her having acted out of a feeling of having been treated unjustly. (RAG 34/39, 37:158-63, No. 22, 27 September 1939.)\textsuperscript{61}

3. Non-Participation in Elections and “Voluntary” Organizations

RAG ruled in favor of a bank employee who had been discharged without notice for having allegedly voted “No” in the plebiscite/election in November 1933. At trial plaintiff had refused to state under oath that he had voted “Yes.” According to the version of the relevant provision of ZPO\textsuperscript{62} that was in force prior to 1934, such a refusal was considered proof of the opposite of the putative fact. (At the trial \textit{de novo} before LAG plaintiff apparently did state under oath that he had voted “Yes”.) RAG rejected defendant’s submission that LAG had violated § 286 ZPO, which provided that the court was required to determine whether a factual assertion was true or false on the basis of the whole record of the hearings and the result of any evidence taken. RAG ruled that there was no support for the claim that LAG had overlooked evi-

\textsuperscript{59} Cf. also RAG 114/39, 39:344-50, No. 62, 9 April 1940.

\textsuperscript{60} In a case that may not have reached RAG, an appeals court ruled that the clear legislative intent of inclusiveness of causes for discharge embodied in § 123 GewO could not be upheld in the case of a Polish worker who had failed to sing the Horst Wessel song and stretch out his arm for the Nazi salute on a \textit{Kraft durch Freude} excursion. It justified its ruling by including “noxious pest [\textit{Schädling}]” within the statutory term “profligate conduct [\textit{liederlicher Lebenswandel}]”. (LAG 9 Sa 126/35, 27:67-71, No. 12, 9 January 1936.) Hueck’s annotation reveals that he was appalled by this act of judicial legislation although he ultimately supported it as but one more chapter in the eternal struggle between legal certainty and equity (LAG 27:69-71). Cf. a similar decision by the trial court in Dresden involving a Czech worker which occupied the Foreign Office; BA R 22/2063, fol. 41-51.

\textsuperscript{61} See also the first appeal: RAG 13/38, 33:107-13, No. 19, 11 May 1938.

\textsuperscript{62} § 464 para. 2 was repealed by the version of ZPO promulgated on 8 November 1933; RGBI I, 821.
dence that plaintiff had always had leftist leanings. The court thus did not have to reach the question of whether plaintiff was required, in the course of litigation with his employer, to reveal how he had voted in a secret ballot. (RAG 79/34, 21:95-98 No 19, 11 July 1934.)

The court upheld the discharge without notice of a very highly paid employee of a public-law corporation doing business with the army who refused to join the rest of the Following in contributing ten per cent of his salary to the Winter Relief Fund (Winterhilfswerk). Although the court appeared to make the case turn on plaintiff's principled hostile attitude toward the State (RAG 132/37, 31:229-41, No. 41, 17 October 1937), during the war it approved of the same result without recourse to this issue (RAG 52/42, 46:24-33, No. 5, 27 November 1942). More interesting were the court's dicta in the case of a bookkeeper in a municipal savings bank who was dismissed without notice (but who was given severance pay as if he had received proper notice) for having relinquished his position as block-warden in the Nazi People's Welfare organization (NS-Volkswohlfahrt) with the permission of that organization. Although the court agreed that a public employer could expect his employees to contribute to the achievement of the Führer's goals, merely quitting the welfare organization did not, without more, justify labeling plaintiff politically unreliable, in particular where his conduct was otherwise correct. The court criticized the employer for not having confronted plaintiff with his complaints before taking the drastic step of depriving a family of a pension entitlement and other benefits. The court found it revealing that defendant spoke in his appeal of making up for the "purge" (Säuberung) of non-Nazi elements that he should have conducted in 1933. Defendant was mistaken, the court stated, in his belief that he could use § 626 BGB without good reason to accomplish what might have been possible at one time pursuant to BBG. (RAG 14/38, 33:97-107, No. 18, 25 May 1938.)

63 This decision should be compared with one handed down by LAG two years later in the case of an employee who was dismissed (with notice) for not having voted in the election of March 1936. The fact that Hitler himself had appeared at the employee's plant two days before the election may have helped shape the opinion, which, once again, differed radically in tone and language from any of RAG's products. (LAG S a 56/36, 28:203-206, No. 52, 8 July 1936, Essen.)

64 This case came up on appeal from Austria. Cf. RAG 10/35, 23:227-32, No. 48, 3 April 1935. According to Richard Grunberger, The 12-Year Reich (NY, 1972), pp. 86-87, once full employment was attained, the Winter Relief campaign became "a gratuitous ritual."

65 Two lower courts denied employers the right to dismiss (sick/disabled) employees who refused to join DAF. (LAG 103 Sa 23/37, 29:178-82, No. 48, 20 March 1937, Berlin; LAG 24 Sa 49/37, 30:202-13, No. 58, 29 June 1937, Leipzig.)
C. Religion-related Dismissals

Most of these cases share elements common to the other rubrics (including those discussed under public-law dismissals); but in view of the importance which the Nazis attached to combating religious affiliation that competed with them for ideological hegemony,66 the few cases are worth examining separately.

An employee of a state research institute who grounded his refusal to contribute to Winter Relief and People's Welfare on the claim that the Nazi Weltanschauung was a heresy (Irrlehre), fared no better than his aforementioned non-religiously motivated counterparts. To be sure, the court added – in a unique reference to the finer distinctions of Nazi ideology – that the result would have been different had plaintiff restricted his rejection of Nazi ideology to the views of Alfred Rosenberg (the Nazi party's leading 'philosopher'). (RAG 271/37, 34:205-12, No. 36, 15 June 1938.)67 More significant was a case which began when the Gestapo ordered the removal of the chairman of a Protestant seminary of which plaintiff was director. She was subsequently dismissed with notice by a deputy appointed by the Reich governor of Hesse. Although the court implicitly accepted plaintiff's submission that the measures taken against her were impermissible, it agreed with the lower court that the appointment of the deputy was not subject to judicial review; the provisions of private law were therefore irrelevant. The court appeared to rest easier knowing that its decision was in accord with the positive law since art. 124 of the Weimar constitution, which guaranteed freedom of association, had been constitutionally repealed seven years earlier. (RAG 54/40, 39:452-58, No. 78, 7 August 1940.)68

By far the most interesting of this group of cases involved a Jehovah's Witness whose pension was terminated by the Nazi successor-organization to the German Civil Servants Federation whose employment plaintiff had left in March 1933. After the Prussian minister of the interior had dissolved the Jehovah's Witnesses organization in June of that year plaintiff continued to be active in the group; as a result, he was sen-

67 Cf. LAG 15 Sa 75/37, 32:65-71, No. 16, 11 November 1937, Breslau.
68 §1 VO des Reichspräsidenten zum Schutz von Volk und Staat, 28 February 1933, RGBI I, 83 was the statutory warrant. Cf. RAG 2/33, 17:474-78, No. 98, 25 February 1933, decided three days before the aforementioned statute was enacted. The court merely alluded to the political background of the case.
enced by a special court to twenty-one months in prison, which he then served. For part of this time the minister of the interior suspended plaintiff's pension payments stemming from his earlier employment for the city of Berlin. Defendant claimed that as an organization affiliated with the Nazi party it could not reasonably be expected to make pension payments to someone convicted of such a crime. (The minister of the interior had characterized plaintiff's activity as Marxist.)

Reversing both lower courts, RAG ruled in favor of plaintiff. It held that since pension payments constituted deferred compensation for work already performed, their termination was in principle impermissible. The court conceded that a retired employee in some measure owed a duty of loyalty to his former employer, violation of which could justify termination of the pension. But the court barred the application of this rule to the case at bar by limiting that duty solely to the actual former employer and not to a successor organization for which plaintiff had never worked. Moreover, plaintiff's activity in the illegal organization had never been directed against defendant. Taking this reasoning one step further, the court also rejected defendant's assertion that plaintiff had violated a general duty of loyalty owed to Volk, State and Party. Foreshadowing a line of reasoning it would apply the next year to sustain pension rights of Jews (see ch. 11), the court held that defendant could no more lawfully refuse to continue paying out pension benefits than it could, for example, have refused to pay plaintiff for land that it had bought from him: "Those convicted of a criminal act against Volk, State and Party do not stand outside of the civil law." Absent express provision by positive legislation, private creditors were not entitled to profit from the criminal conviction of debtors. (RAG 88/39, 37:343-49, No. 52, 29 November 1939.)

In view of the latitude which the expansive notion of the plant-community would have provided the court to rule in favor of the employer,69 and given also "the unfathomable hatred of the National Socialists towards the Jehovah's Witnesses" on account of the latter's uncompromising rejection of Nazi ideology and authority,70 this seemingly courageous71 wartime decision may be best understood as the court's recoiling

69 See, e.g., Hueck's annotation (RAG 37:347-49), which is perhaps the most explicitly Nazi annotation he published.
70 Fraenkel, Doppelstaat, p. 147.
71 See also AG 1 AH B 538/33, 20:102-103, No. 6, 22 December 1933, Mannheim Jehovah's Witness cannot be dismissed without notice because his non-participation in Nazi meetings and election led to unrest among his co-workers where employer did not
at the brink of the slippery slope toward the total absorption of private law obligations by political dictates. Indeed, as virtually all of the cases discussed in this chapter show, to the extent that the contrast between the (formal) voluntary creation of obligations and non-participation in the creation of binding obligations captures an important element of the distinction between private and public law, that supposed great divide became even more untenable under the Nazis than its most severe critics had imagined under pre-fascist conditions. For none of these dismissals was motivated by the economic interests of the employer as traditionally understood; none of them would have occurred in the absence of positive laws or State-mandated observance of certain ideological tenets.

In this sense "the ideological character" of an "absolutizing" "dualism" "between a public (or political) and a private (or unpolitical) legal sphere," which in "the capitalistic system" was "designed to prevent the recognition that the 'private' right created by the legal transaction of a contract is just as much the theater of the political dominion as the public law created by legislation and administration," was not a desideratum of the Nazi political-economic system. For Karl Renner, the fiction of the division between private and public law collapsed once it was recognized that the right which the capitalist had – on the basis of his ownership of the means of production – to control and dominate his employees was public power blindly delegated for the capitalist's own gain; in this sense the employment relationship was a "public duty to serve." The Nazis' subordination of the capitalist's command over his workers to the interests of the State (§ 1 AOG) represented the ultimate realization of Renner's notion of publicly delegated power encased in the form of private law.

Where specific statutory warrant was lacking, the court succeeded in anchoring the political and ideological requirements of the Nazi State and party in the Civil Code by means of the general clauses. But the

72 Wolfgang Friedmann, *Legal Theory* (2nd ed.; L., 1953 [1944]), p. 275, contends that this tendential total absorption characterized the entire Nazi legal system.
introduction of Nazi content into general clauses was not synonomus with the end of calculability\textsuperscript{77} or the realization of the Free Law doctrine (\textit{Freirechtslehre}), according to which socially desirable outcomes were to be achieved by ignoring unambiguous statutory provisions.\textsuperscript{78} For the decisions in this area were, on the one hand, surely no less calculable than dismissal cases had been in Weimar; and the outcomes desired by the Nazis were, on the other hand, not generated by blatantly anti-positivist legal reasoning. Moreover, the general clauses also served as the vehicles for success on the part of employees in a number of cases which "administrators" would presumably have resolved differently.

II. Discharges provided for by Special Statutes

In April 1933 Hitler enacted two laws which enabled private and public employers to discharge employees who were perceived to be politically suspicious or outright opponents of the new regime. Although there is good reason to assume that a significant area of overlap existed between the initiative of the Nazis and that of public employers as to which civil servants were to be dismissed on political grounds, the cases do not allow of an unambiguous judgment as to whether private employers were eager to avail themselves of the new statute in order to settle old scores with 'troublemakers.' Only relatively few cases arising under the first statute reached RAG. That law deprived employees of their right to protest to the plant council\textsuperscript{79} if their discharge was based on a suspicion of anti-State leanings (\textit{Verdacht staatsfeindlicher Einstellung}). Instead, appeal was permitted only to the highest authority of the \textit{Länder} (oberste Landesbehörde).\textsuperscript{80} Since in a number of cases the appealing employees were cleared of such suspicion, it is possible that employers did act on their own initiative.\textsuperscript{81} Because the legal issues on


\textsuperscript{78} As Friedmann, \textit{Legal Theory} (1967), p. 343, asserts.

\textsuperscript{79} As provided in § 84 BRG.

\textsuperscript{80} Art. II G. über Betriebsvertretungen und über wirtschaftliche Vereinigungen, 4 April 1933, RGBI I, 161.

\textsuperscript{81} See, e.g., RAG 252/36, 29:332-37, No. 61, 3 March 1937. Somewhat more complicated was RAG 309/35, 26:265-72, No. 55, 29 April 1936. That differences obtained between employers and government administrators was also revealed by litigation arising under art. I of the law, which authorized the same official to terminate the membership of enemies of the State in the plant council and to appoint new members in their place. See RAG 27/1934, 21:125-28, No. 24, 11 April 1934, and RAG 107/1934, 22:141-49, No. 31, 24 October 1934. In the latter case the court was unimpressed by the employee's argument that judicial
which the cases turned were identical to those in the cases arising under the second statute, they will be mentioned in that connection. The first statute was repealed – together with BRG – effective 1 May 1934 when AOG went into effect. With the abolition of plant councils and the protection they afforded employees against arbitrary discharges, the first statute became superfluous.82

The second statute, BBG, as well as its numerous amendments and implementing decrees have been set forth in detail elsewhere.83 Its purpose was to remove from the civil service Jews, Communists, Social Democrats and others appointed during Weimar. In this section those litigants are studied whose political failings either were not specified in the reported cases or did not fit under the aforementioned rubrics. Of particular significance is the catch-all provision (§ 4 BBG), which provided that employers of civil servants could – but were not required to – discharge civil servants whose previous political activity did not guarantee that they would support the national State without reservation. Judicial review of the definitive decision regarding dismissals by the highest Reich or Länder authority was barred. (§ 7 para. 1 BBG.)

The court’s decisions dealt almost exclusively84 with two issues: 1. whether and under what circumstances a discharge pursuant to BBG could subsequently be converted into a private-law dismissal; and 2. where the line was to be drawn between which aspects of a discharge were and which were not subject to judicial review. Although the statute was designed to effect a one-time purge of the civil service rather than to serve as a permanent instrument of political control,85 the after-effects of dismissals, in particular issues relating to pension rights, continued to occupy the court as late as 1942.86

tolerance of his discharge would mean that “a measure of the total National Socialist State would be weaker” than the employer’s decision to discharge.

82 § 64 and 65 nos. 1 and 4 AOG.
83 See the introduction to Part IV above.
84 But see RAG 45/34, 21:61-65, No. 12, 13 June 1934.
85 The deadline for dismissals was originally 30 September 1934 (§ 7 para. 2 DBG). The deadline for reassignments and superannuation resulting from agency rationalization (Vereinfachung) (§§ 5-6) was subsequently extended to 31 March 1934 (art. I Drittes G. zur Änderung des BBG, 22 September 1933, RGBI I, 655) and then to 30 September 1934 (art. I Viertes G. zur Änderung des BBG, 22 March 1934, RGBI I, 203). The deadline for such measures was ultimately extended to 1 July 1937 – the date on which the Deutsches Beamtenengesetz went into effect (26 January 1937, RGBI I, 39). See art. I Sechstes G. zur Änderung des BBG, 26 September 1934, RGBI I, 845. RAG expressly upheld the time limits on political dismissals (RAG 284/36, 30:22-34, No. 3, 14 April 1937; and RAG 19/41, 43:66-82, No. 12, 19 September 1941).
86 Other means were of course available to remove politically undesired civil servants after the expiration of the relevant statutory periods. The most interesting case to reach
A. Conversion of BBG-Discharges into Contract- and Tarifordnung-based Discharges

Where the statutorily designated officials vindicated civil servants discharged for political reasons, employers often sought to sustain the discharge by subsequently converting it into one within the scope of the termination provisions of BGB or of the relevant Tarifordnung. Uniformly the court ruled in these cases that such a conversion was void where the employer's will to terminate was rooted in a narrowly defined circle of motivating circumstances. It was held to be a violation of good faith to interpret such an expression of will after the fact as containing other motivations. The court grounded its decisions in such notions as the expectations relied on by employees and the rule that uncertainty in expressing his will should redound to the detriment of the employer. (RAG 156/34, 22:71-75, No. 14, 24 October 1934; RAG 17/35, 24:161-69, No. 25, 10 April 1935; RAG 309/35, 26:265-72, No. 55, 29 April 1936 [G. über Betriebsvertretungen]; RAG 217/35, 26:283-90, No. 59, 14 December 1935 [held against employee because will expressed; noteworthy for multitude of administrative and judicial panels involved]; RAG 62/35, 27:97-99, No. 21, 19 June 1936; RAG 68/36, 29:30-35, No. 8, 14 October 1936; RAG 252/36, 29:332-37, No. 61, 3 March 1937 [G. über Betriebsvertretungen; held formally in favor of employee; claim effectively undermined by statute of limitations].) Although plaintiffs in such cases could be validly dismissed afresh, they were spared the more far-reaching sanctions associated with dismissals arising under BBG.

Thus although the court was prepared to assert the traditional policies underlying the meeting of the minds/will theory in contract formation,87 once the competent State authority ruled against the justification of the discharge ab ovo on political grounds, RAG was just as willing to apply a veneer of judicial reasonableness to statutorily prescribed retroactivity. Where, for example, the positive law provided that discharges that had been carried out before the statute went into effect were valid if

RAG involved an employee of the employment office in Danzig who knowingly falsified the workbook of a woman belonging to the Polish minority enabling her to obtain employment with the police. (RAG 124/41, 44:88-73, No. 10, 16 January 1943 [held against plaintiff-employee, affirming LAG, which had reversed AG]).

87 § 140 BGB provides that where a void transaction fulfills the requirements of another transaction, the latter is valid if it is to be assumed that there would have been a will to assert its validity had the invalidity of the first transaction been known.
they could have been supported by certain provisions in the statute, the court rejected the argument that such a discharge constituted an interpretative conversion (Umdeutung) of a private-law discharge. Rather, the court held, it was merely a sustaining of the earlier termination under the aspect of BBG. (RAG 5/1937, 31:356-61, No. 61, 17 April 1937.)

B. Judicial Review

RAG was able to draw relatively bright lines between the issues over which it exercised jurisdiction and those over which the statute assigned exclusive jurisdiction to administrative officials. Thus the court ruled that judicial review was not available in BBG cases with regard to: 1. the time at which a discharge became effective (RAG 83/34, 21:65-69, No. 13, 13 June 1934); 2. whether one of the statutory causes for dismissal was present (RAG 151/34, 22:157-64, No. 34, 3 November 1934 ([court rejects LAG’s view that defendant’s arbitrary assertion that plaintiff had been spiteful could not justify extraordinary measure of excluding judicial review]); 3. the reduction or withdrawal of pensions unless the claim was based on a new agreement between the parties concluded after the discharge (RAG 184/34, 23:92-98, No. 18, 12 January 1935; RAG 3/39, 37:137-45, No. 20, 23 August 1939; RAG 181/39, 39:264-71, No. 48, 17 April 1940; RAG 134/39, 39:332-36, No. 60, 17 January 1940; RAG 181/40, 41:282-89, No. 38, 4 March 1941; RAG 133/41, 44:217-20, No. 35, 27 March 1942); 4. declaring a private-law dismissal void for violating the mandatory hearing provisions where the dismissal was also based on BBG (RAG 288/36, 30:74-77, No. 12, 9 June 1937); and 5. tort claims based on allegations of unfair procedures in determining plain-
tiff’s political reliability (RAG 45/37, 31:149-53, No. 26, 22 September 1937 (§ 839 BGB governs tort recovery for violation of official duties).92

RAG asserted its jurisdiction where: 1. employees sued for their salary for the period intervening between discharge and administratively ordered reappointment (RAG 192/34, 23:56-57, No. 14, 19 December 1934); 2. the employer in discharging an employee used the language of BBG but expressly referred to the Law on Plant Representation (RAG 147/35, 26:26-34, No. 10, 16 November 1935 [different procedures govern each law]); 3. the employer was entitled – but not obligated – to discharge an employee and the latter requested a certificate from the former to prove to the pension fund that he was not at fault (RAG 155/35, 26: 304-306, No. 63, 16 October 1935 [fact that Prussian minister of interior rejected plaintiff’s objection to dismissal not dispositive of fault issue, which must be adjudicated according to private law principles]; RAG 284/35, 27:343-52, No. 60, 8 July 1936 [G. über Betriebsvertretungen]); 4. statute of limitations had run (RAG 284/36, 30:22-34, No. 3, 14 April 1937); 5. the threshold issue93 was presented as to whether the prerequisites for the application of BBG were present, i.e., whether the employee was covered by the statute and whether an authorized official had issued the termination; absent these prerequisites, the entire litigation was to be conducted before ordinary civil courts (RAG 200/36, 29:246-54, No. 49, 27 December 1936 [plaintiff-administrative director of a people’s theater in Berlin, who challenged discharge by Goebbels in latter’s capacity as minister for popular enlightenment and propaganda without approval of DAF as co-plant-leader, lost on merits in all courts]; RAG 167/37, 31:401-405, No. 70, 24 November 1937); and 6. a discharge was based on an employee’s allegedly incorrect answers on a form required by procedures preliminary to evaluating employees’ political reliability within the meaning of BBG; since the discharge was based on § 626 BGB before BBG had been applied, judicial review was available (RAG 194/34, 23:132-42, No. 26, 9 February 1935).94

92 See also RAG 260/39, 39:462-74, No. 80, 10 July 1940.
93 Cf. RAG 158/39, 39:106-12, No. 18, 20 March 1940 (judicial review available where BBG is a threshold issue to a declaratory judgment that salary claims date from a certain point in time).
94 Plaintiff had answered “No” to a question regarding membership in four named organizations, which did not include the Black Front, to which he had belonged. RAG held that defendant had not proved that plaintiff was acquainted with ad § 2 no. 2 Dritte VO zur Durchführung des BBG, 6 May 1933, RGBI I, 245, which required the discharge of those who had been active along the lines of that organization. The court ruled that it was irrelevant that plaintiff could have been dismissed for his membership, especially since
Enemies of the regime

In summary, then, RAG was careful not even to appear to be arrogating to itself jurisdiction over issues that could be conceived of as even marginally belonging to the political realm which the regime statutorily monopolized.

III. DAF as Employer

Generally the court showed great deference to DAF in its role as defendant in employee-initiated litigation. With the exception of a vacation rights case (RAG 153/41, 44:177-81, No. 28, 20 March 1942), the plaintiff party prevailed unambiguously only once. In that case DAF approached plaintiff, who was a partially disabled legal and tax advisor, to manage the office it had recently opened in his town. When, in the course of reorganization, the office was closed several months later, plaintiff was dismissed (with six weeks’ notice). It was plaintiff’s claim that in abandoning his previous livelihood he had relied on DAF’s implied promise of lifetime employment. The court inferred such an agreement from the circumstances of the negotiations; although DAF could still terminate the relationship for extraordinary cause, reorganization did not constitute such a cause because DAF’s size enabled it to find other suitable employment for plaintiff. The court emphasized that it was judging DAF as it would any other legal personality. (RAG 188/36, 28:332-37, No. 69, 16 December 1936.)

In a number of cases RAG held that since DAF was not a corporation under public law (Körperschaft des öffentlichen Rechts), its internal employment regulations (Dienstordnung) were not covered by AOG (or the latter’s public employment counterpart) and were therefore not legally binding unless they were integrated into the labor contract by agreement. (RAG 171/36, 29:224-31, No. 43, 16 December 1936; RAG 143/38, 35:223-29, No. 45, 15 February 1939.) Similarly, the court ruled that DAF’s honor and disciplinary code (Ehren- und Disziplinarordnung), which contained limits on DAF’s power to discharge employees, was not, without more, legally binding, but merely constituted an inter-defendant had not presented such evidence until the first appeal, at which time it was impermissible, and also did not appeal this point.

Cf. RAG 118/38, 35:21-29, No. 6, 21 December 1938 (Reich Farmer-Führer [Reichsbauführer] is justified in discharging without notice a highly paid attorney who acted contrary to his plans by submitting other proposals to Nazi party); and RAG 75/37, 38:131-39, No. 27, 3 November 1937 (Food Estate [Reichsnährstand] is unjustified in discharging without notice an employee who testified against it at a criminal trial).
nal directive to proceed cautiously in dismissing employees. (RAG 25/38, 34:212-21, No. 37, 13 July 1938; RAG 105/38, 34:312-15, No. 49, 30 November 1938.) Mansfeld, the labor ministry's expert on labor law, found the judicial deference unwarranted and the consequent lack of protection for employees vis-à-vis the organization charged with protecting all workers absurd. (RAG 34:221.)

The most significant DAF case, which occupied the court twice, involved an employee who was discharged without notice because the head of the Nazi party Gau personnel office had declared that he was politically unreliable. Whereas plaintiff denied that such a declaration sufficed as a ground for discharge (and, in the alternative, that he was politically unreliable), defendant submitted that the Nazi party's declaration was per se binding on it, and that the concrete facts giving rise to the declaration were immaterial since neither it, DAF, nor the court was empowered to review them. RAG remanded to LAG which, in ruling for DAF, had overturned the trial court's judgment. Since the Nazi party office in question was not authorized to dismiss plaintiff, judicial review was available to him. On remand LAG was instructed to determine whether plaintiff had been expressly characterized as politically unreliable or whether merely doubts had been raised; LAG was also to determine whether a body exercising sovereign rights (Hoheitsträger) or a subordinate office had issued the declaration. (RAG 276/37, 33:22-27, No. 6, 15 June 1938.) On remand LAG affirmed the trial court's ruling in favor of plaintiff after having found that the Nazi party office's withdrawal of its previous certification that plaintiff was unobjectionable indicated that it intended plaintiff to be discharged but only with the normal notice period. RAG set aside this judgment and remanded once again with instructions to determine whether the Nazi party office was affirmatively stating that plaintiff was unreliable (in which case discharge without notice was justified) or was merely expressing doubts (which were subject to review by DAF and then by RAG to determine whether DAF could reasonably be expected to retain plaintiff in employment until the notice period expired). (RAG 215/38, 36:158-62, No. 30, 26 April 1939.)

Although the final disposition of the case is unknown, it is worth noting that the court was willing to devote so much and such minute attention to ascertaining the status and intentions of a Nazi party office on

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96 For a further example of the court's approval of DAF's traditional employer mentality, see RAG 207/36, 29:209-11, No. 38, 24 February 1937.
which turned only whether the dismissed employee would receive back-
pay for the duration of the notice period. It is also unclear why the court
struggled so tenaciously to retain its jurisdiction to review these actions
by DAF and the Nazi party. In the view of Ernst Fraenkel, however, such
decisions are crucial to his thesis that a general exemption of the Nazi
party from all judicial jurisdiction would have jeopardized the existence
of the partial Normative State that characterized the Nazi legal sys-
tem.\textsuperscript{97} A labor court case adduced by Fraenkel in this context involved
an officer in the SA who brought suit for his salary after he had lost his
position as an administrator as a result of the refusal of the office to
which he had been transferred to employ him.\textsuperscript{98} Defendant-SA argued
that no employment relationship existed because service in the SA was
honorary and voluntary. The trial court ruled in plaintiff's favor to the
extent that it recognized his salary claim for the duration of the normal
notice period. Both parties appealed, but LAG affirmed the lower court's
ruling as did RAG on appeal by defendant. Although the court acknowl-
edged that the SA's authority to relieve a member of a position as a
\textit{Führer} was, as an emanation of its command power (\textit{Befehlsgewalt}), not
subject to judicial review, it also ruled that such authority was not
inconsistent with the existence of a private law employment relation-
ship with its attendant legal rights. Referring to, but not having to reach
the question of, the SA's submission that the Nazi party stood above the
State, the court nevertheless concluded that it was not inconsistent with
Nazi party-organizations' being subject to the general principles of pri-
ivate law in their relations with individuals. (RAG 244/36, 29:315-23, No.
58, 10 February 1937.)

\textsuperscript{97} Fraenkel, \textit{Doppelstaat}, p.63 Cf. Erlass des Führers über die Rechtsstellung der
Nationalsozialistischen Deutschen Arbeiterpartei, 12 December 1942, RGBI I, 733.

\textsuperscript{98} Several other cases not cited by Fraenkel indirectly support his contention that a
general exemption was never accorded the Nazi party: RAG 10/36, 33:128-35, No. 23, 16
June 1938 (contract of editor of official Nazi party newspaper); RAG 15/43, 46:142-46, No.
29, 2 April 1943 (case could have been but was not decided on basis of general immunity of
Nazi party: private entrepreneurs can be charged with conducting lottery the employees of
which are not also employees of Nazi party). This aspect of the exemption must be
distinguished from bias in favor of the Nazi party or its members: RAG 61/40, 39: 413-19,
No. 72, 31 July 1940 (potential contributory negligence of plaintiff in tort suit mitigated
inter alia by fact that accident occurred while he, a Nazi party member, was on his way to a
Nazi party celebration commemorating Hitler's takeover of power). But see RAG 163/39,
39:215-21, No. 40, 21 February 1940 (garnishment of salary of employee of Nazi party
provincial organization), which Volkman, the commentator, implicitly criticized for not
being based on the fact that the nature of the employer (Nazi party) precluded suspicion of
any intention to disadvantage the employee's creditor. See also RAG 56/38, 34:192-99, No.
34, 10 August 1938 (no statutory basis for claim that government agency in Nazi State \textit{per}
\textit{se} sufficiently guarantees that its employees are correctly classified as to salary scales).
The import of this decision should not be overestimated. The court did limit its holding to full-time administrative employees of the SA; and as Volkmar, the most Nazi-oriented of the ARS commentators pointed out, individual inequities were available for review without thwarting the political goals of the SA (RAG 29:323). Unless jurisdictional disputes internal to the SA—not alluded to in the opinion—could account for the decision to provoke a resolution through the civil courts, it must be assumed that in view of the important paramilitary functions of the SA at the time the decision was handed down,¹⁰⁰ the leadership of the SA or of the Nazi party itself would have dealt with plaintiff extra-judicially had judicial review been anathema to it. Although the court clearly upheld freedom of (labor) contract, it could with equal plausibility have contained the untoward ramifications—for commercial interests in general—of a judgment in favor of the SA so that no precedent would have been generated, for example, to support a future claim by the SA that it lay within its discretion whether to fulfill an agreement with a corporation supplying it with uniforms. Since it is chiefly this latter issue that Fraenkel had in mind when he supposed that the unbridled growth of the Prerogative State would have been dangerously dysfunctional for the German capitalist economy, it is no longer clear that RAG was intentionally or even inadvertently serving indispensable macro-political-economic ends.

A more plausible interpretation of the court’s activity in this area lies in focusing on the legitimation generated for the Nazi regime by the court’s conducting “business as usual” within the more restricted yet more openly politicized jurisdictional sphere still available to it. Once the regime itself had drawn bright lines around those real-world events and legal issues the untoward or merely random judicial treatment of which might have jeopardized the regime’s stability, the preservation of a rump Rechtsstaat served the function of securing the loyalty of the judiciary. Once the regime had determined what questions were justiciable, that is, once it had decided what kinds of cases it could ‘afford to lose’ in the course of random rule-of-law-like adjudication, the fact that some proportion of allegedly politically unreliable or hostile employees successfully pressed their claims for backpay for the duration of notice

⁹⁹ It is conceivable that the Nazi party welcomed this outcome as documenting the subordinate status of the SA after Röhm’s murder. See Charles Bloch, Die SA und die Krise des NS-Regimes 1934 (F., 1970), pp. 154-59.
¹⁰⁰ See Neumann, Behemoth, pp. 384, 531.
periods, etc., could only redound to the benefit of the regime in terms of consolidating domestic political acceptance and international toleration.

The court’s accommodation to the political, economic and social goals of the new regime was facilitated by the German legal tradition, for which – unlike the Anglo-American Rule of Law – the democratic genesis of laws did not constitute a criterion of Rechtsstaatlichkeit.101 But as the experience of anti-communist legislation and its judicial sanctioning in the United States during the period after World War II has demonstrated,102 the organic interconnection of the political structure of the State (i.e., a democratically elected legislature that enacts laws according to democratic procedures) with the formal requirements of the Rule of Law (namely, the self-subordination of the State to general and abstract rules precluding arbitrary exercise of power; promulgation of laws; judicial review; independence of the judiciary; and due process103) also does not constitute a guarantee of the self-subordination of the legislator to the requirements of the preservation of civil and socioeconomic rights and of the protection of minorities against oppression by the majority (material Rechtsstaat).

101 See ch. 1 § IV.A. above.
102 E.g., Flemming v. Nestor, 363 U.S. 603 (1960), upholding termination of social security insurance benefits to an alien who was deported pursuant to a statute that provided for deportations of aliens because of past Communist party membership (plaintiff had left Communist party fourteen years before statute was enacted). Both provisions – 42 U.S.C. 5402(n) (1954) and 8 U.S.C. § 1251(a)(6)(c)(1) (1953) – are still in force. On the postwar loyalty qualifications for government employment, see Thomas Emerson, The System of Freedom of Expression (NY, 1970), pp. 205-46.
Chapter 11

Jews

An analysis of labor court decisions involving Jews in Nazi Germany may appear to be grotesque academic fiddling while Rome (or after Jews were) burned. Surely it makes itself vulnerable to the criticism that it is missing the forest for the trees. Indeed, in light of the world-historical murder organized by the Nazi apparatus, what purpose does it serve to examine the rearguard struggles of a handful of Jews to preserve their pension rights, holiday pay or entitlement to one month's salary when fired as a result of anti-Semitic laws or personal prejudice? Is it, as Ernst Fraenkel, a participant-observer until 1938, suggested, ultimately inconsequential whether a Jewish plaintiff occasionally wins in a State in which the ruling party informally coerces businessmen and employers into violating contractual obligations owed partners and employees?1 By taking these decisions seriously, is one not, almost a half-century after the fact, falling victim to Nazi propaganda, which flashed the Rechtsstaat for foreign consumption with one hand while it prepared the Final Solution with the other: Can there be any more pernicious, cloistered self-deception than to dissect judicial gymnastics on behalf of Jewish plaintiffs who, on walking out of the courthouse, were transported by the Gestapo to extermination camps?2

The light shed by these cases on the conditions of existence of German Jews may be minimal; their outcomes may have been without significance to the individuals concerned and the Jews as a whole in Europe, although Jewish plaintiffs may not have thought so at the time. This is not, however, a social history of the holocaust, but rather an analysis of the methods of judicial reasoning under unique circumstances; and for this enterprise the Jewish labor cases constitute uniquely revealing material.

1 Ernst Fraenkel, Der Doppelstaat (F., 1974 [1941]), p. 122. Cf. F.A. Müllereisert, "Der Arbeitvertrag als Vertrag mit 'vorbetonter Gemeinschaftsfunktion,'" 4 DAR 94 (1936): "The world can rely on the fact that the German Nazi unshakably stands by his word and by his contract."

2 So-called corrective intervention by the Gestapo and by Hitler personally in criminal cases is documented; see "Zur Perversion der Strafjustiz im Dritten Reich", compiled by Martin Broszat in 6 VZ 390-443 (1958); Albrecht Wagner, "Die Umgestaltung der Gerichtsverfassung und des Verfahrens- und Richterrechts im nationalsozialistischen Staat," in Die deutsche Justiz und der Nationalsozialismus (Stuttgart, 1968), p. 301.
I. The Pertinent Legislation

Given the exceptional statutory status of Jews on which most of the cases turn, it is first necessary to provide an overview of the increasingly restrictive conditions to which Jews were subject insofar as matters within the jurisdiction of the labor courts were concerned.3

The Law pertaining to the Restoration of the Professional Civil Service (BBG) of 7 April 19334 provided in § 3 that tenured civil servants of non-aryan descent were to be superannuated. Excepted from this provision were those whose civil service tenure had accrued before World War I or who had fought at the front or whose fathers or sons had “fallen” in that war. Pensions could be granted only after ten years of service (§ 8), a condition that could be applied retroactively to those who had retired before 7 April 1933 if it could have been applied to them had they retired after 7 April 1933 (§ 9 para. 5). Four days later a ministerial decree stated that one Jewish parent or grandparent sufficed to create a non-aryan within the meaning of § 3.5 On 4 May 1933 another decree established guidelines for the treatment of non-tenured salaried and hourly employees in the public sector. Non-aryans in such positions were to be given one month’s notice, three months’ salary and three-quarters of the value of other legally recoverable entitlements. Similar exceptions were made on behalf of front combatants (§ 3).6 Two days later “descent” was defined to include illegitimate descent.7 Later, exceptions were made for female civil servants whose husbands had died in the war.8 Another law amending the legal status of civil servants prohibited the appointment, as tenured Reich civil servants, of those of non-aryan descent or married with such persons, and mandated the dismissal of aryans Reich civil servants who married non-aryans.9

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3 A mere listing and brief description of the laws, decrees, etc., pertaining to Jews occupies a thick volume; see Das Sonderrecht fur die Juden im NS-Staat, ed. Joseph Walk (Heidelberg, 1981).
4 RGI I, 175.
5 Erste VO zur Durchführung . . . , RGI I, 195.
6 Zweite VO zur Durchführung . . . , RGI I, 233.
7 Dritte VO zur Durchführung . . . , RGI I, 245.
8 Drittes Gesetz zur Anderung . . . , 22 September 1933, RGI I, 655; Zweite VO zur Anderung und Erganzung der zweiten VO zur Durchführung . . . , 28 September 1933, RGI I, 678.
9 Gesetz zur Anderung der Vorschriften auf dem Gebiet des allgemeinen Beamten-, des Besoldungs- und des Versorgungsrechts, 30 June 1933, RGI I, 433, ch. II.
The same day that the original BBG was promulgated Hitler also published a law that authorized the cancellation of admission to the bar of Jewish lawyers through 30 September 1933 except those who had been admitted before, had fought in, or whose fathers or sons had died in World War I. This provision, the use of which was not mandatory, was expressly characterized as applicable in the absence of the normal reasons for exclusion.\textsuperscript{10}

The so-called Nuremberg laws distinguished between nationals (\textit{Staatsangehörige}) and \textit{Reich} citizens (\textit{Reichsbürger}). Only those of the former were included among the latter who were of German or kindred blood; \textit{Reich} citizens were the sole holders of full political rights.\textsuperscript{11} The Law for the Protection of German Blood and German Honor prohibited marriages between Jews and nationals of German blood,\textsuperscript{12} declaring them null and void also if performed abroad to evade the law. It also prohibited extramarital intercourse – subsequently defined as sexual intercourse\textsuperscript{13} – between Jews and nationals of German blood, and prohibited Jews from employing in their households female nationals of German blood under the age of forty-five. Only males transgressing against the intercourse provision were punishable.

Subsequent amendments to the Nuremberg laws declared that Jews, who could not become \textit{Reich} citizens, could neither vote nor hold public office. Tenured civil servants had to retire by the end of 1935; only if they had been front combatants could they receive their salaries until reaching the normal retirement age.\textsuperscript{14} (In the wake of \textit{Kristallnacht} even this concession was retracted\textsuperscript{15}.) A Jew was defined as a person descended from at least three racially purely Jewish (\textit{volljüdisch}) grandparents, or

\textsuperscript{10} Gesetz über die Zulassung zur Rechtsanwaltschaft, 7 April 1933, RGG I, 188. For a general view of the treatment of Jewish lawyers under the Nazis, see Horst Göppinger, \textit{Die Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus} (Villingen, 1963).
\textsuperscript{11} Reichsburgergesetz, 15 September 1935, RGG I, 1146. The two Nuremberg laws were among only nine passed by the Reichstag – as contradistinguished from Hitler – between 21 March 1933 and 6 October 1939; see \textit{Gesetze des NS-Staates}, compiled by Uwe Brodersen (Bad Homburg, 1968), p. 14. On the background of the Nuremberg laws – including Hitler’s participation – see Bernhard Lößner, “Als Rassereferent im Reichsministerium des Innern,” \textit{9 VfZ} 264-313 (1961); Uwe Dietrich Adam, \textit{Judenpolitik im Dritten Reich} (Düsseldorf, 1979 [1972]), pp. 114-44.
\textsuperscript{12} 15 September 1935, RGG I, 1146.
\textsuperscript{13} Erste VO zur Änderung . . . , 14 November 1935, RGG I, 1334, § 11. For an outstanding example of non-positivistic adjudication, see RGSt 73:94, in which the Supreme Court interpreted “sexual intercourse” to include masturbation of a German man in the presence of a Jewish woman (2 February 1939).
\textsuperscript{14} But their seniority could not be increased.
\textsuperscript{15} Siebente VO zum Reichsbürgergesetz, 5 December 1938. RGG I, 1751.
as a Jewish half-breed (Mischling), descended from two purely Jewish grandparents, who belonged to the Jewish religious community or was married to a Jew.¹⁶

Tenured Jewish civil servants who were required to retire before having achieved an entitlement to a pension could, if needy and worthy, be granted a maintenance subsidy. Supervisory doctors at public and non-profit hospitals were forced to leave their positions by 31 March 1936.¹⁷ By 30 September 1938 all Jewish doctors were deprived of their license to practice without special permission.¹⁸

Similarly, all admissions to the bar of Jewish lawyers were revoked as of 30 September 1938; under restrictive conditions some former Jewish lawyers could reappear as legal advisers to Jewish clients.¹⁹ In the course of 1938, but prior to Kristallnacht, it was made unlawful to conceal Jewish ownership of a business,²⁰ and for Jews to engage in certain businesses such as real estate.²¹

In the wake of Kristallnacht Jews were prohibited from conducting retail or mail-order craft businesses as of 1 January 1939; from that date onward they were also prohibited from being plant-leaders within the meaning of AOG. Jewish executives in business enterprises could be given six weeks' notice at the termination of which all pension and severance pay claims on the contract expired.²² Other laws designed to effectuate the so-called aryanization of the economy by means of expropriating Jews followed.²³ Only where Jewish welfare agencies were unable to provide aid could state welfare be granted – and then only under stringent conditions.²⁴ Within two months of having imposed the wearing of the star of David (1 September 1941),²⁵ the Nazis finally promulgated a ministerial decree defining the employment relation sui generis of Jewish workers.²⁶ As alien to the German race (Artfremder), a Jew could not

¹⁶ Erste VO zum Reichsbürgergesetz, 14 October 1935, RGBI I, 1333.
¹⁷ Zweite VO . . . , 21 December 1935, RGBI I, 1524. §§ 2 and 6.
¹⁸ Vierte VO . . . , 25 July 1938, RGBI I, 969.
¹⁹ Fünfte VO . . . , 14 October 1938, RGBI I, 1403.
²⁰ VO gegen die Unterstützung der Tarnung jüdischer Gewerbebetriebe, 22 April 1938, RGBI I, 404.
²¹ Gesetz zur Änderung der Gewerbeordnung für das Deutsche Reich, 6 July 1938, RGBI I, 823.
²² VO zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben, 12 November 1938, RGBI I, 1580.
²³ RGBI 1938, I, 1579, 1638, 1709; 1940, I, 891.
²⁴ VO über die öffentliche Fürsorge für Juden, 19 November 1938, RGBI I, 1649.
²⁵ PolizeiVO über die Kennzeichnung der Juden, RGBI I, 547.
²⁶ VO über die Beschäftigung von Juden, 3 October 1941, RGBI I, 675. The provisions
be a member of a German plant-community (§ 1). Thus neither AOG nor certain laws pertaining to holiday pay applied to Jews (§ 2). In contrast to aryan workers, Jews were entitled to compensation only for work actually performed, and could, therefore, not claim sick-pay; overtime pay, family subsidies, Christmas bonuses and old-age pensions apart from the statutorily provided ones could not be granted Jews (§§ 3-7). Even apart from immediately effective discharges, Jews were entitled to only one day’s notice (§ 9).

Disputes resulting from the employment relation of a Jew were no longer subject to the jurisdiction of the labor courts, but were decided at an arbitration office (Spruchstelle) by a judge appointed by the minister of justice. Although the procedures of the labor court were to apply, no appeal was available (§ 10). Absent special permission from the Employment Office, Jewish employees had to be set to work in groups segregated from the rest of the Following (§ 12). Jews could no longer work as apprentices (§ 13) and were not covered by the special war-time protective labor law (§ 15). Unemployment aid was severely restricted (§ 17).

II. Cases

In view of the special status that Jews occupied in the Nazi party program and in the execution of internal policy, Ernst Fraenkel reasoned that they were subject to the Prerogative State, that is, a system of domination within the context of unlimited arbitrariness and force unconstrained by legal guarantees. Although the following analysis of the Jewish labor cases will make it possible to judge the validity of Fraenkel’s view, a plausible working hypothesis is that positive law enacted by Hitler in this area was clothed with special significance which even judges with pro-Jewish sympathies would not have been able to reason their way out of inconspicuously. The fact that the increasingly oppres-
sive waves of anti-Semitism initiated by the Nazis constituted discernible chronological periods clearly marked off by new legislation suggests a categorization of the cases in terms of stages of anti-Semitism. Fraenkel himself noted that during the first years of the regime the courts as a rule applied Nazi racial policy only where the positive law already reflected it. Once the Nuremberg laws expressly degraded Jews to literal second-class citizenship, however, this judicial approach became anachronistic. But even during the period between the promulgation of these laws and the events surrounding Kristallnacht, that is, during the time when Jews were still permitted to maintain a reduced presence in small commercial and industrial enterprises, Nazi policy towards the Jews was characterized by a contradiction. Since the Jews at this time were still more or less integrated into the capitalist system, a strict application of the methods of the Prerogative State would have meant a disturbance of normal economic life. It was therefore the task of the judicial system to protect the economy from convulsions even if this brought about a certain protection for the Jews.

With the elimination of Jews from normal economic and social life and their transformation into quasi-outlaws, the basis of this contradiction and hence the contradiction in the minds and hearts of German judges disappeared too, in Fraenkel’s view.

With some modification this chronology is adopted below. The first phase covers the time from the promulgation of BBG in April 1933 to the enactment of the Nuremberg laws in September 1935. The second phase ends with the Decree pertaining to the Elimination of Jews from German Economic Life in November 1938. The third phase runs until the special labor code for Jews was issued in October 1941. Here the narrative ends. The last Supreme Labor Court case involving Jews was

31 Ibid., pp. 117-18. Rohlfing, “Rechtsfragen aus der Zugehörigkeit zur jüdischen Rasse im Arbeitsrecht,” 62 JW 2098-2101 (1933), illustrates the impatience of a judge with those of his colleagues who did not understand that extraordinary times required extraordinary means; the latter did not include reconciling revolutionary acts of the SA with the formal law of the Civil Code. Rohlfing became a member of the committee on labor law of the Akademie für Deutsches Recht; see BA R 61/115. For a discussion of Rohlfing’s position from the standpoint of a German Jewry that had not yet abandoned all hope, see Berthold Mosheim, “Ist die Zugehörigkeit zum Judentum ein Entlassungsgrund?” C.V.-Zeitung, vol. 13, no. 1 (4 January 1934), 1st Beilage. On the development of German Jewry during this period, see Hans Lamm, “Über die innere und äussere Entwicklung des deutschen Judentums im Dritten Reich” (Diss., Erlangen, 1951).

32 Fraenkel, Doppelstaat, p. 120.


34 Fraenkel, Doppelstaat, pp. 120-27. Since a “final solution” of the slave question was impossible within the slave economy, the contradiction never disappeared from ante-bellum adjudication. See Robert Cover, Justice Accused (New Haven, 1975).
decided in September 1941. The fourth phase witnessed the consignment of the Jews to the Prerogative State in the form of the Final Solution.

The chronological ordering will be determined not by the first case to be decided under the law ushering in the new phase, but rather simply by time since it is assumed that the policy of the new phase affected decisions relating to events that had occurred earlier. In point of fact, on the border between the first and second phase no decisions were handed down for eighteen months between December 1934 and June 1936, whereas the first case decided under the Nuremberg laws was not decided until June 1937. Similarly, between the second and third phase no decision was issued between September 1938 and March 1939; the first case under the Decree pertaining to the Elimination of Jews from German Economic Life was not decided until July 1939.

A. Phase 1: The Law pertaining to the Restoration of the Professional Civil Service (April 1933-September 1935)

The first case to reach RAG (in July 1933) was based on a precursor to the law authorizing the striking of Jewish lawyers from the list of counsel admitted to the bar. Plaintiff's Jewish lawyer had appealed a trial court case in Berlin to LAG, which denied the appeal because plaintiff was not represented by counsel admitted to practice before a German court.\textsuperscript{35} LAG reached this conclusion because counsel was not on the list of Jewish lawyers selected by a commissar for the Berlin bar, in accordance with decrees issued by the \textit{Reich} commissar of the Prussian ministry of justice at the end of March and beginning of April, as still authorized to appear in court. RAG, in ordering that LAG accept the appeal,\textsuperscript{36} stated that one could not interpret the decrees to have intended to render the lodging of an appeal by such a lawyer as null and void. The court took judicial notice of the fact that the Prussian administration had anticipated the action of the \textit{Reich} because it had feared that the population might engage in "self-help actions" against Jewish lawyers during the agitated period of defensive struggle against pan-Jewish atrocity propaganda. To this end the administration in Prussia undertook to reduce the participation of Jewish lawyers to a "tolerable mea-

\textsuperscript{35} § 11 para. 2 ArbGG, 22 December 1926, RGBI I, 507.
\textsuperscript{36} RAG issued an order (\textit{Beschluf}) in accordance with § 77 ArbGG.
Enemies of the regime

sure," that is, one corresponding to their share in the population.37 But, the court reasoned, to secure this result it was not necessary to intervene in pending litigation, as was done here, especially since the decree was known to be merely provisional in light of the impending promulgation of a national law which, by reference to another law,38 itself expressly upheld the validity of procedural acts such as that taken by plaintiff's counsel. (RAG B.52/53, 18:203-205, No. 46, 11 July 1933.)

The structure of the court's argument is manifest: first it sympathetically depicts the anti-Semitic origins and motivation of the governmental action; then it logically points out that the application of the decree was over-inclusive in the sense that it was not necessary to achieving the government's declared aim; and finally, it retroactively applies the standards of the national law in order to legitimate its second point. The court has thus preserved the integrity of its own internal procedures by embracing and yet confining the applicability of the new Nazi natural-law content of the positive law.

The first case in which the Jewishness of the plaintiff himself was at issue came before the court later that autumn. Plaintiff, who in 1929 had made a contract with his main supplier by which he became the manager of his former store, was fired without notice on 2 April 1933 following the temporary closing of the store the day before by the SA in connec-


The expulsion of Jews from the bar is documented by the fact that between 7 April 1933 and 30 April 1934 1,084 "non-aryan" attorneys were removed on the basis of the Gesetz über die Zulassung von Rechtsanwälten, with an additional 280 having died or left "voluntarily." As of 1 May 1934 2,009 remained in the bar. See "Übersicht über die Zahl der am 15.1934 zugelassenen arischen und nichtarischen Anwälte und Notare," 96 DJ 950 (1934). The aforementioned data refer to attorneys only; it should be noted that the data presented in this article are arithmetically inconsistent.

By the time of the census of 1939, which for the first time included a count of non-religious Jews, only 392 full-breed Jews (Volljuden) were returned as being employed in the area of legal and business consulting (Rechts- und Wirtschaftsberatung), with an additional 370 half-breeds (Mischlinge) in the same branch. See SDR, vol. 552,4: Volks-, Berufs- und Betriebszählung vom 17. Mai 1939, Volkszählung. Die Bevölkerung des Deutschen Reichs nach den Ergebnissen der Volkszählung 1939, fasc. 4: Die Juden und jüdischen Mischlinge im Deutschen Reich (B., 1944), p. 106.

38 § 4 referred to § 91 b para. 2 of the Rechtsanwaltsordnung, which was added by the VO des Reichspräsidenten über Maßnahmen auf dem Gebiet der Finanzen, der Wirtschaft und der Rechtspflege, 18 March 1933, RGBI I, 109, ch. XIII, art. I.
tion with a boycott of Jewish stores; since defendant was not Jewish, the store had been reopened.

In the case at bar the issue was whether plaintiff's Jewishness was an important cause for immediate dismissal within the meaning of § 626 BGB.\(^\text{39}\) It must be kept in mind that BBG applied only to public employment so that the court had no positive anti-Semitic laws to draw on as being directly on point here. Formally applying the schematic balancing test that had, even in Weimar, become the hallmark of this particular species of general clause, the court held that although the fact of being a Jew in itself could constitute cause for dismissal, this was not so in all cases (schlechterdings) and without more. Defendant had not proven that adhering to the contractual period of notice would have led to the decline of his business or even that he had had serious apprehensions. Not only had no further boycotts been announced, but the customers in Cottbus had not taken umbrage at plaintiff's Jewishness. The court attested that plaintiff had proven himself in the war in such a manner that even customers who otherwise had no use for Jews could not help respecting him personally. Finally, the court concluded, even taking into consideration the importance of the circumstances of the times, one could not neglect the fact that precisely the personal relations of the parties to each other could speak in favor of maintaining the contractual relation – perhaps even at the risk of financial losses for defendant. (RAG 220/33, 19:207-10, No. 49, 28 October 1933.)

As its major premise RAG accepted without any discussion that in principle, without any dispositive statutory basis on which to rest its acquiescence in Nazi anti-Semitism, the fact that one was Jewish could make it unreasonable to expect an employer to carry out the provisions of an employment contract. By creatively developing the common law of contract, the court made it unnecessary for the Nazis to intervene in this area of private law until after Kristallnacht. Thus without expressing its sympathy for the ideology of anti-Semitism, but rather matter-of-factly conceding the abstract possibility of the point, the court then proceeded to find concrete facts that not only neutrally deprived defendant of a reasonable cause for dismissal, and also depicted the Jewish plaintiff as an under-dog and a good German, but also implicitly cast defendant-

\(^{39}\text{§ 626 provided that each party could terminate an employment relation, without observing a notice period, for an important cause. The reasonableness and balancing tests that the courts applied during Weimar and the Nazi period were finally written into the Code itself in 1969. See 2 Staudinger's Kommentar zum Bürgerlichen Gesetzbuch, 9th ed., part 2, p. 897 (1928); 3 ibid., 10th ed., part 2, p. 1324 (1939).}\)
employer as a villainous capitalist who was using anti-Semitism as a pretext in order to take advantage of his proletarianized former customer. RAG thus succeeded in shaping a minor premise – this Jew did not make it unreasonable for this employer to adhere to the contract – that led to a conclusion that in no way undermined the usefulness of the major premise as a precedent while permitting justice to be done in the individual case.

In this sense the commentator, Hueck, was correct in asserting that the court had strictly adhered to the tradition of precedents that had come to control the interpretation of these general clauses. *(Ibid.* at 210.) Yet the fact that reasonableness, good faith and the balancing test could be operationalized in terms of anti-Semitism shows only that formalism warranties justice as little as syllogisms do truth. General clause jurisprudence thus proved itself a flexible tool in the sense that it enabled judges to legitimate their existence as formalists who could nevertheless mete out *qadi*-justice while speaking a hard enough language to forestall the enactment of even more barbaric positive law.

A month later the court became more explicit in underscoring that, absent laws relating to the private sector, one could not acknowledge the proposition that every Jewish employee could be dismissed without notice – in spite of the new attitude which the national State and the German people at large had adopted towards Jewry. On the other hand, however, RAG emphasized that this attitude was so fundamentally different from the one that had prevailed until then that one could not overlook its consequences even in the area of private contract law. Echoing the Nazi leadership’s admonition to its so-called left-wing to the effect that the revolutionary period was over, 40 the court measured the anti-Semitic pulse of the nation not by the point of view precipitately generated by political events, but by the “clarified” (“geläuterte”) views of the present. It then criticized the lower court for having accepted the employer’s mere subjective conjecture as to the danger involved in observing the notice period for termination of a Jewish employee. It remanded the case with instructions to examine whether an objective basis supported the subjective perception. (RAG 224/33, 19:214-17, No. 51, 25 November 1933.)

By mid-1934 the first case involving a Jewish employer-defendant and a non-Jewish plaintiff-employee came before the court. Defendant open-

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ed a so-called one-price store in 1932 which even before the Nazi take-over had created unrest among the population and retail dealers. As a result the police closed the store in mid-March 1933, not permitting it to reopen for six weeks.\(^{41}\) (It is not clear whether the new owner, who was also sued, was Jewish.) Defendant discharged all of the store's employees the day the store was closed; plaintiff's suit sought the salary due for the duration of the normal termination period.

Whereas LAG had emphasized that the immediate discharge was unfounded because the employer, though not responsible for the closing, had to bear the risk since the police action was related to his person even if not decisively to his Jewish descent, RAG did not recur to defendant's being Jewish at all. Rather, it decided in favor of plaintiff merely on the grounds that good faith under these particular circumstances made it reasonable for defendant to observe the relatively short notice period. (RAG 80/34, 21:162-66, No. 32, 27 June 1934.)

In another case involving a Jewish defendant-employer, plaintiff was a high-level employee who had been dismissed without notice because he had concocted an intrigue with the political police, the SA and the Nazi party in order to cause his employer trouble. RAG set aside LAG's decision in favor of plaintiff and remanded on procedural grounds. Even if plaintiff's behavior was supportable in terms of subjective exculpatory grounds viewed in the context of the political situation, it was, the court argued, still possible that continued employment could not reasonably be expected if the basis for trust and cooperation were destroyed. The court criticized LAG for singling out only exculpatory grounds instead of examining the totality of circumstances, in particular the higher demands that were normally made of executive employees. (RAG 101/34, 21:217-22, No. 44, 25 July 1934.)

Both of these cases appear to reveal a concern on the part of the court not to introduce a potentially uncontainable bifurcation of labor law adjudication as between Jewish and non-Jewish employers. The court achieved its goal by down-playing or passing over in silence the Jewish aspect. With a minimum of ideological obeisances, RAG managed to decide the cases on the basis of principles that had guided Weimar adjudication as well.

In the last case of the first phase both the employee-plaintiff and the employer-defendant were Jews. At the instigation of the Nazi party lead-
ership of the county plant-cell defendant dismissed plaintiff without notice on the grounds of alleged anti-State remarks. Although the public prosecutor quashed the proceedings, the regional leadership of DAF refused to agree to plaintiff's reinstatement.

Although this third-party pressure was unlawful, RAG acknowledged that it could operate on defendant qua Jewish business as a serious threat to the latter's continued existence in case of non-compliance. Under these circumstances the threat could induce defendant to place the interests of the plant as a whole above plaintiff's private interests, thus making further employment appear unreasonable. In accordance with precedent, of course, where, as here, the situation giving cause for dismissal exists merely in the employer's mind, he must make reasonable efforts to determine the true situation. (RAG 148/34, 22:215-18, No. 46, 12 December 1934.)

What is most remarkable about this decision is not that it appears to interpret the subjective-objective conditions requirement more liberally in favor of the Jewish employer than it had in the case of the aforementioned non-Jewish employer (although both cases were remanded), but that it openly and sympathetically portrays the predicament of a Jewish employer helplessly confronted with the extra-legal demands of a Nazi organization. That in this particular case plaintiff was not only Jewish but also an alleged subversive may have contributed to the outcome.

Few in number, the cases in the first phase display several variations in the relations of the parties to one another: Jewish employee v. non-Jewish employer; Jewish employee/former owner v. non-Jewish employer/former customer; non-Jewish employee v. Jewish owner; Jewish employee v. Jewish employer. Although the court took visible pains to confine the spread of a separate common law for Jewish employers, and although it also sought to mitigate the harshness of dismissals for Jewish employees by enunciating its competence to adjudicate the applicability of non-statutory standards of anti-Semitism to private contract law, it also began to steer the bulldozer down the slippery slope to Auschwitz by accommodating itself to the implicit abrogation of one constitutional provision Hitler had not even requested the Reichstag to repeal: “All Germans are equal before the law.”

One kind of case did not arise during this period – that controlled by BBG, which gave its name to the first phase. And yet the precedent it set

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42 Art. 109 of the Weimar constitution, 11 August 1919, RGBI I, 1383.
in singling out the Jews (abstracting for the moment from politically defined enemies) for discriminatory treatment constituted a brooding omnipresence which decisively influenced the texture and direction of the court's reasoning.

The Lower Courts

In order to form a more distinct impression of the tenor and style of RAG's decisions in this area, it is worth examining the approaches pursued in the lower courts.

Trial Courts

The first suit reached the labor courts in June 1933. Plaintiff was a Jewish physician who also worked part-time for a physicians' organization inspecting incoming insurance accounts. The new board of directors, which had been installed after the organization's *Gleichschaltung*, discharged him without notice. In dicta the court noted that if plaintiff's position had made it necessary for him to have contact with the mainly German customers, then the case would have been easy to decide. Similarly, had the old board remained in office, the court could reasonably have expected it to observe the normal termination period. But where the board's way of thinking had become Nazi, the tension between the parties made cooperation between them impossible. (AG 4 AC 403/33, 19:113-14, No. 1, 16 June 1933, Frankfurt/Main.)

Even if the court's reasoning could be accepted at face value, it is difficult to see why it would have been unreasonable to expect defendant to pay plaintiff's salary for the duration of the termination period which he might spend on leave. Years later RAG would still be applying analogous reasoning in support of pension payments to Jews.

Where a pharmacists' organization threatened to boycott defendant-pharmacy if it refused to fire plaintiff-probationer, the court held that the legality of this pressure was irrelevant since the scope of the threatened damage to defendant was decisive. Here the court decided in favor of defendant because its whole existence was in jeopardy and because it was vulnerable to a social boycott by its professional peers. (AG AC 2051/33, 20:52-54, No. 2, 2 November 1933, Gelsenkirchen.)

Two months later the same court dealt with a similar case in which however the defendant-employer was "of the Jewish race." From March until October 1933 his livestock business was closed on account of accu-
sations by the public. After the government permitted him to reopen his business, both defendant and plaintiff (who was a member of the right-wing paramilitary organization *Stahlhelm*) were badly beaten by defendant's competitors. At this point defendant decided to close his business and informed plaintiff that their employment relation was dissolved. Plaintiff sued for four months' salary. Whereas verbal pressure had been sufficient in the previous case to justify immediate discharge, here physical attack disabling defendant for six weeks merely induced the court to take judicial notice of the fact that the present State was strong enough to be in a position to guarantee a business's existence in the face of violence by individuals. If under these circumstances defendant voluntarily chose to discontinue his business, he could not shift the consequences onto plaintiff. (AG AC 2189/33, 20:54-56, No. 3, 19 January 1934, Gelsenkirchen.) Can the court's logic have turned on anything except Schadenfreude?

In a case involving parties who were both orthodox Jews, defendant-employer dissolved the apprenticeship contract as a result of a Nazi-organized boycott of his store. Although special circumstances marked the case inasmuch as the new owner of the store was a non-Jew for whom plaintiff would and could not work, the court decided on more general grounds that defendant could not reasonably be expected to remain in unprofitable business merely for plaintiff's sake. (AG 105/34, 21:215-18, No. 21, 14 June 1934, Würzburg.)

In connection with mass dismissals at a department store, the labor court in Gelsenkirchen held, six weeks before the Nuremberg laws were promulgated, that dismissing a Jew before Germans corresponded to "the German people's justified will to preserve itself and to the principle of today's State." (AG Ca 339/35, 25:51-53, No. 2, 31 July 1935, Gelsenkirchen.)

Thus the trial courts decided all cases against Jewish plaintiff-employees. Although they did not stoop to the vituperations character-
istic of the lower court opinions on Communists, they based their decisions much more straight-forwardly on a direct integration of Nazi ideology into the general clauses than did RAG's decisions, which still revealed the tensions between formalism and politics.

Appeals Courts

Plaintiff in the first case was a supervisor in a branch of a department store. Discharged without notice in April 1933, he sued for his salary through September. Defendant-employer justified its action on the grounds that it had been able to ward off a destructive boycott only by agreeing with the central boycott office to fire all Jewish employees above a certain level. (In addition, defendant claimed that all Jewish board directors had retired, although it is not clear whether the firm was considered "Jewish.") It could, moreover, not afford to grant paid leave to all the discharged Jewish employees for the duration of their termination periods.

The court, affirming the (unreported decision of the) trial court, held that a contracting party could renounce a contract without any notice only if observing the terms of the contract would constitute, as it were, sabotage of the national revolution. The mere fact of having to suffer certain unpleasantnesses and financial disadvantages would not suffice to justify such a discharge. LAG then proceeded to analyze in great detail how neither the official statements of the government, nor BBG nor even the actual agreement with the central boycott office required the harsh action taken by defendant. The court also rejected defendant's reliance on demands made by NSBO during the revolutionary mood of April 1933. But then in the first of what would become a series of successful moves by the labor courts to use Nazi ideology in favor of Jewish (and other) plaintiffs, LAG noted that permitting the discharges would contradict the principle of the national revolution that special interests must yield to general interests. For the department stores were originally enabled to expand by destroying many independent existences without regard to the public welfare. The Nazi policy of limiting such businesses could not be furthered by allowing them to shift the burden of providing for their discharged employees on to the State in the form of

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44 See LAG 6.II 65/34, 22:16-18, No. 4, 17 September 1934, Frankfurt/Main; LAG 6 II S 110/33, 19:207, No. 49, 27 November 1933, Frankfurt/Main, 2nd Dept.
unemployment and welfare payments. (LAG X i S. 77/33, 19:3-10, No. 1, 25 July 1933, Dortmund.)

In several other cases LAG adhered to the view that defendant-employer was obligated to oppose efforts by third parties – including the SA – to cause it to discharge Jewish employees without notice where neither statute nor Nazi Weltanschauung-inspired general clauses required such a result. (LAG 3 S 75/33 II, 19:126-29, No. 29, 28 September 1933, Bielefeld; RAG 6 a S 151/33, 19:211-14, No. 50, 20 November 1933, Düsseldorf.) One court went so far as to state that an employer who was in the SA reserve could question an order of the SA to discharge a Jewish employee without notice. In chiding the trial court for having held that courts were not competent to examine the authority of such an order, it relied on the government’s repeated efforts to thwart uncoordinated interference by local organizations in the private economy. Finally, the court virtually taunted defendant by pointing out that he had signed the apprenticeship contract with plaintiff at a time (October 1932) when one had to reckon with an eventual Nazi take-over. (LAG 1/34, 20:88-92, No. 23, 23 February 1934, Darmstadt.)

A Berlin court was confronted with a municipally employed nurse who had been discharged in accordance with the normal termination period because she had refused to dissolve her engagement of four years to a Jewish doctor. She was suing for the sum of money that was contractually secured to an employee of her seniority who was not responsible for her dismissal. Although the court conceded that plaintiff had violated her racial duties as a Volks-comrade, nevertheless her loyalty to her fiancé was also an attribute the German people were constrained to admire. The fact that equitable considerations controlled the interpretation of the contractual provision meant that her inability to resolve the conflict between her duties could not be construed as her fault within the meaning of the provision. (LAG 101. S. 46/34, 20:143-46, No. 36, 19 February 1934, Berlin, 1st Dept.)

All LAG decisions in 1933 and 1934 favored the Jewish plaintiffs.45 No LAG cases involving Jews were reported between May 1934 and March 1935. Then, for the first time, a Jewish employee, who had been dismissed with the required period of notice, sued on the grounds that her dismissal was void as contra bonos mores (§ 138 BGB). Defendant dismissed plaintiff because the county leadership of the Nazi party had, in

45 See also LAG 104 S 474/34, 21:39-94, No. 12, 31 May 1934, Berlin, 2nd Dept. Again the text refers only to LAG decisions published in ARS.
a threatening letter, informed it that its members would no longer do
business with defendant if plaintiff were not dismissed. Formulating
the concept of *bonos mores* in terms of Nazi ideology, the court concluded
that German *Volk*-comrades would not find it unconscionable that a
Christian firm fired its only Jewish employee in order to employ an
unemployed Christian *Volk*-comrade in this very highly paid position.
(LAG 6S. 133/34, 24:26-29, No. 5, 5 March 1935, Frankfurt/Main.)

Shortly before the enactment of the Nuremberg laws a court upheld
the discharge of a doctor by a hospital on the grounds that he had con­
cealed his racial background. Expressing disbelief that plaintiff had not
known that his mother was Jewish, the court propounded the view that
since the advance of the Nazi movement (i.e., at the latest, 1925) the race
question had attained such importance that it was unthinkable that in
1933 a university graduate had still not accounted for his descent. (LAG

Finally, four
days before the race laws were enacted, an appeals court upheld the
dismissal of a Jewish employee on the grounds that it had become unac­
ceptable for a female non-aryan to look after aryan children in a kinder­
garten. (LAG 4 a T 12/34, 25:200-205, No. 43, 11 September 1935, Krefeld­
Uerdingen. This was a court order and not an opinion.)

To summarize: during 1934 and 1935 LAG decisions reflected the spir­
it and strategy of contemporaneous RAG decisions; the decisions from
1935 – a year in which RAG handed down no decisions concerning Jews
– succumbed to the increasing hostility to Jews that culminated at the
Nuremberg party congress.

B. Phase 2: The Nuremberg Laws (September 1935-November 1938)

As the initial waves of dismissals receded into the past, the focus of
the reported litigation turned toward the longer-term ramifications of
the earlier dismissals, in particular pensions.

The first such case, decided in mid-1936, involved a musician who was
a permanent employee of a municipal orchestra. In consideration of the
fact that he had been a member of the orchestra since 1910 he was not

46 The court added that defendant would perhaps not have taken offense at plaintiff’s
race so long as plaintiff’s membership in the SA outwardly legitimated him as an aryan; LAG 25:206.

47 In the only relevant decision of the Honor Courts, a Jew was deprived of his position as
plant-leader for having abused his (presumably non-Jewish) Followers by directing
dismissed under BBG; but in 1934 he was deprived of his German citizenship (he had emigrated from Russia in 1904 and had been naturalized in 1927\textsuperscript{48}), and the following year he was dismissed with notice and prohibited from exercising his profession. He then sued for a pension that exceeded the contractually guaranteed minimum level. LAG held in plaintiff’s favor because it would have constituted a breach against good faith had defendant excluded plaintiff alone among all permanent employees from this higher pension. Although RAG conceded that § 315 BGB required defendant to determine the level of the pension in accordance with equitable discretion, it remanded the case because LAG had not taken into consideration that defendant had had an important cause for discharging plaintiff with notice. (RAG 65/36, 27:236-41, No. 46, 20 June 1936.)

On remand LAG granted plaintiff his pension, which defendant then refused to pay. In the ensuing litigation, which once again reached RAG the following year, plaintiff was successful at all levels. RAG held that although defendant was a body incorporated under public law (\textit{Körperschaft des öffentlichen Rechts}), the employment relation belonged to the sphere of private law. Hence judicial review of the instant discretionary determination was not restricted to the administrative standard of pure arbitrariness, but rather was open-ended with respect to the requirement of equity. (RAG 95/37, 32:28-34, No. 4, 13 October 1937.)\textsuperscript{49}

The next case involved a Jewish travelling salesman employed by a firm that had been aryanized in 1934 and some of the owners of which were members of the Nazi party. Plaintiff gave notice after defendant had proposed reducing his compensation; during the notice period – after the enactment of the Nuremberg laws – defendant discharged plaintiff without notice because he had refused to agree to limit his circle of customers to “Jewish” firms and to work on a commission basis only. Plaintiff was successful – in one measure or another – at all levels in his claim for compensation for the duration of the notice period. Although RAG conceded that most aryan firms no longer received Jewish salesmen, it noted that this had been true even earlier in 1935 when

\textsuperscript{48} Gesetz über den Widerruf von Einbürgerungen und der Aberkennung der deutschen Staatsangehörigkeit, 14 July 1933, RGBI I, 980, provided that persons who had been naturalized during the Weimar Republic could be deprived of their German citizenship if they were undesirable. On judicially sanctioned anti-Semitism in Weimar, see Ilse Staff, \textit{Justiz im Dritten Reich} (F., 1964), pp. 17-28.

\textsuperscript{49} The commentator, Hueck, proposed shifting the grounds of the decision from § 315 BGB to § 2 AOG, see RAG 32:33.
defendant tried to renegotiate plaintiff’s contract. By not having made use of the opportunity to discharge plaintiff then, defendant had forfeited the right to use this important cause later. RAG rejected defendant’s claim that the Jewish question had taken a new turn in September 1935 on two grounds: first, procedurally, defendant could not make a submission to RAG that it could have made but omitted to make in the lower courts; and second, on empirical grounds the court stated that defendant had been obligated to investigate the viability of plaintiff’s activity on its behalf long before September. (RAG 71/36, 28:121-26, No. 27, 27 June 1936.)

The court’s reasoning here reflects a determined attempt not to bifurcate its precedential tradition in terms of procedure and substance along Nazi racist lines. RAG was restricted to reviewing LAG’s decision solely with respect to legal errors and was constrained to accept LAG’s factual findings; it had no discretion with regard to admitting new submissions. That it not only attributed no controlling authority to the Nuremberg laws but in effect rubbed defendant’s nose in the dirt for not having been perspicacious enough to have seen which way the wind was blowing may indicate that the court intended to compel employers to comply with every letter of the law in their efforts to use anti-Semitism as an important cause.

RAG’s first opportunity to interpret the Nuremberg laws was presented a year after their enactment. A collective bargaining agreement from the year 1929 provided that permanent employees with ten years’ seniority who were discharged could be deprived of their pensions if they were not German nationals (nicht die deutsche Reichsangehörigkeit besitzen). The lower courts held against the Jewish plaintiff on the grounds that by virtue of the Nuremberg laws he was no longer a Reichsbürger. RAG held that the distinction between Reichsbürger and Staatsangehöriger (German national) had not only not existed in 1929, but that the distinction would have made no sense since the purpose of the provision was to remit non-Germans to their own governments for a remedy. In the case of German Jews such a distinction would be meaningless in 1935 especially since neither BBG nor the Nuremberg laws prohibited granting Jews pensions. (RAG 141/36, 28:134-37, No. 29, 7 October 1936.)

When defendant discharged plaintiff again the following year, plaintiff was again successful in having the discharge declared null and void.

50 § 529 para. 2 ZPO; §§ 67, 73 ArbGG.
After LAG had held that BBG did not apply because plaintiff had fought at the front, and that the Nuremberg laws did not apply because he was not a tenured civil servant within the meaning of those laws (LAG 6 a Sa 143/36, 29:138-43, No. 35, 25 January 1937, Düsseldorf), RAG held that the latter did not preclude recourse to the courts in connection with litigation arising from wage disputes resulting from discharges. Whereas under BBG the exclusion of judicial review was justified because decisions of political expediency were at issue, the decisions contested under the Nuremberg laws derived from a certain fact pattern subject to a statutory norm. (RAG 66/37, 30:153-57, No. 31, 2 June 1937.)

Plaintiff in a case that was to occupy RAG twice was a permanent municipal employee who had fought at the front. He was litigating the validity of his dismissal without notice, which would have deprived him of pre- and post-retirement age compensation. After LAG had ruled that it was reasonable to expect defendant to observe the termination period requirements (LAG 27 Sa 51/36 27:170-74, No. 35, 6 August 1936, Cologne), RAG remanded the case because LAG had not taken into consideration defendant's allegation that plaintiff's continued employment had caused unrest among the public (both courts agreed that plaintiff's colleagues were willing to work with him). (RAG 187/36, 29:214-18, No. 40, 6 February 1937.) On remand LAG (in an unreported decision referred to by RAG) ruled again in plaintiff's favor. The uniqueness of the event alleged by defendant, plaintiff's long and loyal service and the uncommonly severe consequences of the discharge without notice induced the court to reject the event as an important cause. According to RAG these factual determinations were not subject to review by it on points of law. (RAG 122/37, 32:129-36, No. 18, 10 October 1937.)

Plaintiff, who had fought at the front, was an employee in an accounting office of a municipal works enterprise. His employment contract provided that he could be dismissed only for an important cause and with six months' notice. Defendant, who had once before unsuccessfully tried to dismiss plaintiff, now made use of this clause with plaintiff's Jewishness as the cause. Plaintiff sued for a determination that the dismissal was void or, in the alternative, for his salary or his pension. Both lower courts ruled in favor of defendant. RAG's opinion is noteworthy for a number of reasons. First, it is RAG's first opinion that adopts an anti-Semitic style above and beyond the call of duty. It emphasized the obligation of local governments to propagate Nazi ideas. Whereas earlier the court had very strictly applied the standing rules concerning forfeiture of the right to dismiss on the grounds of an important cause if the...
employer allowed too much time to elapse, here it expressly pointed to the popular diffusion of Nazi racial views in 1935 as justification for the delayed use of the cause. Thus RAG affirmed the ruling with regard to the dismissal and compensation.

But then it turned about and faulted LAG for assuming that plaintiff also had no right to a pension. Rather, it accepted plaintiff's argument that the contractual provision securing plaintiff a pension, if for reasons of physical or mental infirmity he was no longer able to work, was applicable to the fact pattern at hand to the extent that a circumstance that the parties could not foresee had arisen for which plaintiff did not bear responsibility. It remanded with instructions to determine whether defendant had denied the pension – to which plaintiff to be sure had no entitlement but which the courts could nevertheless confer on him – arbitrarily in contravention of good faith and bonos mores. (RAG 295/36, 29:290-98, No. 54, 20 March 1937.)

Stylistically this opinion represents one turning point in a series that RAG was to generate. But the fact that it not only applied, but had to go out of its way to reach for, equitable considerations places it in line with earlier decisions that conceded the principle to the Nazis but sought some justice in the individual case.

It is puzzling that Fraenkel singled out this relatively late and heavy-handed opinion as proof of the claim that the courts had capitulated to the political authorities. For judicial capitulation in fact occurred as soon as the court injected Nazi anti-Semitic content into the interpretation of a general clause or accepted as a standard of Rechtsstaatlichkeit any positive law discriminating against Jews. That is to say, the court capitulated from its very first opinion dealing with Jews.

The fact that the lower courts were quick to interpret the Nuremberg laws expansively, thus paving the way for the statutory escalation of anti-Semitism, whereas RAG fought a series of (hopeless) formalistic and/or equitable rearguard battles to contain the ramifications of such exceptional laws, is crucial to understanding the peculiar tensions inhering in the decisions. Not only was Nazi adjudication as a whole not monolithic, as Fraenkel's notion of the Dual State demonstrates, but even the Normative State itself was internally contradictory.

52 In fairness to Fraenkel it should be noted that, since he quoted this opinion from a legal journal, which did not reproduce it in full, he may have been unaware of the resolution of the pension issue. See 66 JW 2310 (1937). Franz Neumann, Behemoth (2nd ed.; NY, 1966 [1942]), pp. 116-17 and p. 489 n. 2, uncritically accepts Fraenkel's position.
A case displaying the use of formalism and the implicit refusal to apply equity in support of anti-Semitism was presented by a plaintiff – again a World War I front veteran – whose employment relation was terminated by a municipal orchestra after he had been denied admission to the Reichsmusikkammer.\textsuperscript{53} The court rejected plaintiff's claim that BBG protected him from precisely this sort of action. The relevant provision\textsuperscript{54} protected him only from dismissals based on his non-aryan status, whereas here his dismissal was based on non-admission to the Reichsmusikkammer, which may have been based on his Jewishness but need not have been.\textsuperscript{55} Plaintiff's non-admission did not bring about his compulsory retirement but merely the impossibility of performance. (RAG 222/36, 29:298-303, No. 55, 6 February 1937.)

It is important to observe that this decision, which in its disembodied formalism is the equal of any American case of the pre-realist period, constituted the first unmitigated defeat of a Jewish plaintiff-employee in almost four years of litigation at the highest level.

Several months later the court showed itself equally willing to place its rigid formalism at the disposal of a Jewish plaintiff. The latter was a travelling salesman who responded to defendant's advertisement regarding a line of coats he wanted someone to sell. The parties agreed on contractual conditions and plaintiff began taking orders as an independent agent. In the meantime DAF informed defendant that plaintiff was Jewish; consequently, defendant terminated the contract and returned the orders to plaintiff without compensating him. Plaintiff, who did not contest the dissolution of the contract itself, sued only for the commissions outstanding. Defendant alleged that plaintiff's failure to inform him of his Jewishness had made the contract void ab ovo.

All three courts found in favor of plaintiff. RAG refused to create a general rule that every Jewish job applicant was \textit{per se} obligated to inform the employer of his ancestry.\textsuperscript{56} And it accepted the lower court's factual determinations that in this case plaintiff had no way of knowing that defendant was unwilling to contract with Jews. Moreover, it interpreted defendant's own submission – to the effect that employers in Ger-

\textsuperscript{53} The grounds were impossibility of performance - § 323 BGB.
\textsuperscript{54} § 3 para. 2 of the Second Implementing Decree, RGBI 1933, I, 233.
\textsuperscript{55} Reichskulturkammergesetz, 22 September 1933, RGBI I, 661; Erste VO zur Durchführung ... 1 November 1933, RGBI I, 797. § 10 provided for denying admission to those lacking reliability or fitness.
\textsuperscript{56} A year later such a regulation was promulgated as applied to Germans aiding Jews; see n. 20 above.
many were obligated to hire Germans before Jews – to mean that Jews could operate on the assumption that they could be hired. On formal, procedural and statute of limitations grounds it also rejected defendant's claims with regard to wilful deceit and mistake as to plaintiff's person. (RAG 60/37, 30:103-109, No. 19, 9 June 1937.)

During this second phase the court had occasion to deal with several non-Jewish plaintiffs who had been discharged on account of their dealings with Jews. In the first such case plaintiff was a member of the SA and the Nazi party (having joined before 1933) who, after having been expelled from those organizations, was then dismissed without notice from his position as a permanent municipal employee because he had shopped in a “Jewish” department store. After the lower courts had found for plaintiff, RAG agreed that expulsion in itself did not constitute an important cause, but held that patronizing “Jewish” stores could justify immediate dismissal as a violation of official duties. Perhaps in recognition of the tragi-comic circumstance that plaintiff, who had at one time been unemployed and in financial straits, had found it necessary to buy from a “Jewish” store because it was the only one that would sell on an instalment plan, RAG remanded with instructions to determine whether plaintiff should have revealed his indebtedness to his employer in light of plaintiff's fear that, had he merely stopped paying the store, the latter would have had his salary garnished. (RAG 156/37, 31:125-37, No. 22, 22 September 1937.)

In the case of a non-tenured professor of international economics who was dismissed without notice because as administrator of his institute's library he had authorized the acquisition (in part from his own personal library) of “Jewish books,” the court upheld the lower court's ruling that such conduct did not justify dismissal. (RAG 200/37, 32:19-28, No. 3, 8 January 1938.) In the last of this trio of cases, plaintiff administered an estate for the city of Berlin. Before accepting this position he had borrowed money from a Jewish cattle merchant with whom he then dealt in cattle as estate administrator. Fired without notice on account of these dealings, he lost his suit in trial court but was vindicated by the appeals court. In the course of the first suit defendant caused an article to

57 The court also attributed little significance to the claim that plaintiff should have informed defendant that he had been convicted in 1933 of propagating lies against the Nazis. The relevant provisions are §§ 119-124, 142 BGB.
58 When this case came up again, RAG approved of LAG's having disregarded plaintiff's employer's allegations concerning his pro-Jewish sentiments; see RAG 19/41, 43:66-82, No. 12, 19 September 1941.
Enemies of the regime

appear in the *Völkischer Beobachter* portraying plaintiff as having committed the acts for which he was discharged. In a separate suit for damages and retraction the lower courts found in favor of plaintiff, whereupon RAG set aside the judgment and remanded for further findings. But in what must be viewed inter alia as an oblique critique of the editorial policies of the Party newspaper, RAG held that even where the requirements for damages are not met, an obligation to retract may still arise if the charges against plaintiff are subsequently adjudged unfounded and the employer is thus found not to have acted in pursuit of his justified interests. (RAG 188/37, 33:144-54, No. 26, 9 February 1938.)

In none of these cases did the court succumb without reservation to official and unofficial anti-Semitism. Indeed, in two of the cases it not only failed to make use, but actually ruled in the teeth, of unmistakable 'hints' from the Nazi party and the SA that an aryan had betrayed his race. And although the court never unambiguously ruled in favor of the defendant-public employer in any of these three cases, in a fourth case, involving a Jewish private employer, it did do so. There the defendant-employer voluntarily established an old-age pension fund for his travelling salesmen in order to encourage their continued employment. Those who left his employ before reaching the age of sixty-five forfeited all claims unless employment ceased as a result of sickness, accident or old-age infirmity. Plaintiff quit after four years because it was unreasonable to expect him to work for a "Jewish" firm since his earnings were declining as a result of customers' disinclination to patronize such a firm. His argument that his reason for leaving should be equated with those expressly provided for was rejected by all courts. Accepting arguendo plaintiff's allegation that defendant's contribution - which financed the entire fund - in effect constituted a deduction from commissions, which were below-average for the branch, and conceding that such a procedure did not accord with Nazi notions of plant management, and that defendant had acted self-interestedly, RAG nevertheless held that plaintiff was not entitled to higher commissions especially since he had never complained while employed. (RAG 61/38, 34:91-98, No. 16, 21 September 1938.)

59 Neither the headnote nor the opinion mentions that defendant was Jewish - only the statement of facts does. The rather lengthy squib in Hermann Meissinger, *Die Rechtsprechung des Reichsarbeitsgerichts 1927-1945* (Stuttgart, 1958), vol. I, pp. 126-27, also omits mention of this fact.
What is remarkable about this opinion is that the court had available to it the precedent it had established a year and a half earlier—on behalf of the Jewish plaintiff whom Fraenkel adduced as proof that Jews could not expect legal protection from courts—concerning the equitable standards by which to interpret pension provisions under circumstances that could not have been foreseen by the parties. If these two cases can be distinguished on the grounds that in the former the employer may have arbitrarily excluded certain employees whereas the Jewish employer may have consistently applied his provisions to all employees, then the court’s reasoning reveals that on the eve of the total aryanization of the economy RAG was still firmly resisting the racist bifurcation of labor law, which might have been difficult to contain neatly without undermining entrepreneurial authority.60

The court also overturned a lower court decision in favor of a defendant-employer who had denied a widow her pension both because she was Jewish and because the promise made to her husband was voluntary and constituted a non-binding gift lacking the requisite legal form. RAG rejected all these claims. (RAG 172/37, 32:191-99, No. 28, 5 January 1938.)61

In the second and last case of this phase in which a Jewish plaintiff-employee was entirely unsuccessful in his suit, RAG held that the First and Second Decrees pursuant to the Nuremberg Reichsbürger Law were unambiguously designed to disadvantage tenured Jewish supervisory doctors in public hospitals vis-a-vis non-tenured doctors with respect to pension entitlements.62 Since the will of the legislator was clear, there was no need to question its motives and no room to apply equitable considerations in mitigation of special hardship. (RAG 226/37, 33:3-7, No. 1, 23 March 1938.)

As this last case indicates, where the Nazis clearly singled out Jews in certain positions for special treatment, the court retreated to its positivist approach. To say this, however, is not necessarily to agree with the court that these particular statutory provisions were incapable of a more expansive interpretation. Generally, however, the opinions of this phase are difficult to reduce to a common denominator. Formalism, positivism and equity appear to be applied or not without any discernible

60 Hueck’s commentary—namely, that plaintiff’s claim had to be rejected because current law made the entrepreneur’s expressed will controlling with regard to pension promises—confirms this view; RAG 34:97.
61 Two years later plaintiff’s pension rights were once again under attack; RAG 38:285.
62 §§ 4 and 6 respectively.
pattern, although again the overriding impression is that of a somewhat good samaritan in hell.

The Lower Courts

The reported lower court decisions of greatest interest during this phase deal with representation by Jewish lawyers. But in several cases involving dismissals the appeals courts engaged in path-breaking judicial legislation such as RAG had not done in the area of anti-Semitism. Thus one court justified the sacking of two Jewish employees – rather than any two non-Jews – in connection with a general reduction of employment at a firm as being in the interest of both parties: gradually non-aryan workers should migrate to “non-aryan” plants from which the aryran workers could be removed. (LAG 9 Sa 126/37, 32:152-53, No. 33, 11 December 1937, Gleiwitz.)63 Another court, conceding that plaintiff, who was a technical laboratory assistant at a university, was right in arguing that the Nuremberg laws did not preclude the continued employment of non-aryans in non-tenured positions in the public sector, held that no statutory regulation was required. Public employers, as models for the private sector, had of necessity to be conducted in accordance with Nazi principles. (LAG 15 a Sa 62/36, 28:64-67, No. 17, 24 July 1936, Breslau.)

In order to understand the cases pertaining to Jewish lawyers, it is necessary to summarize the statutory changes that the courts were interpreting in them. The new version of the Labor Court Law, which the labor and justice ministries issued in 1934, provided that only officials and employees of DAF were authorized to represent parties before trial courts as well as attorneys authorized by DAF in individual cases.64 The following year this provision was modified by the addition of a clause to the effect that if representation of a party by DAF was out of the question, the chairman of a trial court could admit an attorney or other suitable person to represent the party.65 The minister of labor subsequently issued guidelines interpreting this new provision. According to them, representation by DAF was out of the question if the party was not a member of DAF or if DAF declined to represent him. If such a situation arose, the chairman of the trial court decided whether in the

63 Cf. LAG Sa 22/37, 30:228-31, No. 42, 30 June 1937, Chemnitz.
64 § 11 para. 1 ArbGG, 10 April 1934, RGBI I, 319.
65 Gesetz zur Abänderung des Arbeitsgerichtsgesetzes, 20 March 1935, RGBI I, 386.
individual case admission of a legal representative was necessary and, if so, what kind of representation was appropriate.66

The significance of this issue of representation was rooted in the fact that Jews were excluded from membership in DAF.67 Focusing on the lower court cases is necessary because before RAG was presented with or seized the opportunity to reconcile the conflicting decisions, Jewish lawyers were disbarred.

At the outset the appeals courts ruled that the decision of the trial court chairman was unreviewable. (LAG Ta 17/35, 25:87-88, No. 23, 17 September 1935, Nuremberg-Fürth; LAG l5 Ta 17/35, 25:85-86, No. 22, 24 October 1935, Magdeburg.) Then one court ruled that the chairman was not authorized to examine the person of the representative, which was to remain in the discretion of the party (LAG 19 Ta 2/36, 26:76-79, No. 12, 22 January 1936, Hanover); another court held that although the view of a lower court that a German-blooded bar was necessary in order to discover purely German law was noteworthy, it did not correspond to the will of the legislator. (LAG Ta 3/36, 26:70-74, No. 10, 12 February 1936, Essen.)68 Still another court justified the admission of a Jewish attorney to represent a Jewish defendant on the grounds that, since aryan attorneys either could not (if they were Nazi party members) or should not represent Jews, if plaintiff was represented, then not only would the principle of equal weapons be violated, but the Jewish defendant would be deprived of his rights—a result not intended by the legislature. (LAG 19 Ta 16/37, 31:9-13, No. 2, 20 August 1937, Hamburg.) As late as 1938 a court sanctioned the representation of a Jewish client by an aryan lawyer on the grounds that no one had yet proposed conceding to Jewish lawyers a monopoly with regard to Jewish clients. (LAG l5a Ta 37/37, 32:98-107, No. 22, 15 January 1938, Breslau.) Finally the last reported appellate court case on this point held that the chairman of a trial court

67 According to “Jüdische Arbeitnehmer und Arbeitsfront,” C.V.-Zeitung, vol. 12 n. 45, p. 3 (23 November 1933), it had been officially stated that DAF would found a special organization for Jewish employees (which would not be a part of DAF), but nothing was undertaken toward this end.
68 For an example of the stereotypical Nazi ideological cliches used by the chairman of a trial court in rejecting a Jewish lawyer, see AG 5 Ea 169/36, 28:229-31, No. 1, 1 August 1936, Magdeburg. Volkmar, the most consistent and explicit Nazi among the commentators, who criticized virtually all the LAG decisions favoring Jewish counsel, praised this opinion for finally having put his views into practice.
could in principle not admit a Jewish lawyer to represent even a Jewish party. (LAG Ta 6/38, 33:105-109, No. 24, 21 April 1938, Kassel.)

To the extent that these reported decisions are representative, their major characteristics appear to be a desire to preserve at least the trappings of fairness associated with individualistic notions of advocacy within an adversarial system. Achieving this outcome was facilitated by the state of the positive law. Ultimately the legislator spared the courts the embarrassment of having to acquiesce in mandatory pro se appearances by Jewish parties by denying the latter access to the labor courts altogether.

C. Phase 3: The Decree pertaining to the Elimination of Jews from German Economic Life (November 1938-September 1941)

The evolution of adjudication during this period differs from that of the earlier phases in an interesting structural way. The apparently trendless flow of cases is punctuated on several occasions by the declaration of new fundamental principles that unambiguously constitute turning points on the road to the Final Solution. But these landmark decisions do not arise out of a traditional body of legal reasoning; indeed, the court at times no longer seeks to clothe the sovereign’s commands in judicial language. Yet, strangely enough, these precedential ruptures seemingly exhaust themselves, to be followed by new decisions that belong to an earlier period. But then contradictions could not fail to abound in the interim between Kristallnacht and the firing of the crematoria in a court that itself was confused as to whether it was conducting judicial business as usual or engaging in a charade.

The language and tone of the first case reveal that the situation had become exacerbated. In another case involving a musician who was ultimately denied a pension because he had not been admitted to the Reichsmusikkammer – because he had married a Jewish woman – the court was no longer content to let its formalism run amok. Rather, it added that it would hardly be consistent with Nazi legal thinking if defendant were compelled to pay plaintiff (who was relatively young) a lifelong pension solely because he had married a Jew. (RAG 159/38, 35:161-65, No. 34, 1 March 1939.) Yet the same day the court ruled in favor of the estate of a Jewish merchant and against his (apparently

69 Cf. RAG 291/38, 37:29-34, No. 5, 26 July 1939.
non-Jewish) female domestic employee. The issue in the case was whether independent grounds for the bequest could be established if the testament itself proved null and void. The court held that an oral remark that he would include her in his will need not be interpreted as having created a contract with her to provide a pension. (RAG 176/38, 35:173-79, No. 37, 1 March 1939.) In light of the partial taboo which the Nuremberg laws had imposed on the employment of non-Jewish women in Jewish families, the court’s refusal to introduce the notion of special Jewish estate property is noteworthy. It is also possible that the decision served as general deterrence vis-a-vis German women who continued to work in Jewish households. In another case the court partially upheld the authority of a Jewish managing director despite an explicit attempt by plaintiff to draw the court into his anti-Semitic campaign. Plaintiff, who had worked for defendant for thirty-five years, was dismissed without notice because his wife had written anonymous letters to Hitler, DAF, the plant-leader and others in which she attacked the managing director. Although affirming the lower court’s grant of salary for the duration of the notice period, the court rejected plaintiff’s appeal for one year’s salary. It noted that aryan members of the plant had also been insulted and that no matter how justified plaintiff’s wife’s struggle against Jewry was, her methods had to be disapproved of. (RAG 190/38, 36:49-54, No. 11, 19 April 1939.)

By the summer of 1939 the valiant anti-Semitic wife was vindicated by the first turning point in the court’s adjudications during this phase. In connection with a suit by three Jewish apprentices against the new owner of an aryanized plant who had terminated their contracts shortly after having acquired the plant in late 1937, the court enunciated a new principle: the successful societal assertion of the notion of race meant that Nazi racial views rather than economic harm (to the plant) constituted the most important factor in determining whether an important cause for terminating a contract without notice was available in the context of unforeseen/unforeseeable circumstances.70 (RAG 198/38, 36:392-97, No. 70, 5 July 1939.)

Although RAG derived its authority for this new principle from the new situation created for the economy by the Nuremberg laws and the

70 Despite the fact that defendant had alleged that he would be denied military orders if he retained Jewish apprentices, the lower court ruled that his civilian business was prosperous enough to preclude discharging them on these grounds alone. RAG merely remanded with instructions to re-decide the case on the basis of the new principle.
**Kristallnacht** decrees, no plausibility attaches to the attempt to read this outcome out of the positive law. In this instance RAG, by virtue of reading prevailing Nazi ideology into a general clause, empowered itself to achieve by common law a result which the legislator had not yet ventured to mandate by positive law.

And yet the structure of this interstitial judicial intervention does not differ fundamentally from that used by the Warren court in the 1960s to reach radically different substantive outcomes by means of fourteenth amendment due process and equal protection reasoning. Indeed, even Learned Hand at times did not recoil from the self-imposed task of taking the moral pulse of the country in order to interpret statutory terms.71

In terms of Hand’s desideratum of a national Gallup poll, who is to say that RAG was not in a position to capture the moral spirit of its time more accurately and at the risk of using less arbitrary discretion in the process than judges in societies without State-mandated moral standards? It is perhaps a sign of the residual force of pre-Nazi notions of natural law that the Jewish apprentices case only inconsistently formulated a principle which one of its subsequent American counterparts – *Brown v. Board of Education* – asserted completely, albeit with its values reversed.

Shortly after this case was decided the first case under the decree eliminating Jews from the economy reached the court. Specifically reserving the question as to whether § 2 of that decree could be interpreted to relieve an employer of the obligation to pay a pension to a former employee, the court held that where defendant in the course of aryanization had merely contractually agreed with the former Jewish owner to pay a pension to a Jewish employee (with an aryan wife and children) whom he himself refused to continue to employ and to whom he otherwise had no relation, the decree provided defendant no relief.

(RAG 44/39, 36:397-401, No. 71, 22 July 1939.)

In the first case decided after World War II began, the court refused to tolerate violations of certain procedures imposed on partners by corporation law even in the context of an aryanization contest in which the Nazi party and the State police had intervened. After one Jewish partner had fled the country and had been convicted in absentia of foreign exchange crimes, unrest in the plant and town caused the State police to forbid the managing director, who was the Jewish uncle of the afore-

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mentioned partner, and plaintiff, who was a Jewish employee, to enter
the premises or remain in town. The remaining, non-Jewish, partner,
then dismissed plaintiff without notice and without having observed the
legal procedures required to create a quorum. The court rejected defen­
dant's submission that his actions had been justified on the basis of a
"supra-legal emergency."\textsuperscript{72}

Since the dismissal itself was void, the court found it unnecessary to
decide whether its new principle, enunciated two months earlier, was
applicable. But this did not secure plaintiff his salary for the remaining
six months of the contractual notice period. First, the court held that §§
323-326 BGB, which deal with impossibility in contracts, were not appli­
cable to the contractual relation between entrepreneur and Follower as
it was in connection with the exchange of goods. In particular, equity
and social sentiments played a part in the personal relation within a
plant-community that was lacking between ordinary debtors and credi­
tors. Moreover, although the payment of wages as a rule presupposed
the performance of labor, the fact that wages constituted the basis of the
Follower's and his family's existence could lead to requiring an entre­
preneur, in accordance with his duties of welfare and loyalty, to contin­
ue paying wages even where the Follower performed no work. But in
view of the fact that plaintiff had been employed in the plant-community
only eighteen months, that he had had an unusually long notice period,
and that although he was Jewish the Jewish character of the company
had become merely formal, the court found it unreasonable to require
defendant to pay plaintiff's salary until the end of the year. On the other
hand, defendant would be violating his duties of loyalty and welfare if he
dismissed plaintiff with no notice at all. The court thus hit upon the
provisions of § 66 of the Commercial Code, the statutory minimum (six
weeks' notice to the end of the calendar quarter), as presumably the just

The structure of this opinion is remarkable. On the one hand it upheld
the unity of corporation law whereas the appeals court had accepted
defendant's argument concerning the alleged supra-legal emergency. On
the other hand, LAG found in favor of plaintiff because the original
defendant (i.e., the partially "Jewish" company) had been responsible for
plaintiff's inability to perform his part of the employment contract (§ 324
BGB). RAG, consistent with its precedents oriented toward replacing

\textsuperscript{72} Hueck was gratified that it was possible, even in difficult situations, to find a
reasonable solution; RAG 37:241.
code provisions that formally applied to all contracts by standards that realistically applied to the special relations inherent in the offer, acceptance, performance and compensation of labor, substituted equitable general clauses for the code. Yet the equity it applied favored the employer in spite of the fact that historically the struggle against the Civil Code provisions had focused on the fact that they systematically disadvantaged the employee because they did not take into consideration the latter's structurally determined dependence.\textsuperscript{73}

Stranger still is that the outcome was not affected by RAG's abandonment of the Civil Code. For the case turned on the fact that the court imputed co-responsibility for impossibility of performance to plaintiff because he was Jewish. Given this interpretation,\textsuperscript{74} RAG could just as easily have reapportioned the gains and losses on the basis of the Civil Code.\textsuperscript{75}

On 9 January 1940 the court reached a second turning point. Plaintiff, who had worked for defendant since before the turn of the century and had become its deputy director with a very high income, had asked to retire in 1935. His pension amounted to RM 6,000 p.a. of which RM 4,000 were characterized as revocable. In the wake of the decree eliminating Jews from the economy, defendant ceased all pension payments. The trial court held in favor of defendant, whereas LAG granted plaintiff only the non-revocable portion of his pension. RAG rejected the appeals of both parties. Although, the court held, that decree applied only to Jewish executives who were still active in the enterprise at the time the decree was issued, RAG no longer adhered to the view that race laws as exceptional laws had to be interpreted literally.\textsuperscript{76} Rather, they were orders (or systems) created by the leadership of the State in order to put into practice points four and five of the Nazi party program, which bore the character of constitutional principles directed toward segregating Jews and Germans. On the other hand, the decree was not designed to serve to punish Jews in general. In this context the subsequent revocation of a pension would subserve the aims of the decree; since the enter-

\textsuperscript{73} See ch. 4.

\textsuperscript{74} Since LAG's determination that defendant and not plaintiff was responsible for the impossibility was a factual one, which RAG was bound to accept, it is unclear why RAG felt free to reapportion responsibility especially since LAG's legal error did not affect this issue.

\textsuperscript{75} Hueck, RAG 37:242-43, also advanced this view. It is instructive to observe how Hueck manages to write five pages of technical commentary without mentioning that the case concretely turned on anti-Semitism.

\textsuperscript{76} See RAG 28:136.
prise was already “de-Jewed,” revocation would merely benefit the private economic interests of the aryanized firm without benefiting the German people’s interests. The Volk-consciousness, oriented as it was toward the Nazi Weltanschauung, would judge in the concrete the extent to which legislator had not drawn the conclusion that the events leading to Kristallnacht justified encroaching on those obligations. In the instant case defendant could revoke the revocable part of the pension if its action was not arbitrary and an urgent reason to do so was available. The court found such a reason in the relation between an aryan enterprise and Jews, which was more serious than economic reasons, which might also have sufficed. (RAG 207/39, 38:262-81, No. 52, 9 January 1940.)

Thus in one fell swoop the court transformed the Nazi party program into a constitution—a step that the legislator himself had not found expedient to take—and arrogated to itself the authority to determine whether Jews’ pension rights were tolerable. RAG did not elaborate on the causal links between legislative enactments and Volk-consciousness; but the logic of its argument seemed to imply that the former could lag behind the latter, for otherwise the court would not, absent positive law, have had a reliable source to draw upon to guide its Solomonic decisions to split the difference (more or less) down the middle.77

A month later78 RAG implicitly clarified the positions it had set forth on 9 January. Plaintiff was a female office manager who had worked for defendant armaments plant since 1902. She was dismissed with notice in 1933 and granted a pension which defendant expressly characterized as not carrying an entitlement. After defendant reduced the amount of the pension plaintiff sued, pleading that she should not be treated different-

77 See, e.g., RAG 209/39, 38:285-90, No. 54, handed down the same day; RAG 186/39, 38:281-84, No. 53, also decided that day, held that the decree eliminating Jews from the economy also applied to foreign nationals. In the fourth case decided that day, the court again applied its ‘on the one hand, on the other hand’ approach when it remanded a pension case with instructions to take into consideration: on the one hand that Nazi legal sentiment could not permit the continuation of excessive payments to Jews in order to induce them to leave their positions; and on the other, to what extent the pension payments were reflected in a lower purchase price paid for the firm in the course of aryanization. RAG 261/39, 39:25-37, No. 4. On the connections between statutes and consciousness, see Franz Neumann, “The Governance of the Rule of Law” (Diss., London, 1936), p. 576.

78 In the interim the court upheld the discharge without notice of an executive whose wife had shopped in a Jewish department store (RAG 109/39, 38:226-37, No. 47, 23 January 1940), and ordered payment of commissions to a (non-Jewish?) employee of a Jewish-owned business who, after Kristallnacht, could no longer maintain her route (RAG 152/39, 38:214-17, No. 43, 31 January 1940).
ly than other employees. The lower court accepted defendant’s submission that Germans and Jews could not be treated equally even if this meant, in the case at bar, countenancing reduction of plaintiff’s pension to the level granted hourly workers.

RAG set the judgment aside and remanded. It underscored that, absent special statutes to the contrary, “the Jew still participates in general legal intercourse [der Jude . . . noch am allgemeinen Rechtsverkehre teilnimmt].” On the one hand, plaintiff’s Jewishness could not be disregarded, but on the other hand it in itself did not justify, but merely constituted the prerequisite for, reducing a pension. Although a Jew could not be afforded preferential treatment, she also had no absolute right to equal treatment, but only to an “adequate” pension. Having thus created general clauses within general clauses, the court then remanded to LAG to strike a balance. (RAG 254/39, 38:252-62, No. 51, 7 February 1940.)

When LAG failed at this task, RAG returned to the case the following year.

In the interim, however, the court handed down a much more portentous decision. The circumstances that gave rise to it must be briefly outlined. Between 1934 and 1939 the government established a number of legal holidays. As of 1934 the first of May became the national holiday of the German people; in 1937 New Year’s day, Easter and Whit-Monday and Christmas and Boxing Day became paid holidays; the same applied to Hitler’s fiftieth birthday in 1939. During this period a number of Jewish workers filed suit for payment of their wages for these holidays. The lower courts did not respond to this litigation uniformly. Two illustrations from the appellate courts may suffice. A Jewish worker was successful in his suit as to Hitler’s birthday and 1 May 1939 in the trial court; the latter held that since the legislature had expressly reserved to itself regulation of the Jewish question, and since exceptional rules were not available, the court was not authorized to interpret the laws expansively. The appeals court disagreed. It bottomed its decision on the claim that, since Jewish hourly wage workers were a new phenomenon, the

79 Cf. RAG 211/39, 38:290-98, No. 55, 7 February 1940.
80 Gesetz über die Lohnzahlung am nationalen Feiertag des deutschen Volkes, 26 April 1934, RBGI I, 337. See in general Gesetz über die Feiertage, 27 February 1934, RBGI I, 129.
81 AO zur Durchführung des Vierjahresplanes über die Lohnzahlung an Feiertagen, 3 December 1937, RAB I, 320. These holidays were named after Göring, who was the general deputy for the four year plan.
82 Gesetz über einmalige Sonderfeiertage, 17 April 1939, RBGI I, 763; VO zum Gesetz . . . , 17 April 1939, RBGI I, 764.
83 The court did not explain what his workplace, “special camp O,” was.
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legislature had not considered them at all in formulating these laws. Because the purpose of these holidays was political rather than economic, and because the Jewish worker could take no part in this political aspect, the law did not apply to him. (LAG S a 13/39, 36:126-28, No. 32, 4 August 1939, Koblenz.)

After World War II began, an appeals court in Berlin, affirming the decision of the trial court, held that a Jewish demolition worker was eligible to receive holiday pay for the two aforementioned days and Whit-Monday as well. Whereas the first appeals court had chosen to read Nazi ideology back into the law, this court equated the legislator's silence with its intention not to make distinctions on racial or other grounds. (LAG 101 Sa 425/39, 37:98-101, No. 19, 13 November 1939, Berlin.)

Despite the fundamental importance of the issue, the court, in view of war-time conditions, did not permit an appeal to RAG. (Ibid. at 100.) Mansfeld, Ministerialdirektor in the ministry of labor in charge of labor law, did not share this view. (Seeking to draw an analogy to Weimar, Mansfeld based his desire to exclude Jewish workers on revenge.) Perhaps as a result of this cue, two other cases went up on appeal to RAG.

The irony of RAG's decision lies in the fact that whereas Mansfeld had been of the opinion that the religious holiday, being without political importance, could be judged differently, RAG used it as a vehicle for transforming Jewish workers into quasi-labor outlaws. Since the implementing decree regulating holiday pay for Whit-Monday referred to members of the Following (Gefolgschaftsangehörige), the court excluded Jews from the pay provision by excluding them from the Following. The language it used, however, and the import of this holding make it implausible that nothing more was at stake here than saving an employer RM 6.60.

The community relation with its relation of leader and Follower, which underlay AOG, corresponded to a Germanic idea (Anschauung). The Jew, by virtue of his racial predisposition to promoting personal interests and attaining economic advantages, wrote the court in its longest italicized passage during the Nazi years, remained alien to this

84 According to Mansfeld, just as the non-socialist worker who had been willing to work on May Day during Weimar went without wages because others wanted to celebrate, so now the Jew could not complain if the celebrating community excluded him; LAG 37:100-101. Roland Freisler, "Ein arbeitsrechtlicher Einzelfall als Prüfstein der Frage: Wie weit ist unser Rechtsdenken heute geläutert?" 5 (N.S.) Deutsches Gemein- und Wirtschaftsrecht 265-72 (1940).
community. As a necessary consequence, neither AOG nor other recent labor regulations applied, without more, to Jewish workers. (RAG 77/40 and 86/40, 39:383-91, No. 67, 24 July 1940.) That for six years Jews were considered Followers the court explained as a result of the fact that it had not been immediately clear that they by virtue of their very essence could not be integrated into the plant-community. (Ibid. at 386.)

But the court was still confronted with the problem of how to apply the labor laws to Jews "accordingly" so long as no special labor code had been created for them. In this instance it ruled that where the Nazi State deviated from its principle of paying wages only for labor actually performed, only German workers were benefited. (Ibid. at 386-88.)

Lest readers of the opinion wondered whether the court was retreating from its landmark decision of 9 January 1940, RAG reiterated the talismanic refrain concerning the Jew's continued participation in general civil law intercourse, but added that the manner of that participation depended on the substance of existing statutory provisions and, in case of controversy, was subject to judicial action. (Ibid. at 391.)

In his commentary Mansfeld, who a year earlier had speculated as to whether the use of Jewish labor should not be governed by special regulations (LAG 37:101), praised the opinion for having established the status of Jews in the sphere of labor law until special legislation was forthcoming (RAG 39:391).

If after this crucial decision some can still argue that legal positivism was the primary means by which the judiciary was instrumentalized for Nazi ends, the fourth and final decisional turning point renders that position untenable. This case, which was decided in January 1941, arose in the latter half of 1939 when a segregated group of 160 Jews were assigned to construction work. Plaintiff, who was one of eleven non-local residents in this crew, was discharged in the middle of a work day; he subsequently sued for full wages for that day and three additional days, as provided for in the Tarifordnung for the construction industry. Defendant refused on the grounds that the Jews' employment relation was governed not by private law, but by public law in connection with the political and welfare-oriented goals of the employment office. The trial court, assuming that public law applied, held for defendant; the
appeals court, assuming that private law applied, held for plaintiff. The appellate court recognized that public law applied to the local residents, but denied its application to the non-local residents because the latter had not been entrusted to the care of the local employment office. Since defendant-municipality conceded that it had not intended to employ out-of-town Jews in a public law-obligatory employment relation – this was allegedly a reason for discharging them – and yet knew on the basis of plaintiff’s work papers from the outset that he was not a local resident, plaintiff could have been hired only within the framework of an ordinary private law employment relation.

In its appeal defendant submitted that for reasons of state security the employment of the entire group had to be viewed as a unitary measure from which plaintiff could not be excepted. RAG, accepting the reference to state security – segregation and supervision of Jewish workers – was reluctant to characterize the measure simply as an exercise of public law welfare. Unable however to locate a statutory warrant for this measure, the court abandoned any attempt at judicial reasoning; it simply spoke of a “special case... which in view of its element of State and racial politics must follow its own legal rules, which, if necessary, must be inferred from the law in the making [dem werdenden Recht].” (RAG 142/40, 41:252-59 at 256, No. 34, 28 January 1941.)

This case unambiguously marks the collapse of the distinction between the Normative State and the Prerogative State in labor law. The court openly announced its capitulation to the paramount racist concerns of the State. Professing its inability to derive a statutory basis for State action that would not involve the court in legally unacceptable contradictions, RAG, having literally left the Final Solution to the State, sanctioned it.87

This view need not necessarily be modified by the court’s decision several months later in connection with the female employee whose pension rights case it had remanded to LAG. For although it rebuked the appellate court for having violated its statutory duty88 to take as a basis for its decision the binding principles enunciated by RAG in setting aside LAG’s earlier decision; and although its opinion is replete with sympathetic references to the plight of plaintiff and similarly situated

87 Bernd Rüthers, Die unbegrenzte Auslegung (Tübingen, 1968), p. 171, misleadingly characterizes the court’s decision in this case as “consistent.” For the contemporaneous capitulation in the United States, see Korematsu v. United States, 323 U.S. 214(1944); but see the strong dissent by Jackson, J., ibid. at 242-48.
88 § 565 para. 2 ZPO.
Jews – the decisive factor appears to have been a communication to RAG from the minister of labor, six days before the decision was handed down, contradicting the lower court’s undifferentiatedly negative approach to the pension rights of Jews already in retirement. (RAG 197/40, 42:75-84, No. 12, 22 April 1941.)

But in September 1941, literally days before Jews were removed from the court’s jurisdiction, in its final decision involving a Jewish party, RAG undertook to restore, at least partially, a principled distinction between the Normative State and the Prerogative State. The fact that the court nevertheless managed to achieve an anti-Semitic result based on other anti-Semitic tenets doubtless facilitated its reintroduction of a modified version of ‘classical’ Nazi pseudo-**Rechtsstaatlichkeit**.

 Plaintiff was the trustee in bankruptcy of the assets of the Jewish owner of a pub that had been wrecked during **Kristallnacht** and could not be reopened. The issue in the case was the kind of termination notice period owed defendant-employees. What is of interest in this context is that the court rejected the view of the trial court – the case had come up on expedited appeal – that the Jewish bankrupt was co-responsible for all attacks by Jews on Germanity within the meaning of § 276 BGB, which makes the debtor accountable for intent and negligence. Although it agreed that in accordance with the Nazi Weltanschauung every Jew was politically co-responsible for all attacks by his racial comrades on German **Volkstum**, a private law responsibility could not be inferred from these facts without more. Indeed, since the bankrupt had personally contributed nothing to precipitating the attack on his pub, the BGB provision was irrelevant. Moreover, the fact that he personally had undertaken nothing in opposition to the anti-German tendencies of Jewry also constituted no basis for making him accountable in terms of private law obligations.

 Having re-separated private and political law, the court was then free to interpret its doctrine of plant-risk anti-Semitically. Thus, although it had recently held that Followers might be obligated to forego a wage claim if asserting it would jeopardize the continued existence of the plant, this rule did not apply as between a Jewish entrepreneur and aryran Followers, who would not be permitted to suffer the consequences
flowing from the struggle of Germanity against Jewry. (RAG 81/41, 43:167-76, No. 23, 16 September 1941.)

Explanations of why the court chose to retrace its steps back towards a shrunken Normative State for Jews would be speculative. It is possible that RAG, aware of the impending withdrawal of its jurisdiction over Jews, wished to go on record restoring the unity and autonomy of private tort, contract and property law. It is also possible that it was motivated by the fact that since Jews as of 1 January 1939 were prohibited from being plant-leaders, such cases could no longer arise. Alternatively, this decision can be interpreted as consistent with a line of cases involving Jewish employers that tended to assimilate their rights and prerogatives to those of employers in general more strictly than was the case with regard to Jewish employees.

Regardless of the judicial or extra-judicial origins of the court’s reasoning, it is noteworthy that judges, who for the past two years had piecemeal yet methodically anticipated the legislator’s expedited administrative measures by shaping the common law of the Final Solution, retired from their chosen trade without availing themselves of the opportunity to transform the core of private law into a vehicle for the politically sanctioned plundering of the property of Jews. Yet, even having stopped short of the complete formal identification of law and politics or rather the complete absorption of law by politics, they secured what they knew to be the desired political outcomes by incorporating still another layer of anti-Semitism into the already rich catalog of available equitable interpretations of AOG.

III. Conclusions

This review and analysis of the Jewish labor cases still leaves unanswered a crucial set of questions: What was really at stake? Why did the Nazi leadership permit these socio-economic and political conflicts to continue to crystallize into judicially cognizable legal issues long after it had revealed to the world that it was in the process of resolving the Jewish question “administratively”? And finally: How did

92 Fraenkel, Doppelstaat, pp. 124-25, argues that this step had been taken in general in private law by 1938.
93 Ingeborg Maus, Bürgerliche Rechtstheorie und Faschismus (Munich, 1976), pp. 135-36, is correct in attributing to AOG the character of a general clause, but she overlooks the labor courts’ role in interpreting it.
the methods of reasoning, principles and outcomes of these cases affect the court's adjudication in general?

Even within the framework of the already shrunken subject-matter jurisdiction of the labor courts, the Jewish cases represent a very limited and skewed selection of the universe of justiciable issues. The overwhelming majority relate to discharges and, especially, pensions. Among the former, which predominated in the earliest period, the claim was not for reinstatement but merely for salary for the duration of the relevant notice period. Whether Jewish employees viewed reinstatement litigation as hopeless, or whether such suits were not entertained by the courts, or perhaps were merely never reported, is unknown. In the course of time pension claims came to the fore. In their atypicality these cases mirror the progressive destruction of the economic basis of existence of German Jews, who were being ousted from their old positions or from the work force altogether. The cases thus constitute the legal response to State-imposed marginalization and planned obsolescence.

Especially for older Jews who were unable to find other employment or whose accumulated wealth was insufficient to sustain them through old age, successful resolution of their private pension claims may have seemed at the time to be the paramount problem of their lives. Regardless of whether Nazi leaders knew that German employers would not long be burdened with such payments, two points are clear: 1. as compared to the aryanization of productive, profit-generating business assets owned by German Jews, the curtailment or elimination of Jewish employees' (vested) pension rights, for which German employers had

94 See the unsubstantiated claim by Frieda Wunderlich, *German Labor Courts* (Chapel Hill, 1946), pp. 169-70.
95 The age and occupational distribution of the Jewish population remaining in Germany in 1939 underscored the importance of old-age pensions. In May of that year 28,977 of 138,819 male Volljuden were sixty-five years of age or older (20.9%); 39,101 were returned as living on their capital ("Vom eigenen Vermögenselebende Rentner") and an additional 45,449 as small pensioners or living on disability pensions. Only 24,546 male Volljuden were counted as being in the workforce ("Erwerbspersonen"). Among women, 41,374 of 191,720 Volljüdinnen were sixty-five or older (21.6%); 68,534 were listed as living on capital or pensions. Only 17,481 were returned as in the workforce. See *SDR*, vol. 552.4: *Die Juden*, pp. 56, 74. For an overview of the socio-economic conditions of Jews during Weimar, see Arthur Ruppin, *Soziologie der Juden* (2 vols.; B., 1930-1931), passim.
97 See in general Helmut Genschel, *Die Verdrängung der Juden aus der Wirtschaft im Dritten Reich* (Göttingen, 1966).
presumably made financial provision, was not economically significant; and 2. as a general legal issue employee pension rights did not rise to such a level of importance that employers would have been crucially benefited by the partial transfer of precedents regarding the pension rights of Jews to those of non-Jewish employees (abstracting from the fact that no such reflection back onto non-Jewish cases ever occurred).

But these macro-social links may be too undifferentiated to be fruitful for analysis. What may be relevant in this context is the fact that aryанизation of Jewish-owned businesses did not benefit German capitalists uniformly; rather, its beneficiaries were chiefly large conglomerates of capital. Moreover, the methods of aryananization, whether 'voluntary'-contractual or coercive-administrative, did not normally require recourse to the courts. Under these circumstances smaller employers may have regarded various forms of contractual and extra-contractual harassment, exploitation and oppression of Jewish employees as a means of sharing the plunder. Since Hitler's government had regulated the treatment of pensions of Jewish public employees in greater statutory detail, leaving courts less room for creatively manipulating equitable discretion, litigation was primarily a result of action taken in the private economy. But it is obvious that the courts did not serve as a safety-valve for disgruntled small employers. Not they, but their Jewish employees brought suit after employers had acted to take advantage of what they perceived as State-encouraged helplessness of German Jews. The question then becomes: Why did the Nazi leadership subject such employer self-help to judicial scrutiny? This question, however, is only the obverse of the question: Why were the Jews not deprived of all their rights earlier?

98 It is significant in this context that a disproportionately large percentage of the Jewish population was self-employed and hence not eligible for private pensions that would have financially burdened other employers. See the analysis of the census of 1933 by E.R-z., "Die Juden in der Wirtschaft," C.V.-Zeitung, vol. 14, no. 47 (22 November 1935), 4th Beiblatt.
100 Unfortunately the reports of the labor court cases, unlike those of the social honor courts, do not reveal the size of the employing business.
101 That Jews were not deprived of all of their rights earlier has not always been recognized. See, e.g., Jacob Robinson and Philip Friedman, Guide to Jewish History under Nazi Impact (NY, 1960), p. 229: "The Jews received no relief from anti-Jewish legislation through the interpretation and application of the laws by the courts in general and by the Reichsgericht in particular." See also The Black Book. The Nazi Crime Against the Jewish People (NY, 1946), p. 95.
To this question many answers may be given. But in this context, it is clear that until the Final Solution was prepared, a certain measure of legitimation derived from having independent judges, many of whom were appointed before the Nazis took power, apply anti-Semitic laws within a venerable tradition of neutral procedures and empty general clauses. Occasional decisions at odds with Nazi policies have recently been explained as the price the regime was forced to pay for this legitimation.\textsuperscript{102} In an alternative but less plausible version, the labor courts are seen as having relieved the executive of the task of taking unpopular measures.\textsuperscript{103} Apart from the issue of the ‘popularity’ of anti-Semitism,\textsuperscript{104} such an approach fails to explain how any labor court decision could have more closely approximated “the actual dirty business”\textsuperscript{105} than the Nazi statutes themselves.

Fraenkel’s view, namely, that so long as Jewish businessmen remained an integral part of the capitalist system, the strict application of the methods of the Prerogative State to them would have created dislocations in the normal economy, appears to form a more promising starting point for an explanatory framework. In particular, Fraenkel’s thesis that the courts served to protect the economy from shocks emanating from actions of the Prerogative State even if Jewish employers were occasionally also protected as an inevitable (but unintended) by-product,\textsuperscript{106} fits somewhat plausibly into the foregoing interpretation of RAG cases involving Jewish employers. Its validity with regard to Jewish employees, however, is considerably more doubtful.

\textsuperscript{103} Bertram Michel, “Die Entwicklung der Arbeitsgerichtsbarkeit in den [sic] Faschismus,” Das Recht des Unrechtsstaates, ed. Udo Reifner (F., 1981), p. 170. Inattentive to the deeper immanent contradictions of RAG adjudication, and failing to distinguish between RAG and the lower courts, Michel sees the court only in its role as judicial legislator, anticipating the next wave of statutory anti-Semitism.
\textsuperscript{104} According to a report by the security service (SD) of the SS dated 25 April 1941 and entitled, “Die Juden im Rechtverkehr,” many judges did not understand why German courts still had to entertain suits involving plaintiffs and defendants both of whom were Jewish and represented by Jewish consultants. See Meldungen aus dem Reich, ed. Heinz Boberach (Neuwied, 1965), p. 139. It was also reported that the uncertain legal status of the debts of Jews owed to non-Jews was being compared by the population with the favorable treatment which courts accorded Jewish employees of formerly Jewish-owned businesses who sued the aryan successor-firms for the continued payment of their pensions; the population believed that such claims were denied only in isolated cases and in opposition to the adjudication of the Supreme Court. Ibid., pp. 140-41. Cf. Ibid., p. 141 n. 2, on popular criticism of a trial court that upheld a Jew’s claim to a vacation.
\textsuperscript{105} Michel, “Entwicklung,” p. 170.
The disruptions that were feared in the case of employers were not, at least in the first instance, subjective, psychological, political or ideological ones acting directly on German businessmen, but rather 'objective' interference with the distribution and profitability of capital. No analogous apprehensions applied to labor; that is to say, the problem did not lie in the possibility that failure to contain the application of new judicial principles to Jewish workers would, for example, lead to dysfunctional re-allocations or outright withdrawal of German workers from the economy. Rather, the only relevant fear on the part of the ruling strata would have related to the impact of the breakdown of categorization on German workers politically. Yet this causal link, which Tushnet has analyzed with regard to slaves, slaveowners and non-slaveowning whites in ante-bellum America,\(^{107}\) loses its force in the Nazi class structure. For not only were Nazi foreign-military goals absolutely dependent on gaining at least the passive acceptance of the working class,\(^{108}\) but anti-Semitism functioned precisely to secure that alliance among workers, capitalists, armed forces and Nazi party leaders.\(^{109}\)

The labor court decisions as a whole refute the thesis that anti-Semitic legal principles ever "infected" cases involving non-Jewish employees. The political problem in the ante-bellum South may have consisted in the possibility of subordinating non-slaveowning whites to common law principles worked out in reference to black slaves. But in Nazi Germany the political problem consisted in not permitting judicial interpretations that benefited non-Jewish workers to redound to the benefit of Jewish workers. This difference derives from the fundamentally different constituent organizing principles of the two societies: a slave society by definition could not permit racist ideology to lead to the "final solution" of the slave question; not being structurally dependent on Jewish labor,\(^{111}\) Nazi leaders could allow themselves the ideological luxury, as it were, of such a policy.\(^{112}\) And what is even more important in this con-

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\(^{108}\) Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen, 1977).


\(^{110}\) Tushnet, *American Law of Slavery*, p. 44.


\(^{112}\) The annihilation of the Jews took to its logical conclusion Carl Schmitt's thesis that politics was the relation of friend to foe, whereby the latter was any person who in the last analysis had to be physically exterminated. See Carl Schmitt, *Der Begriff des Politischen* ([West] B., 1963 [1932; first published in 58 AfSwSp 1-33 (1927)]).
text: as a public-totalitarian, capitalist society, Nazi Germany could enforce anti-Semitism statutorily, administratively and judicially. Slave society in ante-bellum America, however, as a private-totalitarian, slave-capitalist society would have undermined its own socio-economic and political prerequisites had it undertaken to engage in similar actions.113

But if the Jewish labor court cases generate any jurisprudential interest at all, it is that the Nazis never succeeded in preventing the categories of general labor law adjudication from finding some applicability to Jewish workers. The fact that through 1939 not merely an occasional Jew, but the majority of Jews were successful in their suits before RAG114 cannot, to be sure, be credibly viewed as the primary factor motivating the Nazis to abolish labor court jurisdiction over Jewish employees. For the transformation of the court's adjudication in 1940 and 1941 held out the certain prospect of a vast reduction in the 'price' the Nazis would have to pay for retaining the division of labor between the judiciary and the SS. Rather, consignment of the fate of the Jews to the Prerogative State root and branch was dictated by the planned expulsion of the Jews from civil society altogether.115

Yet the fact that the establishment of a special Jewish labor code was accompanied by the withdrawal of Jews from the jurisdiction of the ordinary labor courts was not coincidental. For retention of jurisdiction would have led to one of two dysfunctional alternative approaches: either the court would have been occasionally compelled by the logic of precedent to continue categorizing Jewish employees together with non-Jewish employees, thus leading to occasional plaintiff victories (which would have become unacceptable on the eve of the implementation of the Final Solution when anti-Semitism had become unyieldingly rigid); or the court would have self-consciously accommodated that rigidity by systematically proclaiming its capitulation to politics and openly abandoning any pretense of judicial reasoning, as it had begun to do in 1940 and 1941. But then the judge would no longer have possessed the func-

114 This pattern as well as that in many other areas of RAG's adjudication shows that the Nazi Normative State did not serve only capital-functional norms as is claimed by Bernhard Blanke, "Der deutsche Faschismus als Doppelstaat," 8 KJ 221-43 at 226 (1975).
115 On the stereotypical treatment meted out to Jews by other courts, see Hans Robinsohn, Justiz als politische Verfolgung: Die Rechtsprechung in "Rassenschandfällen" beim Landgericht Hamburg 1936-1943 (Stuttgart, 1977); Diemut Majer, "Fremdvölkische" im Dritten Reich (Boppard, 1981).
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tions of a judge: "He has become a mere bailiff, a mere policeman." At that point the courts would have lost their reason for being. It was precisely such a predicament that led a leading Nazi professor of constitutional law to express the fear that abandoning the distinction between judicial and administrative functions meant "'cold Bolshevisation,' and then we no longer need to rack our brains about the distinction between National Socialism and Bolshevism in this area."117

Once Jews were forbidden to be employers or even to conduct independent businesses, class distinctions collapsed in favor of the overriding racial distinction between aryan employers and employees on the one side and Jews on the other. Consequently, the system "based on a dual policy of 'prerogative' constables and 'normative' judges, on a law-exempted police for the various assortments of rogues and on a calculable rule of law for the law-abiding citizen and corporation of substantial means"118 ceased, as applied to Jews, to serve any economic or political purpose for capital or the Nazis. The time for adjudication had passed. Special codification and "administration" became the order of the day.119

119 Raul Hilberg, The Destruction of the European Jews (Chicago, 1967 [1961]), offers a broad view of the administration of the Final Solution; see ibid., pp. 292-96, on the subsequent role of the judiciary. For an overview of the steps leading to the "special treatment" of Jewish workers, see Hans Küppers, "Die vorläufige arbeitsrechtliche Behandlung der Juden," RAB1, V, 106-10 (1941). Some of the ministerial correspondence relating to the planning of this "special treatment" during the period from 11 September 1939 to 9 January 1941 may be consulted in document NG-1143, Office of Chief of Counsel for War Crimes, U.S. Army (mimeograph on file at the Harvard Law School library).