MARC LINDER

The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

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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,\(^\text{12}\) then the Nazi legislator, with its typical reliance on the form of vague and hence capacious general clauses,\(^\text{13}\) 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,\(^\text{14}\) 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-

\(^\text{12}\) Allgemeines Landrecht für die Preussischen Staaten. On the intended role of the judiciary, see §§ 46-50. Cf. Franz Wiegner, Privatrechtsgeschichte der Neuzeit (2nd ed.; Göttingen, 1967 [1952]), pp. 332-35. But see Hermann Conrad, Richter und Gesetz im Übergang vom Absolutismus zum Verfassungsstaat (Graz, 1971), pp. 8-23, who indicates that the legislator may have been less optimistic about the possibility of dispensing with the need for creative judicial decisions. On the social, economic and political background of this codification and its juridical consequences, see Uwe-Jens Heuer, Allgemeines Landrecht und Klassenkampf (Berlin ([GDR], 1960); Reinhard Koselleck, Preussen zwischen Reform und Revolution (Stuttgart, 1975 [1967]).

\(^\text{13}\) General clauses entered the German legal system at least as early as BGB; see §§ 138, 157, 242, 826. On general clauses, see Justus Hedemann, Die Flucht in die Generalklauseln (Tübingen, 1933); Karl Engisch, Einführung in das juristische Denken (3rd ed.; Stuttgart, 1964 [1956]), pp. 118-33; Fritz Werner, Zum Verhältnis von gesetzlichen Generalklauseln und Richterrecht (Karlsruhe, 1966).

\(^\text{14}\) On 29 March 1942 Hitler stated that "for him everyone who was a jurist either had to be defective by nature or became so with time." See Hitlers Tischgespräche im Führerhauptquartier 1941-1942, newly ed. by Percy Schramm (Stuttgart, 1963 [1951]), p. 225. Hitler also approvingly cited Dietrich Eckart as having broken off his legal studies in order to avoid becoming "a complete idiot"; ibid., pp. 222-25. See also Hitler's so-called Führermonolog of 20 August 1942 in BA R 22/4720.
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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 Führerstaat,” 26 (N.S.) \textit{Archiv der öffentlichen Rechts} 129-54 at 143 (1935); Roland Freisler, “...noch keine vollwertigen Mitarbeiter...Gedanken zu einer überheblichen Kritik und zu gemeinschädigenden Vorschlägen,” 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

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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.\textsuperscript{24} 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.\textsuperscript{25} 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."\textsuperscript{26}

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.\textsuperscript{27}

\textsuperscript{24} Carl Schmitt, "Neue Leitsätze für die Praxis," \textit{62 JW} 2793-94 (1933).
\textsuperscript{25} Carl Schmitt, "Nationalsozialismus und Rechtsstaat," \textit{63 JW} 716 (1934).
\textsuperscript{27} For the notion, see Rothenberger, \textit{Richter}, p. 23. On compromises, see Otto Kirchheimer, "Changes in the Structure of Political Compromise," \textit{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.”

Although the authoritarian Ordnungsstaat was able to prevent the “legal vacuum and irregularity from assuming proportions that would have endangered the regime,” the fiction of a unified Nazi Weltanschauung 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.”

Under these circumstances the glorification of the expanded role of the judiciary was tantamount to making a virtue of a necessity.

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 judicia opinions.” If such


29 Broszat, Staat Hitlers, p. 171.

30 Ibid., pp. 301-303.

31 Ibid., p. 355.

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 ZdAfDR 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
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.
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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

des Zweiten Reiches (H., 1934), p. 13; idem, "Was bedeutet der Streit um den Rechtsstaat?," 95 ZfSt 189-201 (1935); idem, "Nationalsozialismus und Rechtsstaat," 63 JW 713-18 (1934). Schmitt's major opponent in this debate was Otto Koellreutter, Der deutsche Führerstaat (Tübingen, 1934); idem, Vom Sinn und Wesen der nationalen Revolution (Tübingen, 1933). See the summary discussion in Günther Krauss and Otto von Schweinichen, Disputation über den Rechtsstaat (H., 1935). After World War II Schmitt portrayed himself as having been taken by surprise by events that his own theory not only predicted but normatively prescribed. See Schmitt, "Der Zugang zum Machthaber," in idem, Verfassungsrechtliche Aufsätze, p. 436.

45 Schmitt, Verfassungslehre, p. 142.
46 See § IV below.
statute that covers and can subsume all cases and all situations in advance in terms of fact patterns cannot be resuscitated." Schmitt then formulated the dilemma confronting the Nazis:

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 question.

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 epistemological truth that only he was in a position to see facts correctly, to hear statements correctly, to understand words correctly and to evaluate correctly 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 differences” became crucial. By seeking an answer to the question, Quis judicabit?, in the Volksgebundenheit (being tied to the Volk) and Artgleichheit (identity of species) of the judicial corps, 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” 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 fundamental values of our community and that also knows how to express them in its

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.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.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.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.57

From the point of view of Nazi party jurists (e.g., Frank, Freisler, Thierack and Rothenberger) and ministerial officials (e.g., Gürner and Schlegelberger),58 who aspired to induce the judicial corps, of whom only very few had joined the Nazi party before 1933,60 to avoid handing down decisions that would provoke Hitler into carrying out his threat to decimate the bench,61 it was necessary to provide sitting judges with object lessons.61

55 In which case it might be closely related to the approach developed by Henry Hart and Albert Sacks, The Legal Process (tentative ed.; Cambridge, Mass., 1958).
57 See "Rechtssicherheit und richterliche Unabhängigkeit aus der Sicht des SD," 4 VfZ 399-422 at 415 (1956).
58 Weinkauff, "Die deutsche Justiz," pp. 39-95, provides this categorization.
59 See 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.
60 In 1942 Hitler threatened to eliminate ninety percent of the judicial corps; see Hitlers Tischgespräche, p. 223.
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
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 [Lehensverhältnisses] 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 miniführer-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
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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 [Artgleichheit] of the German 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 weltanschaulich question as the punishment of dueling was controversial, “how contradictory will be the position of the legal conscience in questions of expediency!”

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. 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.

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, Gesetz, p. 22.
69 Peter Thoss, 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. 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 no 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.

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.

71 Indeed, soon after the defeat of Nazi Germany Hueck reiterated this charge of “unclear emotional jurisprudence.” See Alfred Hueck, 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, 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.

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 völkisch 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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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 politi-
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 (*Gemeinschaftsregelung*)—that is, presumably by achieving the outcomes desired by the regime. Just how circumscribed this independence was became clear when Koellreutter defined the scope of formal judicial review as limited to examining whether a statute had been promulgated in the *Reichsgesetzblatt*; even the inquiry into whether the appropriate minister had countersigned the statute Koellreutter deemed to have become senseless.

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.

Rothenberger expressed similar views 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.

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

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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, *Verfassungsrecht*, p. 285; Georg Dahm et al., "Leitsätze über Stellung und Aufgaben des Richters," 1 *Deutsche Rechtswissenschaft* 123-24 (1936); [Roland] Freisler, "Richter, Recht und Gesetz," 96 *DJ* 1333-35 (1934).
91 Cf. Rothenberger, *Der deutsche Richter*, p. 49.
92 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 postulate 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 “vouch[ed] for the fact that he will at all times espouse the cause of the Nazi State.”95 A further section provided, however, that, “The superannuation 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.”

96 § 171 para. (1) DBG.
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 worldview 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.”97 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.98

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,99 Gürtner underscored in a letter to Lammers that elimination of § 171 would mean “the abolition of judicial office.”100 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.101 Ten days later Lammers restated this view in a confidential letter sent to a number of ministers.102

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.
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from office.\textsuperscript{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.\textsuperscript{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 \textit{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” (\textit{sachlich}) was meant to elucidate.\textsuperscript{105} But since it was also Hitler who ultimately determined what constituted the Nazi legal and world-view, the statutory protection became meaningless.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{108} Although no court struck down a Nazi law as unconstitutional,\textsuperscript{109} this also occurred only very rarely in Weimar.\textsuperscript{110} And although it may also be true that such open opposition might have led to incarceration in a concentration camp,\textsuperscript{111} or that the subservience of some judges may have been motivated by fear of not being promoted,\textsuperscript{112}

\textsuperscript{103} \textit{Ibid.}, fol. 113.
\textsuperscript{105} August Jäger, “Die verfassungsrechtliche Stellung des Richters im Grossdeutschen Reich,” \textit{9} \textit{DR} (Ausgabe B) 467, 468 (1939).
\textsuperscript{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, \textit{Nationalsozialistisches Recht und Rechtsdenken} (B., 1938), purported to take this statutory provision seriously.
\textsuperscript{107} Rothenberger, “Die Stellung des Richters im Fuhrerstaat,” \textit{9} \textit{DR} (Ausgabe B) 262, 263 (1939).
\textsuperscript{110} See § IV B below.
\textsuperscript{111} Evers, \textit{Richter}, p. 37.
\textsuperscript{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.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 implementation 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 *Verordnung über Strafen und Strafverfahren bei Zuwiderhandlungen gegen Vorschriften auf dem Gebiet der Bewirtschaftung bezugsberechtigter Erzeugnisse*,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 justice115 noted that the order bordered on compromising a German administrative agency vis-à-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 comrades his rights and his victory over a German agency [Behörde] in a twenty-page decision without even wasting a word on how sound 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 . . . , he


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

114 6 April 1940, RGBI 1, 610.

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-à-vis the latter.\footnote{Richterbriefe, ed. Heinz Boberach (Boppard am Rhein, 1975), pp. 14-16 (Letter No. 1 of 1 October 1942).}

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.\footnote{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.} 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."\footnote{Helmut Külz, "Verwaltungskontrolle unter dem Nationalsozialismus," 1969 KJ 367, 378. For a description of court proceedings, see Edith Roper, Skeleton of Justice (NY, 1941). On the bar during the Nazi period, see Fritz Ostler, Die deutschen Rechtsanwälte 1871-1971 (Essen, 1971), pp. 229-304; cf. Hans Wrobel, "Der deutsche Juristenbund im Jahr 1933," 15 KJ 323-47 (1982).} Even in the wake of Hitler’s speech before the (last session of the) 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,”\footnote{Max Domarus, Hitler. Reden und Proklamationen 1932-1945, vol. 2: Untergang (1939-1945) (Neustadt, 1963), p. 1874. Cf. Joachim Gernhuber, "Das völkische Recht," Tübinger Festschrift für Eduard Kern (Tübingen, 1968), pp. 167-200 at 188.} and which contemporaries agreed eliminated judicial independence,\footnote{E.g., Bergmann, RuM – Amt für Neuordnung der Deutschen Gerichtsverfassung, “Die äußeren Garantien der richterlichen Unabhängigkeit,” BA R 22/4721, p. 15 (dated 23 May 1944). Cf. Albrecht Wagner, Der Richter (Karlsruhe, 1959), p. 76. Of little use is Wolfgang Steinlechner, "Der Richter im Dritten Reich" (Diss., Mainz, 1974).} 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 Volk-community was “entitled to expect.” That the executive in Nazi Germany sought
to appoint politically sympathetic judges to the Supreme Court was manifestly not unique to this political system.\textsuperscript{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 supported\textsuperscript{122} Hitler's appeal to the second session of the new \textit{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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 \textit{Reichsjustizkommissar} and "Generalgleichschalter for the entire bench and bar,"\textsuperscript{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 [\textit{Zersetzer}], they have long since been removed from the bench as pests."\textsuperscript{127}

How did the executive proceed in order to insure itself against the reintroduction of \textit{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 \textit{Reichskanz-}

\textsuperscript{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," \textit{Pestschrift für Rudolf Gmür} (Gieseking, 1983), pp. 201-53; Rudolf Wassermann, \textit{Der politische Richter} (Munich, 1972).

\textsuperscript{122} As reported by Karl Linz, "Zeitspiegel," 25 \textit{DRZ} 123 (15 April 1933).

\textsuperscript{123} Wolff's Telegrafisches Büro, vol. 84, no. 669, as filed at RJM and preserved in BA R 22/4085.

\textsuperscript{124} See ch. 2.

\textsuperscript{125} Linz, "Zeitspiegel," p. 123. On the Republican Judges' Association, see the issues of the journal \textit{Die Justiz}.

\textsuperscript{126} Schulz, \textit{Anfänge}, p. 124.

\textsuperscript{127} Hans Frank, "Der Richter im Neuen Reich," 25 \textit{DRZ} 162 (15 June 1933).
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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,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.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 unrestrainedly espouse the cause of the Nazi State.130

In January 1935 RJM informed RFM that Heinrich Burmeister “has to be taken on for political reasons.”131 The nature of these political reasons was not revealed; and since Burmeister did not join the Nazi party until 1941,132 it is unclear what these reasons were.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.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.135 From this point onward data concerning party affiliation became the rule.136 None the

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).
129 Ibid.
130 Ibid. The personnel forms contained rubrics for proof of aryan descent and party membership. See ch. 2.
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.
132 BA FB 4320 N.
133 Burmeister had been a member of the DNVP in 1919-20; ibid.
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.
135 Ibid., fol. 88.
136 See 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 Gürtner 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 Gürtner 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 Gürtner 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 Gürtner'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 majoritization 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, Weinkauff, 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.\(^{142}\) 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.\(^{143}\) AOG took great strides in this direction by conferring virtually unlimited authority on employers to create Betriebsordnungen and to discipline workers for infractions.\(^{144}\) 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.”\(^{145}\) 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).

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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

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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 1. 543; Sturm, “Der Betriebsführer bei der Bekämpfung von Arbeitsvertragsbrüchen,” 12 DAR 33-36 (1944). For a case study of a plant, see Stefan Karner, “Arbeitsvertragsbrüche 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 \textit{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 \textit{Führer}-power \textit{[Fürhergewalt]} by virtue of which the \textit{Führer}, free of any statutory self-limitation \textit{[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 \textit{rechtsstaatlich} 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 \textit{ad absurdum} by conceding that general clauses did not constitute norms for the

\(^{150}\) BA R 22/4720, entry of 20 August 1942, p. 6. The statement is part of the so-called \textit{Führer monologues}.

\(^{151}\) Bergmann, “Die äusseren Garantien der richterlichen Unabhängigkeit,” dated 23 May 1944, in BA R 22/4721, p. 15.

\(^{152}\) To the extent that the principle of \textit{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 \textit{SPSS} 444-64 (1939); Schulz, \textit{Anfänge}, pp. 194-204.
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Volk-comrades, but rather an authorization for the administrative agencies managing them; hence the importance of the personality of the agents.  

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.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. 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 Empire156 even though their formal political independence had been suspended.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,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. 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.

154 Ibid., p. 6.
155 §§ 46-50 Allgemeines Landrecht.
156 See the literature in n. 2 above.
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, “Rechtsabwehrtische Funktionsbestimmung der Justiz im Nationalsozialismus am Beispiel der ‘Völkischen Ungleichheit’,” in Recht, Rechtsphilosophie und Nationalsozialismus: ARSP, Beiheft 18, pp. 163-75 at 164 (1983).
158 15 July 1941, RGBI I, 383.
159 §§ 1-2.
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It is unclear whether such a radical step was ever contemplated by RJM.\textsuperscript{160} Also uncertain is the extent to which the statute was ever applied.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Volk-community order disorder by means of law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{166} What is significant about

\begin{itemize}
  \item \textsuperscript{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. \textit{Ibid.}
  \item \textsuperscript{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," \textit{Ibid.}, p. 67.
  \item \textsuperscript{162} See Wagner, "Umgestaltung," pp. 285-86.
  \item \textsuperscript{163} This last case involved interpretation of the customs pertaining to the rights of farmworkers in Mecklenburg; \textit{RGZ} 170: 28-36, Grosser Senat für Zivilsachen, 12 September 1942. The other cases may be consulted at \textit{Ibid.}, 169: 129-33, 140-45, 145-47, 341-45.
  \item \textsuperscript{164} \textit{Richterbriefe}, p. 1. On the persons to whom the \textit{Richterbriefe} were distributed, see BA R 22/4160; among these persons was Bormann in the \textit{Führerhauptquartier.}
  \item \textsuperscript{165} \textit{Richterbriefe}, p. xx.
  \item \textsuperscript{166} E.g., Letter no. 6 of 1 March 1943, \textit{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)\textsuperscript{167} constituted 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,\textsuperscript{168} 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...."\textsuperscript{169} 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-

had pushed a Russian war prisoner who had been doing what he had been told to do need not have been punished since her comment did not constitute a declaration of solidarity); Letter no. 7 of 1 April 1943, \textit{ibid.}, pp. 95-106 (eighty-two year-old man who was sentenced to death for having picked up a horse's reins in street during air raid and having made suspenders out of it: sentence which is converted into capital punishment only for reasons of deterrence although court thought three to five years appropriate, but which defendant would not have survived, is not just).

\textsuperscript{167} Theo Rasehorm, "Richterbriefe und Rechtspflege heute," \textit{ibid.}, p. 487.


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 functions 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
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 \textit{volkisch} science of law which is open to such considerations.\textsuperscript{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 \textit{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-
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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].” He maintains that the court’s attitude is surprising inasmuch as it contradicted its lack of respect for the Weimar legislator. 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.

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.” 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, 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 rechtstaatlich anchored mechanism of the separation of powers to decentralize and atomize the formulation of unpopular decisions. 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,

184 Hempfer, *Die nationalsozialistische Staatsauflassung*, p. 110 and p. 110 n. 56.
188 As Hempfer, *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 [gesetzestreuen Haltung], no other choice but to execute the legislative will.”
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. Rüthers, *Die unbegrenzte Auslegung*, pp. 232-36, generalizes for all of private law.
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 discretion of the legislator could not have redounded to the benefit of the Nazis.190

In summary: since legal change in private law was implemented overwhelmingly by means of judicial interpretation rather than new legislation,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 position on the desirability of judicial anticipation of legislative action.192 Freisler, for example, even while upholding the natural law background of the judicial decision-making process in Nazi Germany, implicitly conceded 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 Führer.193

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 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, Tarifrecht auf der Grundlage der Rechtsprechung des Reichsarbeitsgerichts (B., 1931); idem, Koalitionsfreiheit und Rechtsverfassung (B., 1932); Nathan Reich, Labour Relations in Republican Germany (NY, 1938) pp. 238-67. Cf. David Abraham, The Collapse of the 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, Nationalsozialismus und Gewerkschaftsbewegung (Hannover, 1958); Mason, Sozialpolitik; Gerhard Beier, “Dokumentation: Gesetzentwürfe zur Ausschaltung der Deutschen Arbeitsfront 1938-17 AFS 297-335 (1977). Cf. Kirchheimer, “Changes in the Structure of Political Compromise.”

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


193 Freisler, “... 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 \textit{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 \textit{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.) \textit{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 \textit{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 superpositivistic 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 arcana dominationis.198

Before these analyses can be examined, it is necesssary 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.\(^{199}\)

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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 monarchal sovereignty; the failure of the bourgeois revo-


201 Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” 71 HLR 630, 636 (1958).

202 After Kriele, Staatslehre, p. 104.
olution 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.\(^\text{209}\)

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


\(^\text{208}\) 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 [1st ed.: 1872]).

\(^\text{209}\) Neumann, “Governance,” pp. 342-52. The following works represent a useful sampling of the very large historical-analytical literature on the Rechtsstaat: Friedrich Darmstaedter, *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 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-a-vis the legislature but only vis-a-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 Kübler, "Der deutsche Richter"; Fransen, "Positivismus."
\textsuperscript{218} 53 \textit{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 \textit{JW} 90.
\textsuperscript{222} \textit{Ibid}. 
such warnings were issued in anticipation of Nazi rule even before such criticism became dangerous.223

No more trenchant analysis of the *aporia* of the Weimar Rechtsstaat was offered than by its contemporary, Carl Schmitt. Establishing a correspondence between the principles of “[t]he modern bourgeois-rechtsstaatlisch 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.224 In a polemical sense the bourgeois Rechtsstaat could be understood in social-historical opposition to the *Machtstaat* of absolutism and the traditional paternalistic-authoritarian Police or Welfare State,225 which did not restrict itself merely to preserving a legal order.226

Such a Rechtsstaat also contains the fiction that its constitution is nothing but a system of legal creations of norms (*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.227

Historically the ideal of the bourgeois Rechtsstaat culminated in a general judicialization (*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:

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

223 But see the articles in “Justiz im Dritten Reich” in the journal of the Republican Judges’ Association, *Die Justiz.*
227 Ibid., p. 131.
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.\textsuperscript{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 view\textsuperscript{229} 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 possible\textsuperscript{230}

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.\textsuperscript{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.”\textsuperscript{232} Thus in a period of relativism\textsuperscript{233} there remained one last indispensable constituent element – the general character of the legal norm – without which the rechtstaatlich distinction between law and command, ratio and voluntas, would disappear.\textsuperscript{234} Schmitt sensed that the bourgeois Rechtsstaat itself hung in the balance: without at least this de-substantialized version of

\textsuperscript{228} \textit{Ibid.}, pp. 133-34.
\textsuperscript{229} Associated with Austin and Kelsen.
\textsuperscript{231} \textit{Ibid.}, p. 139.
\textsuperscript{232} \textit{Ibid.}, p. 142.
\textsuperscript{233} See Schmitt, “Nationalsozialistisches Rechtsdenken,” 4 \textit{DR} 223 (1934).
\textsuperscript{234} Schmitt, \textit{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.

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.
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 parliamentarism\(^{245}\) 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 people\(^{246}\) 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.
\(^{242}\) Ibid., p. 66. For a different valuation, see Morton Horwitz, “The rule of Law: An Unqualified Human Good?” 86 YLY 561, 566 (1977).
\(^{243}\) 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 \textit{rechtstaatlich} concept of law. See Karl Zeidler, \textit{Massnahmegesetz und “klassisches” Gesetz} (Karlsruhe, 1961), pp. 104-44. Cf. Ernst-Wolfgang Bockenförde, “Entstehung und Wandel des Rechtsstaatsbegriffs,” \textit{Festschrift fur 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.
tially 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.248 If earlier in Weimar Schmitt had focused on the insuperable contradiction between liberal individual consciousness and democratic homogeneity,249 towards its end he shifted his attention to the contradictions engendered by pluralistically defined class warfare.250

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 Schleich­er251 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.252 The renunciation of supra-positive sources of law by leading socialist legal thinkers in Weimar253 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.254 Neither of these shifts in position was one of principle255; rather, both were clearly motivated by the political transformation that integrated the working class into the legislative process.256 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

249 Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus, p. 23.
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 ministerial 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 ambiguous than it had been under Bismarck when, in the form of constitutional 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 *weltanschaulich* 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-
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 fulfilment 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 *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.268

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."269 In view of the relativity of the general clauses, the formal rationality of general laws yielded to material rationality, which, however, quickly degenerated into "material irrationality as the judge bases his decision on his individual evaluation."270

After alluding to a few general clause-studded statutes in the areas of contract, commercial, regulatory and labor law271 that had been interpreted by the Weimar courts in favor of "monopolists,"272 Neumann con-
eluded "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.

276 Neumann, "Governance," pp. 543-44.
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."
Introduction

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

278 Ibid., pp. 548-49.
279 Ibid., "Introduction."
280 Ibid., pp. 549-51. Unger, Law in Modern Society, pp. 219-20, appears to misunderstand this incompatibility when he accuses "left-wing socialists" and "critical intelligence" in Weimar of having "worked toward the final replacement of positive law and the centralized state by self-regulating community."
281 Kehr, "Zur Genesis," p. 121, proposed -- without empirical corroboration -- a more differentiated version of class alignments involving the legal system. He maintained that the social basis of the Rechtsstaat had disappeared with the decomposision of the bourgeoisie into a "großkapitalistisches Generaldirektorpatriziat," on the one hand, which could assert itself more easily by exerting its political power than through formalism, and petty bourgeois employees, on the other, who were oriented toward equity.
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, commercial 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; Forsthoft, 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

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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.292

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.293 Under these circumstances the courts, according to Kirchheimer, were largely deprived of their former function of deciding disputes between groups and individuals.294 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.295

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.296 Although Neumann and Kirchheimer may have been correct in faulting Fraenkel


294 For indirect confirmation, see Franz Wieacker, “Richtermacht und privates Rechtsverhältnis,” 29 (N.S.) *AdR* 1-38 at 34, 37 (1938).


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.
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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."300 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.301 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 . . . ."302 Conformity with these injunctions, on the other hand, constitutes "a procedural or institutional kind of natural law."303 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 compromise of legality.”304

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.305 Similarly, in the context of Nazi labor law and RAG-adjudication, 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

301 Ibid., pp. 33-94.
302 Ibid., p. 39.
303 Ibid., p. 184.
304 Ibid., p. 153.
305 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.
“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 differenda 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-

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.\textsuperscript{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 exculpation\textsuperscript{313} contradicted the very essence of any notion of law.\textsuperscript{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,\textsuperscript{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.

\textsuperscript{312} Compare the suggestive remarks by E.P. Thompson, \textit{Whigs and Hunters} (NY, 1975), pp. 258-69.
\textsuperscript{314} Compare Carl Schmitt, "Der Führer schützt das Recht," 39 \textit{DJZ} 945 (1 August 1934) – an early highpoint in the self-corruption and self-degradation of German jurisprudence.
\textsuperscript{315} Master-servant law was the rubric under which such relations were organized in Anglo-American jurisdictions. See Mark Freedland, \textit{The Contract of Employment} (Oxford, 1976).
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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. 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.

To the extent, however, that law legitimates itself through tradition and venerability, 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-

316 It is a desideratum of research to determine whether employers during the Nazi period formulated and pursued litigational strategies. Cf. n. 190 above.
317 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.
318 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.
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. 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, *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? 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 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. Moreover, even relatively

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319 Perhaps the period of blitzkrieg victories constituted an exception; but see Mason, *Sozialpolitik*, pp. 299-322.


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 *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.

322 See the strictures by Wilhelm Herschel, "Rechtlicher und staatlicher Sinn der Bekanntmachung von Richtlinien und Tarifordnungen im Reichsarbeitsblatt," 3 *DAR* 39-42 at 41 (1933).
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. 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, 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. 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, but – with the exceptions already noted – generally pur-
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.