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MARC LINDER

The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

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Chapter 11

Jews

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

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

1 Ernst Fraenkel, Der Doppelstaat (F., 1974 [1941]), p. 122. Cf. F.A. Müllereisert, “Der Arbeitsvertrag als Vertrag mit ‘vorbetonter Gemeinschaftsfunktion,” 4 DAR 94 (1936): “The world can rely on the fact that the German Nazi unshakeably stands by his word and by his contract.”

2 So-called corrective intervention by the Gestapo and by Hitler personally in criminal cases is documented; see “Zur Perversion der Strafjustiz im Dritten Reich”, compiled by Martin Broszat in 6 VZ 390-443 (1958); Albrecht Wagner, “Die Umgestaltung der Gerichtsverfassung und des Verfahrens- und Richterrechts im nationalsozialistischen Staat,” in Die deutsche Justiz und der Nationalsozialismus (Stuttgart, 1968), p. 301.
I. The Pertinent Legislation

Given the exceptional statutory status of Jews on which most of the cases turn, it is first necessary to provide an overview of the increasingly restrictive conditions to which Jews were subject insofar as matters within the jurisdiction of the labor courts were concerned.3

The Law pertaining to the Restoration of the Professional Civil Service (BBG) of 7 April 19334 provided in § 3 that tenured civil servants of non-aryan descent were to be superannuated. Excepted from this provision were those whose civil service tenure had accrued before World War I or who had fought at the front or whose fathers or sons had “fallen” in that war. Pensions could be granted only after ten years of service (§ 8), a condition that could be applied retroactively to those who had retired before 7 April 1933 if it could have been applied to them had they retired after 7 April 1933 (§ 9 para. 5). Four days later a ministerial decree stated that one Jewish parent or grandparent sufficed to create a non-aryan within the meaning of § 3.5 On 4 May 1933 another decree established guidelines for the treatment of non-tenured salaried and hourly employees in the public sector. Non-aryans in such positions were to be given one month’s notice, three months’ salary and three-quarters of the value of other legally recoverable entitlements. Similar exceptions were made on behalf of front combatants (§ 3).6 Two days later “descent” was defined to include illegitimate descent.7 Later, exceptions were made for female civil servants whose husbands had died in the war.8 Another law amending the legal status of civil servants prohibited the appointment, as tenured Reich civil servants, of those of non-aryan descent or married with such persons, and mandated the dismissal of aryan Reich civil servants who married non-aryans.9

3 A mere listing and brief description of the laws, decrees, etc., pertaining to Jews occupies a thick volume; see Das Sonderrecht für die Juden im NS-Staat, ed. Joseph Walk (Heidelberg, 1981).
4 RGBl I, 175.
5 Erste VO zur Durchführung . . ., RGBl I, 195.
6 Zweite VO zur Durchführung . . ., RGBl I, 233.
7 Dritte VO zur Durchführung . . ., RGBl I, 245.
8 Drittes Gesetz zur Änderung . . ., 22 September 1933, RGBl I, 655; Zweite VO zur Änderung und Ergänzung der zweiten VO zur Durchführung . . ., 28 September 1933, RGBl I, 678.
9 Gesetz zur Änderung der Vorschriften auf dem Gebiet des allgemeinen Beamten-, des Besoldungs- und des Versorgungsrechts, 30 June 1933, RGBl I, 433, ch. II.
The same day that the original BBG was promulgated Hitler also published a law that authorized the cancellation of admission to the bar of Jewish lawyers through 30 September 1933 except those who had been admitted before, had fought in, or whose fathers or sons had died in World War I. This provision, the use of which was not mandatory, was expressly characterized as applicable in the absence of the normal reasons for exclusion.¹⁰

The so-called Nuremberg laws distinguished between nationals (Staatsangehörige) and Reich citizens (Reichsburger). Only those of the former were included among the latter who were of German or kindred blood; Reich citizens were the sole holders of full political rights.¹¹ The Law for the Protection of German Blood and German Honor prohibited marriages between Jews and nationals of German blood,¹² declaring them null and void also if performed abroad to evade the law. It also prohibited extramarital intercourse – subsequently defined as sexual intercourse¹³ – between Jews and nationals of German blood, and prohibited Jews from employing in their households female nationals of German blood under the age of forty-five. Only males transgressing against the intercourse provision were punishable.

Subsequent amendments to the Nuremberg laws declared that Jews, who could not become Reich citizens, could neither vote nor hold public office. Tenured civil servants had to retire by the end of 1935; only if they had been front combatants could they receive their salaries until reaching the normal retirement age.¹⁴ (In the wake of Kristallnacht even this concession was retracted.)¹⁵ A Jew was defined as a person descended from at least three racially purely Jewish (volljüdisch) grandparents, or

¹⁰ Gesetz über die Zulassung zur Rechtsanwaltschaft, 7 April 1933, RGBl I, 188. For a general view of the treatment of Jewish lawyers under the Nazis, see Horst Goppinger, Die Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus (Villingen, 1963).
¹¹ Reichsburgergesetz, 15 September 1935, RGBl I, 1146. The two Nuremberg laws were among only nine passed by the Reichstag – as contradistinguished from Hitler – between 21 March 1933 and 6 October 1939; see Gesetze des NS-Staates, compiled by Uwe Brodersen (Bad Homburg, 1969), p. 14. On the background of the Nuremberg laws – including Hitler’s participation – see Bernhard Lösener, “Als Rassereferent im Reichsministerium des Innern,” 9 VfZ 264–313 (1961); Uwe Dietrich Adam, Judenpolitik im Dritten Reich (Düsseldorf, 1979 [1972]), pp. 114–44.
¹² 15 September 1935, RGBl I, 1146.
¹³ Erste VO zur Änderung . . ., 14 November 1935, RGBl I, 1334, § 11. For an outstanding example of non-positivistic adjudication, see RGSt 73:94, in which the Supreme Court interpreted “sexual intercourse” to include masturbation of a German man in the presence of a Jewish woman (2 February 1939).
¹⁴ But their seniority could not be increased.
¹⁵ Siebente VO zum Reichsburgergesetz, 5 December 1938, RGBl I, 1751.
as a Jewish half-breed (*Mischling*), descended from two purely Jewish grandparents, who belonged to the Jewish religious community or was married to a Jew.\textsuperscript{16}

Tenured Jewish civil servants who were required to retire before having achieved an entitlement to a pension could, if needy and worthy, be granted a maintenance subsidy. Supervisory doctors at public and non-profit hospitals were forced to leave their positions by 31 March 1936.\textsuperscript{17} By 30 September 1938 all Jewish doctors were deprived of their license to practice without special permission.\textsuperscript{18}

Similarly, all admissions to the bar of Jewish lawyers were revoked as of 30 September 1938; under restrictive conditions some former Jewish lawyers could reappear as legal advisers to Jewish clients.\textsuperscript{19} In the course of 1938, but prior to *Kristallnacht*, it was made unlawful to conceal Jewish ownership of a business,\textsuperscript{20} and for Jews to engage in certain businesses such as real estate.\textsuperscript{21}

In the wake of *Kristallnacht* Jews were prohibited from conducting retail or mail-order craft businesses as of 1 January 1939; from that date onward they were also prohibited from being plant-leaders within the meaning of AOG. Jewish executives in business enterprises could be given six weeks’ notice at the termination of which all pension and severance pay claims on the contract expired.\textsuperscript{22} Other laws designed to effectuate the so-called aryanization of the economy by means of expropriating Jews followed.\textsuperscript{23} Only where Jewish welfare agencies were unable to provide aid could state welfare be granted – and then only under stringent conditions.\textsuperscript{24} Within two months of having imposed the wearing of the star of David (1 September 1941),\textsuperscript{25} the Nazis finally promulgated a ministerial decree defining the employment relation *sui generis* of Jewish workers.\textsuperscript{26} As alien to the German race (*Artfremder*), a Jew could not

\begin{footnotesize}
\begin{enumerate}
\item<sup>16</sup> Erste VO zum Reichsbürgergesetz, 14 October 1935, RGG I, 1333.
\item<sup>17</sup> Zweite VO . . . , 21 December 1935, RGG I, 1524. §§ 2 and 6.
\item<sup>18</sup> Vierte VO . . . , 25 July 1938, RGG I, 969.
\item<sup>19</sup> Fünfte VO . . . , 14 October 1938, RGG I, 1403.
\item<sup>20</sup> VO gegen die Unterstützung der Tarnung jüdischer Gewerbebetriebe, 22 April 1938, RGG I, 404.
\item<sup>21</sup> Gesetz zur Änderung der Gewerbeordnung für das Deutsche Reich, 6 July 1938, RGG I, 823.
\item<sup>22</sup> VO zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben, 12 November 1938, RGG I, 1580.
\item<sup>23</sup> RGG I 1938, I, 1579, 1638, 1709; 1940, I, 891.
\item<sup>24</sup> VO über die öffentliche Fürsorge für Juden, 19 November 1938, RGG I, 1649.
\item<sup>25</sup> PolizeiVO über die Kennzeichnung der Juden, RGG I, 547.
\item<sup>26</sup> VO über die Beschäftigung von Juden, 3 October 1941, RGG I, 675. The provisions
\end{enumerate}
\end{footnotesize}
be a member of a German plant-community (§ 1). Thus neither AOG nor certain laws pertaining to holiday pay applied to Jews (§ 2). In contrast to aryan workers, Jews were entitled to compensation only for work actually performed, and could, therefore, not claim sick-pay; overtime pay, family subsidies, Christmas bonuses and old-age pensions apart from the statutorily provided ones could not be granted Jews (§§ 3-7). Even apart from immediately effective discharges, Jews were entitled to only one day’s notice (§ 9).

Disputes resulting from the employment relation of a Jew were no longer subject to the jurisdiction of the labor courts, but were decided at an arbitration office (Spruchstelle) by a judge appointed by the minister of justice. Although the procedures of the labor court were to apply, no appeal was available (§ 10). Absent special permission from the Employment Office, Jewish employees had to be set to work in groups segregated from the rest of the Following (§ 12). Jews could no longer work as apprentices (§ 13) and were not covered by the special war-time protective labor law (§ 15). Unemployment aid was severely restricted (§ 17).

II. Cases

In view of the special status that Jews occupied in the Nazi party program and in the execution of internal policy, Ernst Fraenkel reasoned that they were subject to the Prerogative State, that is, a system of domination within the context of unlimited arbitrariness and force unconstrained by legal guaranties. Although the following analysis of the Jewish labor cases will make it possible to judge the validity of Fraenkel’s view, a plausible working hypothesis is that positive law enacted by Hitler in this area was clothed with special significance which even judges with pro-Jewish sympathies would not have been able to reason their way out of inconspicuously. The fact that the increasingly oppres-

mentioned in the text are all taken from the Implementing Decree, 31 October 1941, RöB I, 681. On the legislative history, see Adam, Judenpolitik, pp. 285-92.

27 On 10 December 1941 RJM issued an AV providing for the Errichtung von Spruchstellen bei den Arbeits-(Gewerbe-)gerichten und Überleitung anhängiger Verfahren auf die Spruchstellen; 103 DJ 1143 (1941). No information concerning these units has been uncovered.
28 VO über den Arbeitsschutz, 12 December 1939, RöB I, 2403.
29 Das Programm der National-Sozialistischen Deutschen Arbeiter-Partei [25 February 1920] (B., 1930), Points 4-8, 23 and 25 anticipated much of the aforementioned anti-Jewish legislation.
30 Fraenkel, Doppelstaat, pp. 21, 119-20.
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pressive waves of anti-Semitism initiated by the Nazis constituted discernible chronological periods clearly marked off by new legislation suggests a categorization of the cases in terms of stages of anti-Semitism. Fraenkel himself noted that during the first years of the regime the courts as a rule applied Nazi racial policy only where the positive law already reflected it. Once the Nuremberg laws expressly degraded Jews to literal second-class citizenship, however, this judicial approach became anachronistic. But even during the period between the promulgation of these laws and the events surrounding Kristallnacht, that is, during the time when Jews were still permitted to maintain a reduced presence in small commercial and industrial enterprises, Nazi policy towards the Jews was characterized by a contradiction. Since the Jews at this time were still more or less integrated into the capitalist system, a strict application of the methods of the Prerogative State would have meant a disturbance of normal economic life. It was therefore the task of the judicial system to protect the economy from convulsions even if this brought about a certain protection for the Jews.

With the elimination of Jews from normal economic and social life and their transformation into quasi-outlaws, the basis of this contradiction and hence the contradiction in the minds and hearts of German judges disappeared too, in Fraenkel’s view.

With some modification this chronology is adopted below. The first phase covers the time from the promulgation of BBG in April 1933 to the enactment of the Nuremberg laws in September 1935. The second phase ends with the Decree pertaining to the Elimination of Jews from German Economic Life in November 1938. The third phase runs until the special labor code for Jews was issued in October 1941. Here the narrative ends. The last Supreme Labor Court case involving Jews was

31 Ibid., pp. 117-18. Rohlfing, “Rechtsfragen aus der Zugehörigkeit zur jüdischen Rasse im Arbeitsrecht,” 62 JW 2098-2101 (1933), illustrates the impatience of a judge with those of his colleagues who did not understand that extraordinary times required extraordinary means; the latter did not include reconciling revolutionary acts of the SA with the formal law of the Civil Code. Rohlfing became a member of the committee on labor law of the Akademie für Deutsches Recht; see BA R 61/115. For a discussion of Rohlfing’s position from the standpoint of a German Jewry that had not yet abandoned all hope, see Berthold Mosheim, “Ist die Zugehörigkeit zum Judentum ein Entlassungsgrund?” C.V.-Zeitung, vol. 13, no. 1 (4 January 1934). 1st Beilage. On the development of German Jewry during this period, see Hans Lamm, “Über die innere und äussere Entwicklung des deutschen Judentums im Dritten Reich” (Diss., Erlangen, 1951).

32 Fraenkel, Doppelstaat, p. 120.


34 Fraenkel, Doppelstaat, pp. 120-27. Since a “final solution” of the slave question was impossible within the slave economy, the contradiction never disappeared from ante-bellum adjudication. See Robert Cover, Justice Accused (New Haven, 1975).
decided in September 1941. The fourth phase witnessed the consignment of the Jews to the Prerogative State in the form of the Final Solution.

The chronological ordering will be determined not by the first case to be decided under the law ushering in the new phase, but rather simply by time since it is assumed that the policy of the new phase affected decisions relating to events that had occurred earlier. In point of fact, on the border between the first and second phase no decisions were handed down for eighteen months between December 1934 and June 1936, whereas the first case decided under the Nuremberg laws was not decided until June 1937. Similarly, between the second and third phase no decision was issued between September 1938 and March 1939; the first case under the Decree pertaining to the Elimination of Jews from German Economic Life was not decided until July 1939.

A. Phase 1: The Law pertaining to the Restoration of the Professional Civil Service (April 1933-September 1935)

The first case to reach RAG (in July 1933) was based on a precursor to the law authorizing the striking of Jewish lawyers from the list of counsel admitted to the bar. Plaintiff's Jewish lawyer had appealed a trial court case in Berlin to LAG, which denied the appeal because plaintiff was not represented by counsel admitted to practice before a German court. LAG reached this conclusion because counsel was not on the list of Jewish lawyers selected by a commissar for the Berlin bar, in accordance with decrees issued by the Reich commissar of the Prussian ministry of justice at the end of March and beginning of April, as still authorized to appear in court. RAG, in ordering that LAG accept the appeal, stated that one could not interpret the decrees to have intended to render the lodging of an appeal by such a lawyer as null and void. The court took judicial notice of the fact that the Prussian administration had anticipated the action of the Reich because it had feared that the population might engage in "self-help actions" against Jewish lawyers during the agitated period of defensive struggle against pan-Jewish atrocity propaganda. To this end the administration in Prussia undertook to reduce the participation of Jewish lawyers to a "tolerable mea-

35 § 11 para. 2 ArbGG, 22 December 1926, RGGI I, 507.
36 RAG issued an order (Beschluss) in accordance with § 77 ArbGG.
sure," that is, one corresponding to their share in the population. But, the court reasoned, to secure this result it was not necessary to intervene in pending litigation, as was done here, especially since the decree was known to be merely provisional in light of the impending promulgation of a national law which, by reference to another law, itself expressly upheld the validity of procedural acts such as that taken by plaintiff's counsel. (RAG B.52/53, 18:203-205, No. 46, 11 July 1933.)

The structure of the court's argument is manifest: first it sympathetically depicts the anti-Semitic origins and motivation of the governmental action; then it logically points out that the application of the decree was over-inclusive in the sense that it was not necessary to achieving the government's declared aim; and finally, it retroactively applies the standards of the national law in order to legitimate its second point. The court has thus preserved the integrity of its own internal procedures by embracing and yet confining the applicability of the new Nazi natural-law content of the positive law.

The first case in which the Jewishness of the plaintiff himself was at issue came before the court later that autumn. Plaintiff, who in 1929 had made a contract with his main supplier by which he became the manager of his former store, was fired without notice on 2 April 1933 following the temporary closing of the store the day before by the SA in connec-


The expulsion of Jews from the bar is documented by the fact that between 7 April 1933 and 30 April 1934 1,084 "non-aryan" attorneys were removed on the basis of the Gesetz über die Zulassung von Rechtsanwälten, with an additional 280 having died or left "voluntarily." As of 1 May 1934 2,009 remained in the bar. See "Übersicht über die Zahl der am 1.5.1934 zugelassenen arischen und nichtarischen Anwälte und Notare," 96 DJ 950 (1934). The aforementioned data refer to attorneys only; it should be noted that the data presented in this article are arithmetically inconsistent.

By the time of the census of 1939, which for the first time included a count of non-religious Jews, only 392 full-breed Jews (Volljuden) were returned as being employed in the area of legal and business consulting (Rechts- und Wirtschaftsberatung), with an additional 370 half-breeds (Mischlinge) in the same branch. See SDR, vol. 552,4: Volks-, Berufs- und Betriebszählung vom 17. Mai 1939, Volkszählung: Die Bevölkerung des Deutschen Reichs nach den Ergebnissen der Volkszählung 1939, fasc. 4: Die Juden und jüdischen Mischlinge im Deutschen Reich (B., 1944), p. 106.

38 § 4 referred to § 91 b para. 2 of the Rechtsanwaltsordnung, which was added by the VO des Reichspräsidenten über Maßnahmen auf dem Gebiet der Finanzen, der Wirtschaft und der Rechtspflege, 18 March 1933, RGBI I, 109, ch. XIII, art. I.
tion with a boycott of Jewish stores; since defendant was not Jewish, the store had been reopened.

In the case at bar the issue was whether plaintiff's Jewishness was an important cause for immediate dismissal within the meaning of § 626 BGB. It must be kept in mind that BBG applied only to public employment so that the court had no positive anti-Semitic laws to draw on as being directly on point here. Formally applying the schematic balancing test that had, even in Weimar, become the hallmark of this particular species of general clause, the court held that although the fact of being a Jew in itself could constitute cause for dismissal, this was not so in all cases (schlechterdings) and without more. Defendant had not proven that adhering to the contractual period of notice would have led to the decline of his business or even that he had had serious apprehensions. Not only had no further boycotts been announced, but the customers in Cottbus had not taken umbrage at plaintiff's Jewishness. The court attested that plaintiff had proven himself in the war in such a manner that even customers who otherwise had no use for Jews could not help respecting him personally. Finally, the court concluded, even taking into consideration the importance of the circumstances of the times, one could not neglect the fact that precisely the personal relations of the parties to each other could speak in favor of maintaining the contractual relation – perhaps even at the risk of financial losses for defendant. (RAG 220/33, 19:207-10, No. 49, 28 October 1933.)

As its major premise RAG accepted without any discussion that in principle, without any dispositive statutory basis on which to rest its acquiescence in Nazi anti-Semitism, the fact that one was Jewish could make it unreasonable to expect an employer to carry out the provisions of an employment contract. By creatively developing the common law of contract, the court made it unnecessary for the Nazis to intervene in this area of private law until after Kristallnacht. Thus without expressing its sympathy for the ideology of anti-Semitism, but rather matter-of-factly conceding the abstract possibility of the point, the court then proceeded to find concrete facts that not only neutrally deprived defendant of a reasonable cause for dismissal, and also depicted the Jewish plaintiff as an under-dog and a good German, but also implicitly cast defendant-
employer as a villainous capitalist who was using anti-Semitism as a pretext in order to take advantage of his proletarianized former customer. RAG thus succeeded in shaping a minor premise – this Jew did not make it unreasonable for this employer to adhere to the contract – that led to a conclusion that in no way undermined the usefulness of the major premise as a precedent while permitting justice to be done in the individual case.

In this sense the commentator, Hueck, was correct in asserting that the court had strictly adhered to the tradition of precedents that had come to control the interpretation of these general clauses. (Ibid.at 210. Yet the fact that reasonableness, good faith and the balancing test could be operationalized in terms of anti-Semitism shows only that formalism warranties justice as little as syllogisms do truth. General clause jurisprudence thus proved itself a flexible tool in the sense that it enabled judges to legitimate their existence as formalists who could nevertheless mete out qadi-justice while speaking a hard enough language to forestall the enactment of even more barbaric positive law.

A month later the court became more explicit in underscoring that, absent laws relating to the private sector, one could not acknowledge the proposition that every Jewish employee could be dismissed without notice – in spite of the new attitude which the national State and the German people at large had adopted towards Jewry. On the other hand, however, RAG emphasized that this attitude was so fundamentally different from the one that had prevailed until then that one could not overlook its consequences even in the area of private contract law. Echoing the Nazi leadership’s admonition to its so-called left-wing to the effect that the revolutionary period was over, 40 the court measured the anti-Semitic pulse of the nation not by the point of view precipitately generated by political events, but by the “clarified” (“geläuterte”) views of the present. It then criticized the lower court for having accepted the employer’s mere subjective conjecture as to the danger involved in observing the notice period for termination of a Jewish employee. It remanded the case with instructions to examine whether an objective basis supported the subjective perception. (RAG 224/33, 19:214-17, No. 51, 25 November 1933.)

By mid-1934 the first case involving a Jewish employer-defendant and a non-Jewish plaintiff-employee came before the court. Defendant open-

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ed a so-called one-price store in 1932 which even before the Nazi takeover had created unrest among the population and retail dealers. As a result the police closed the store in mid-March 1933, not permitting it to reopen for six weeks. It is not clear whether the new owner, who was also sued, was Jewish. Defendant discharged all of the store's employees the day the store was closed; plaintiff's suit sought the salary due for the duration of the normal termination period.

Whereas LAG had emphasized that the immediate discharge was unfounded because the employer, though not responsible for the closing, had to bear the risk since the police action was related to his person even if not decisively to his Jewish descent, RAG did not recur to defendant's being Jewish at all. Rather, it decided in favor of plaintiff merely on the grounds that good faith under these particular circumstances made it reasonable for defendant to observe the relatively short notice period. (RAG 80/34, 21:162-66, No. 32, 27 June 1934.)

In another case involving a Jewish defendant-employer, plaintiff was a high-level employee who had been dismissed without notice because he had concocted an intrigue with the political police, the SA and the Nazi party in order to cause his employer trouble. RAG set aside LAG's decision in favor of plaintiff and remanded on procedural grounds. Even if plaintiff's behavior was supportable in terms of subjective exculpatory grounds viewed in the context of the political situation, it was, the court argued, still possible that continued employment could not reasonably be expected if the basis for trust and cooperation were destroyed. The court criticized LAG for singling out only exculpatory grounds instead of examining the totality of circumstances, in particular the higher demands that were normally made of executive employees. (RAG 101/34, 21:217-22, No. 44, 25 July 1934.)

Both of these cases appear to reveal a concern on the part of the court not to introduce a potentially uncontainable bifurcation of labor law adjudication as between Jewish and non-Jewish employers. The court achieved its goal by down-playing or passing over in silence the Jewish aspect. With a minimum of ideological obeisances, RAG managed to decide the cases on the basis of principles that had guided Weimar adjudication as well.

In the last case of the first phase both the employee-plaintiff and the employer-defendant were Jews. At the instigation of the Nazi party lead-

41 See VO des Reichspräsidenten zum Schutz der Wirtschaft, 9 March 1932, RGG I, 121.
ership of the county plant-cell defendant dismissed plaintiff without notice on the grounds of alleged anti-State remarks. Although the public prosecutor quashed the proceedings, the regional leadership of DAF refused to agree to plaintiff's reinstatement.

Although this third-party pressure was unlawful, RAG acknowledged that it could operate on defendant qua Jewish business as a serious threat to the latter's continued existence in case of non-compliance. Under these circumstances the threat could induce defendant to place the interests of the plant as a whole above plaintiff's private interests, thus making further employment appear unreasonable. In accordance with precedent, of course, where, as here, the situation giving cause for dismissal exists merely in the employer's mind, he must make reasonable efforts to determine the true situation. (RAG 148/34, 22:215-18, No. 46, 12 December 1934.)

What is most remarkable about this decision is not that it appears to interpret the subjective-objective conditions requirement more liberally in favor of the Jewish employer than it had in the case of the aforementioned non-Jewish employer (although both cases were remanded), but that it openly and sympathetically portrays the predicament of a Jewish employer helplessly confronted with the extra-legal demands of a Nazi organization. That in this particular case plaintiff was not only Jewish but also an alleged subversive may have contributed to the outcome.

Few in number, the cases in the first phase display several variations in the relations of the parties to one another: Jewish employee v. non-Jewish employer; Jewish employee/former owner v. non-Jewish employer/former customer; non-Jewish employee v. Jewish owner; Jewish employee v. Jewish employer. Although the court took visible pains to confine the spread of a separate common law for Jewish employers, and although it also sought to mitigate the harshness of dismissals for Jewish employees by enunciating its competence to adjudicate the applicability of non-statutory standards of anti-Semitism to private contract law, it also began to steer the bulldozer down the slippery slope to Auschwitz by accommodating itself to the implicit abrogation of one constitutional provision Hitler had not even requested the Reichstag to repeal: "All Germans are equal before the law."42

One kind of case did not arise during this period – that controlled by BBG, which gave its name to the first phase. And yet the precedent it set

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42 Art. 109 of the Weimar constitution, 11 August 1919, RGBI I, 1383.
in singling out the Jews (abstracting for the moment from politically defined enemies) for discriminatory treatment constituted a brooding omnipresence which decisively influenced the texture and direction of the court's reasoning.

The Lower Courts

In order to form a more distinct impression of the tenor and style of RAG's decisions in this area, it is worth examining the approaches pursued in the lower courts.

Trial Courts

The first suit reached the labor courts in June 1933. Plaintiff was a Jewish physician who also worked part-time for a physicians' organization inspecting incoming insurance accounts. The new board of directors, which had been installed after the organization's Gleichschaltung, discharged him without notice. In dicta the court noted that if plaintiff's position had made it necessary for him to have contact with the mainly German customers, then the case would have been easy to decide. Similarly, had the old board remained in office, the court could reasonably have expected it to observe the normal termination period. But where the board's way of thinking had become Nazi, the tension between the parties made cooperation between them impossible. (AG 4 AC 403/33, 19:113-14, No. 1, 16 June 1933, Frankfurt/Main.)

Even if the court's reasoning could be accepted at face value, it is difficult to see why it would have been unreasonable to expect defendant to pay plaintiff's salary for the duration of the termination period which he might spend on leave. Years later RAG would still be applying analogous reasoning in support of pension payments to Jews.

Where a pharmacists' organization threatened to boycott defendant-pharmacy if it refused to fire plaintiff-probationer, the court held that the legality of this pressure was irrelevant since the scope of the threatened damage to defendant was decisive. Here the court decided in favor of defendant because its whole existence was in jeopardy and because it was vulnerable to a social boycott by its professional peers. (AG AC 2051/33, 20:52-54, No. 2, 2 November 1933, Gelsenkirchen.)

Two months later the same court dealt with a similar case in which however the defendant-employer was "of the Jewish race." From March until October 1933 his livestock business was closed on account of accu-
sations by the public. After the government permitted him to reopen his business, both defendant and plaintiff (who was a member of the right-wing paramilitary organization Stahlhelm) were badly beaten by defendant's competitors. At this point defendant decided to close his business and informed plaintiff that their employment relation was dissolved. Plaintiff sued for four months' salary. Whereas verbal pressure had been sufficient in the previous case to justify immediate discharge, here physical attack disabling defendant for six weeks merely induced the court to take judicial notice of the fact that the present State was strong enough to be in a position to guarantee a business's existence in the face of violence by individuals. If under these circumstances defendant voluntarily chose to discontinue his business, he could not shift the consequences onto plaintiff. (AG AC 2189/33, 20:54-56, No. 3, 19 January 1934, Gelsenkirchen.) Can the court's logic have turned on anything except Schadenfreude?

In a case involving parties who were both orthodox Jews, defendant-employer dissolved the apprenticeship contract as a result of a Nazi-organized boycott of his store. Although special circumstances marked the case inasmuch as the new owner of the store was a non-Jew for whom plaintiff would and could not work, the court decided on more general grounds that defendant could not reasonably be expected to remain in unprofitable business merely for plaintiff's sake. (AG 105/34, 21:215-18, No. 21, 14 June 1934, Würzburg.)

In connection with mass dismissals at a department store, the labor court in Gelsenkirchen held, six weeks before the Nuremberg laws were promulgated, that dismissing a Jew before Germans corresponded to "the German people's justified will to preserve itself and to the principle of today's State." (AG Ca 339/35, 25:51-53, No. 2, 31 July 1935, Gelsenkirchen.)

Thus the trial courts decided all cases against Jewish plaintiff-employees. Although they did not stoop to the vituperations character-
istic of the lower court opinions on Communists, they based their decisions much more straight-forwardly on a direct integration of Nazi ideology into the general clauses than did RAG's decisions, which still revealed the tensions between formalism and politics.

Appeals Courts

Plaintiff in the first case was a supervisor in a branch of a department store. Discharged without notice in April 1933, he sued for his salary through September. Defendant-employer justified its action on the grounds that it had been able to ward off a destructive boycott only by agreeing with the central boycott office to fire all Jewish employees above a certain level. (In addition, defendant claimed that all Jewish board directors had retired, although it is not clear whether the firm was considered "Jewish.") It could, moreover, not afford to grant paid leave to all the discharged Jewish employees for the duration of their termination periods.

The court, affirming the (unreported decision of the) trial court, held that a contracting party could renounce a contract without any notice only if observing the terms of the contract would constitute, as it were, sabotage of the national revolution. The mere fact of having to suffer certain unpleasantnesses and financial disadvantages would not suffice to justify such a discharge. LAG then proceeded to analyze in great detail how neither the official statements of the government, nor BBG nor even the actual agreement with the central boycott office required the harsh action taken by defendant. The court also rejected defendant's reliance on demands made by NSBO during the revolutionary mood of April 1933. But then in the first of what would become a series of successful moves by the labor courts to use Nazi ideology in favor of Jewish (and other) plaintiffs, LAG noted that permitting the discharges would contradict the principle of the national revolution that special interests must yield to general interests. For the department stores were originally enabled to expand by destroying many independent existences without regard to the public welfare. The Nazi policy of limiting such businesses could not be furthered by allowing them to shift the burden of providing for their discharged employees on to the State in the form of

44 See LAG 6.II 65/34, 22:16-18, No. 4, 17 September 1934, Frankfurt/Main; LAG 6 II S 110/33, 19:207, No. 49, 27 November 1933, Frankfurt/Main, 2nd Dept.
unemployment and welfare payments. (LAG X i S. 77/33, 19:3-10, No. 1, 25 July 1933, Dortmund.)

In several other cases LAG adhered to the view that defendant-employer was obligated to oppose efforts by third parties – including the SA – to cause it to discharge Jewish employees without notice where neither statute nor Nazi Weltanschauung-inspired general clauses required such a result. (LAG 3 S 75/33 II, 19:126-29, No. 29, 28 September 1933, Bielefeld; RAG 6 a S 151/33, 19:211-14, No. 50, 20 November 1933, Düsseldorf.) One court went so far as to state that an employer who was in the SA reserve could question an order of the SA to discharge a Jewish employee without notice. In chiding the trial court for having held that courts were not competent to examine the authority of such an order, it relied on the government’s repeated efforts to thwart uncoordinated interference by local organizations in the private economy. Finally, the court virtually taunted defendant by pointing out that he had signed the apprenticeship contract with plaintiff at a time (October 1932) when one had to reckon with an eventual Nazi take-over. (LAG 1/34, 20:88-92, No. 23, 23 February 1934, Darmstadt.)

A Berlin court was confronted with a municipally employed nurse who had been discharged in accordance with the normal termination period because she had refused to dissolve her engagement of four years to a Jewish doctor. She was suing for the sum of money that was contractually secured to an employee of her seniority who was not responsible for her dismissal. Although the court conceded that plaintiff had violated her racial duties as a Volks-comrade, nevertheless her loyalty to her fiance was also an attribute the German people were constrained to admire. The fact that equitable considerations controlled the interpretation of the contractual provision meant that her inability to resolve the conflict between her duties could not be construed as her fault within the meaning of the provision. (LAG 101. S. 46/34, 20:143-46, No. 36, 19 February 1934, Berlin, 1st Dept.)

All LAG decisions in 1933 and 1934 favored the Jewish plaintiffs.45 No LAG cases involving Jews were reported between May 1934 and March 1935. Then, for the first time, a Jewish employee, who had been dismissed with the required period of notice, sued on the grounds that her dismissal was void as contra bonos mores (§ 138 BGB). Defendant dismissed plaintiff because the county leadership of the Nazi party had, in

45 See also LAG 104 S 474/34, 21:39-94, No. 12, 31 May 1934, Berlin, 2nd Dept. Again the text refers only to LAG decisions published in ARS.
a threatening letter, informed it that its members would no longer do business with defendant if plaintiff were not dismissed. Formulating the concept of *bonos mores* in terms of Nazi ideology, the court concluded that German *Volk-* comrades would not find it unconscionable that a Christian firm fired its only Jewish employee in order to employ an unemployed Christian *Volk-* comrade in this very highly paid position. (LAG 6 S. 133/34, 24:26-29, No. 5, 5 March 1935, Frankfurt/Main.)

Shortly before the enactment of the Nuremberg laws a court upheld the discharge of a doctor by a hospital on the grounds that he had concealed his racial background. Expressing disbelief that plaintiff had not known that his mother was Jewish, the court propounded the view that since the advance of the Nazi movement (i.e., at the latest, 1925) the race question had attained such importance that it was unthinkable that in 1933 a university graduate had still not accounted for his descent. (LAG 15 Sa 32/35, 25:205-207, No. 44, 5 August 1935, Breslau.) Finally, four days before the race laws were enacted, an appeals court upheld the dismissal of a Jewish employee on the grounds that it had become unacceptable for a female non-aryan to look after aryan children in a kindergarten. (LAG 4 a T 12/34, 25:200-205, No. 43, 11 September 1935, Krefeld-Uerdingen. This was a court order and not an opinion.)

To summarize: during 1934 and 1935 LAG decisions reflected the spirit and strategy of contemporaneous RAG decisions; the decisions from 1935—a year in which RAG handed down no decisions concerning Jews—succumbed to the increasing hostility to Jews that culminated at the Nuremberg party congress.47

B. Phase 2: The Nuremberg Laws (September 1935-November 1938)

As the initial waves of dismissals receded into the past, the focus of the reported litigation turned toward the longer-term ramifications of the earlier dismissals, in particular pensions.

The first such case, decided in mid-1936, involved a musician who was a permanent employee of a municipal orchestra. In consideration of the fact that he had been a member of the orchestra since 1910 he was not
dismissed under BBG; but in 1934 he was deprived of his German citizenship (he had emigrated from Russia in 1904 and had been naturalized in 1927⁴⁸), and the following year he was dismissed with notice and prohibited from exercising his profession. He then sued for a pension that exceeded the contractually guaranteed minimum level. LAG held in plaintiff's favor because it would have constituted a breach against good faith had defendant excluded plaintiff alone among all permanent employees from this higher pension. Although RAG conceded that § 315 BGB required defendant to determine the level of the pension in accordance with equitable discretion, it remanded the case because LAG had not taken into consideration that defendant had had an important cause for discharging plaintiff with notice. (RAG 65/36, 27:236-41, No. 46, 20 June 1936.)

On remand LAG granted plaintiff his pension, which defendant then refused to pay. In the ensuing litigation, which once again reached RAG the following year, plaintiff was successful at all levels. RAG held that although defendant was a body incorporated under public law (Körperschaft des öffentlichen Rechts), the employment relation belonged to the sphere of private law. Hence judicial review of the instant discretionary determination was not restricted to the administrative standard of pure arbitrariness, but rather was open-ended with respect to the requirement of equity. (RAG 95/37, 32:28-34, No. 4, 13 October 1937.)⁴⁹

The next case involved a Jewish travelling salesman employed by a firm that had been_aryanized in 1934 and some of the owners of which were members of the Nazi party. Plaintiff gave notice after defendant had proposed reducing his compensation; during the notice period – after the enactment of the Nuremberg laws – defendant discharged plaintiff without notice because he had refused to agree to limit his circle of customers to “Jewish” firms and to work on a commission basis only. Plaintiff was successful – in one measure or another – at all levels in his claim for compensation for the duration of the notice period. Although RAG conceded that most aryran firms no longer received Jewish salesmen, it noted that this had been true even earlier in 1935 when

⁴⁸ Gesetz über den Widerruf von Einbürgerungen und der Anerkennung der deutschen Staatsangehörigkeit, 14 July 1933, RGBI I, 980, provided that persons who had been naturalized during the Weimar Republic could be deprived of their German citizenship if they were undesirable. On judicially sanctioned anti-Semitism in Weimar, see Ilse Staff, Justiz im Dritten Reich (F., 1964), pp. 17-28.
⁴⁹ The commentator, Hueck, proposed shifting the grounds of the decision from § 315 BGB to § 2 AOG; see RAG 32:33.
defendant tried to renegotiate plaintiff's contract. By not having made use of the opportunity to discharge plaintiff then, defendant had forfeited the right to use this important cause later. RAG rejected defendant's claim that the Jewish question had taken a new turn in September 1935 on two grounds: first, procedurally, defendant could not make a submission to RAG that it could have made but omitted to make in the lower courts; and second, on empirical grounds the court stated that defendant had been obligated to investigate the viability of plaintiff's activity on its behalf long before September. (RAG 71/36, 28:121-26, No. 27, 27 June 1936.)

The court's reasoning here reflects a determined attempt not to bifurcate its precedential tradition in terms of procedure and substance along Nazi racist lines. RAG was restricted to reviewing LAG's decision solely with respect to legal errors and was constrained to accept LAG's factual findings; it had no discretion with regard to admitting new submissions. That it not only attributed no controlling authority to the Nuremberg laws but in effect rubbed defendant's nose in the dirt for not having been perspicacious enough to have seen which way the wind was blowing may indicate that the court intended to compel employers to comply with every letter of the law in their efforts to use anti-Semitism as an important cause.

RAG's first opportunity to interpret the Nuremberg laws was presented a year after their enactment. A collective bargaining agreement from the year 1929 provided that permanent employees with ten years' seniority who were discharged could be deprived of their pensions if they were not German nationals (nicht die deutsche Reichsangehörigkeit besitzen). The lower courts held against the Jewish plaintiff on the grounds that by virtue of the Nuremberg laws he was no longer a Reichsbürger. RAG held that the distinction between Reichsbürger and Staatsangehöriger (German national) had not only not existed in 1929, but that the distinction would have made no sense since the purpose of the provision was to remit non-Germans to their own governments for a remedy. In the case of German Jews such a distinction would be meaningless in 1935 especially since neither BBG nor the Nuremberg laws prohibited granting Jews pensions. (RAG 141/36, 28:134-37, No. 29, 7 October 1936.)

When defendant discharged plaintiff again the following year, plaintiff was again successful in having the discharge declared null and void.

50 § 529 para. 2 ZPO; §§ 67, 73 ArbGG.
After LAG had held that BBG did not apply because plaintiff had fought at the front, and that the Nuremberg laws did not apply because he was not a tenured civil servant within the meaning of those laws (LAG 6 a Sa 143/36, 29:138-43, No. 35, 25 January 1937, Düsseldorf), RAG held that the latter did not preclude recourse to the courts in connection with litigation arising from wage disputes resulting from discharges. Whereas under BBG the exclusion of judicial review was justified because decisions of political expediency were at issue, the decisions contested under the Nuremberg laws derived from a certain fact pattern subject to a statutory norm. (RAG 66/37, 30:153-57, No. 31, 2 June 1937.)

Plaintiff in a case that was to occupy RAG twice was a permanent municipal employee who had fought at the front. He was litigating the validity of his dismissal without notice, which would have deprived him of pre- and post-retirement age compensation. After LAG had ruled that it was reasonable to expect defendant to observe the termination period requirements (LAG 27 Sa 51/36 27:170-74, No. 35, 6 August 1936, Cologne), RAG remanded the case because LAG had not taken into consideration defendant's allegation that plaintiff's continued employment had caused unrest among the public (both courts agreed that plaintiff's colleagues were willing to work with him). (RAG 187/36, 29:214-18, No. 40, 6 February 1937.) On remand LAG (in an unreported decision referred to by RAG) ruled again in plaintiff's favor. The uniqueness of the event alleged by defendant, plaintiff's long and loyal service and the uncommonly severe consequences of the discharge without notice induced the court to reject the event as an important cause. According to RAG these factual determinations were not subject to review by it on points of law. (RAG 122/37, 32:129-36, No. 18, 10 October 1937.)

Plaintiff, who had fought at the front, was an employee in an accounting office of a municipal works enterprise. His employment contract provided that he could be dismissed only for an important cause and with six months' notice. Defendant, who had once before unsuccessfully tried to dismiss plaintiff, now made use of this clause with plaintiff's Jewishness as the cause. Plaintiff sued for a determination that the dismissal was void or, in the alternative, for his salary or his pension. Both lower courts ruled in favor of defendant. RAG's opinion is noteworthy for a number of reasons. First, it is RAG's first opinion that adopts an anti-Semitic style above and beyond the call of duty. It emphasized the obligation of local governments to propagate Nazi ideas. Whereas earlier the court had very strictly applied the standing rules concerning forfeiture of the right to dismiss on the grounds of an important cause if the
employer allowed too much time to elapse, here it expressly pointed to
the popular diffusion of Nazi racial views in 1935 as justification for the
delayed use of the cause. Thus RAG affirmed the ruling with regard to
the dismissal and compensation.

But then it turned about and faulted LAG for assuming that plaintiff
also had no right to a pension. Rather, it accepted plaintiff's argument
that the contractual provision securing plaintiff a pension, if for rea-
sons of physical or mental infirmity he was no longer able to work, was
applicable to the fact pattern at hand to the extent that a circumstance
that the parties could not foresee had arisen for which plaintiff did not
bear responsibility. It remanded with instructions to determine whether
defendant had denied the pension – to which plaintiff to be sure had no
entitlement but which the courts could nevertheless confer on him –
arbitrarily in contravention of good faith and bonos mores. (RAG
295/36, 29:290-98, No. 54, 20 March 1937.)

Stylistically this opinion represents one turning point in a series that
RAG was to generate. But the fact that it not only applied, but had to go
out of its way to reach for, equitable considerations places it in line with
earlier decisions that conceded the principle to the Nazis but sought
some justice in the individual case.

It is puzzling that Fraenkel singled out this relatively late and heavy-
handed opinion as proof of the claim that the courts had capitulated to
the political authorities. For judicial capitulation in fact occurred as
soon as the court injected Nazi anti-Semitic content into the interpreta-
tion of a general clause or accepted as a standard of Rechtsstaatlichkeit
any positive law discriminating against Jews. That is to say, the court
capitulated from its very first opinion dealing with Jews.

The fact that the lower courts were quick to interpret the Nuremberg
laws expansively, thus paving the way for the statutory escalation of
anti-Semitism, whereas RAG fought a series of (hopeless) formalistic
and/or equitable rearguard battles to contain the ramifications of such
exceptional laws, is crucial to understanding the peculiar tensions
inhering in the decisions. Not only was Nazi adjudication as a whole not
monolithic, as Fraenkel's notion of the Dual State demonstrates, but
even the Normative State itself was internally contradictory.

52 In fairness to Fraenkel it should be noted that, since he quoted this opinion from a
legal journal, which did not reproduce it in full, he may have been unaware of the
resolution of the pension issue. See 66 JW 2310 (1937). Franz Neumann, Behemoth (2nd
A case displaying the use of formalism and the implicit refusal to apply equity in support of anti-Semitism was presented by a plaintiff – again a World War I front veteran – whose employment relation was terminated by a municipal orchestra after he had been denied admission to the *Reichsmusikkammer*. The court rejected plaintiff’s claim that BBG protected him from precisely this sort of action. The relevant provision protected him only from dismissals based on his non-aryan status, whereas here his dismissal was based on non-admission to the *Reichsmusikkammer*, which may have been based on his Jewishness but need not have been. Plaintiff’s non-admission did not bring about his compulsory retirement but merely the impossibility of performance. (RAG 222/36, 29:298-303, No. 55, 6 February 1937.)

It is important to observe that this decision, which in its disembodied formalism is the equal of any American case of the pre-realist period, constituted the first unmitigated defeat of a Jewish plaintiff-employee in almost four years of litigation at the highest level.

Several months later the court showed itself equally willing to place its rigid formalism at the disposal of a Jewish plaintiff. The latter was a travelling salesman who responded to defendant’s advertisement regarding a line of coats he wanted someone to sell. The parties agreed on contractual conditions and plaintiff began taking orders as an independent agent. In the meantime DAF informed defendant that plaintiff was Jewish; consequently, defendant terminated the contract and returned the orders to plaintiff without compensating him. Plaintiff, who did not contest the dissolution of the contract itself, sued only for the commissions outstanding. Defendant alleged that plaintiff’s failure to inform him of his Jewishness had made the contract void *ab ovo*.

All three courts found in favor of plaintiff. RAG refused to create a general rule that every Jewish job applicant was *per se* obligated to inform the employer of his ancestry. And it accepted the lower court’s factual determinations that in this case plaintiff had no way of knowing that defendant was unwilling to contract with Jews. Moreover, it interpreted defendant’s own submission – to the effect that employers in Ger-

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53 The grounds were impossibility of performance - § 323 BGB.
54 § 3 para. 2 of the Second Implementing Decree, RGI 1933, I, 233.
55 Reichskulturkammergesetz, 22 September 1933, RGI I, 661; Erste VO zur Durchführung ... 1 November 1933, RGI I, 797. § 10 provided for denying admission to those lacking reliability or fitness.
56 A year later such a regulation was promulgated as applied to Germans aiding Jews; see n. 20 above.
many were obligated to hire Germans before Jews – to mean that Jews could operate on the assumption that they could be hired. On formal, procedural and statute of limitations grounds it also rejected defendant’s claims with regard to wilful deceit and mistake as to plaintiff’s person. (RAG 60/37, 30:103-109, No. 19, 9 June 1937.)

During this second phase the court had occasion to deal with several non-Jewish plaintiffs who had been discharged on account of their dealings with Jews. In the first such case plaintiff was a member of the SA and the Nazi party (having joined before 1933) who, after having been expelled from those organizations, was then dismissed without notice from his position as a permanent municipal employee because he had shopped in a “Jewish” department store. After the lower courts had found for plaintiff, RAG agreed that expulsion in itself did not constitute an important cause, but held that patronizing “Jewish” stores could justify immediate dismissal as a violation of official duties. Perhaps in recognition of the tragi-comic circumstance that plaintiff, who had at one time been unemployed and in financial straits, had found it necessary to buy from a “Jewish” store because it was the only one that would sell on an instalment plan, RAG remanded with instructions to determine whether plaintiff should have revealed his indebtedness to his employer in light of plaintiff’s fear that, had he merely stopped paying the store, the latter would have had his salary garnished. (RAG 156/37, 31:125-37, No. 22, 22 September 1937.)

In the case of a non-tenured professor of international economics who was dismissed without notice because as administrator of his institute’s library he had authorized the acquisition (in part from his own personal library) of “Jewish books,” the court upheld the lower court’s ruling that such conduct did not justify dismissal. (RAG 200/37, 32:19-28, No. 3, 8 January 1938.) In the last of this trio of cases, plaintiff administered an estate for the city of Berlin. Before accepting this position he had borrowed money from a Jewish cattle merchant with whom he then dealt in cattle as estate administrator. Fired without notice on account of these dealings, he lost his suit in trial court but was vindicated by the appeals court. In the course of the first suit defendant caused an article to

57 The court also attributed little significance to the claim that plaintiff should have informed defendant that he had been convicted in 1933 of propagating lies against the Nazis. The relevant provisions are §§ 119-124, 142 BGB.

58 When this case came up again, RAG approved of LAG’s having disregarded plaintiff’s employer’s allegations concerning his pro-Jewish sentiments; see RAG 19/41, 43:66-82, No. 12, 19 September 1941.
Enemies of the regime

appear in the *Völkischer Beobachter* portraying plaintiff as having committed the acts for which he was discharged. In a separate suit for damages and retraction the lower courts found in favor of plaintiff, whereupon RAG set aside the judgment and remanded for further findings. But in what must be viewed *inter alia* as an oblique critique of the editorial policies of the Party newspaper, RAG held that even where the requirements for damages are not met, an obligation to retract may still arise if the charges against plaintiff are subsequently adjudged unfounded and the employer is thus found not to have acted in pursuit of his justified interests. (RAG 188/37, 33:144-54, No. 26, 9 February 1938.)

In none of these cases did the court succumb without reservation to official and unofficial anti-Semitism. Indeed, in two of the cases it not only failed to make use, but actually ruled in the teeth, of unmistakable 'hints' from the Nazi party and the SA that an anryan had betrayed his race. And although the court never unambiguously ruled in favor of the defendant-public employer in any of these three cases, in a fourth case, involving a Jewish private employer, it did do so. There the defendant-employer voluntarily established an old-age pension fund for his travelling salesmen in order to encourage their continued employment. Those who left his employ before reaching the age of sixty-five forfeited all claims unless employment ceased as a result of sickness, accident or old-age infirmity. Plaintiff quit after four years because it was unreasonable to expect him to work for a "Jewish" firm since his earnings were declining as a result of customers' disinclination to patronize such a firm. His argument that his reason for leaving should be equated with those expressly provided for was rejected by all courts. Accepting *ad* plaintiffs allegation that defendant's contribution - which financed the entire fund - in effect constituted a deduction from commissions, which were below-average for the branch, and conceding that such a procedure did not accord with Nazi notions of plant management, and that defendant had acted self-interestedly, RAG nevertheless held that plaintiff was not entitled to higher commissions especially since he had never complained while employed. (RAG 61/38, 34:91-98, No. 16, 21 September 1938.)

59 Neither the headnote nor the opinion mentions that defendant was Jewish - only the statement of facts does. The rather lengthy squib in Hermann Meissinger, *Die Rechtsprechung des Reichsarbeitsgerichts 1927-1945* (Stuttgart, 1958), vol. 1, pp. 126-27, also omits mention of this fact.
What is remarkable about this opinion is that the court had available to it the precedent it had established a year and a half earlier—on behalf of the Jewish plaintiff whom Fraenkel adduced as proof that Jews could not expect legal protection from courts—concerning the equitable standards by which to interpret pension provisions under circumstances that could not have been foreseen by the parties. If these two cases can be distinguished on the grounds that in the former the employer may have arbitrarily excluded certain employees whereas the Jewish employer may have consistently applied his provisions to all employees, then the court's reasoning reveals that on the eve of the total aryanization of the economy RAG was still firmly resisting the racist bifurcation of labor law, which might have been difficult to contain neatly without undermining entrepreneurial authority.\textsuperscript{60}

The court also overturned a lower court decision in favor of a defendant-employer who had denied a widow her pension both because she was Jewish and because the promise made to her husband was voluntary and constituted a non-binding gift lacking the requisite legal form. RAG rejected all these claims. (RAG 172/37, 32:191-99, No. 28, 5 January 1938.)\textsuperscript{61}

In the second and last case of this phase in which a Jewish plaintiff-employee was entirely unsuccessful in his suit, RAG held that the First and Second Decrees pursuant to the Nuremberg Reichsbürger Law were unambiguously designed to disadvantage tenured Jewish supervisory doctors in public hospitals vis-a-vis non-tenured doctors with respect to pension entitlements.\textsuperscript{62} Since the will of the legislator was clear, there was no need to question its motives and no room to apply equitable considerations in mitigation of special hardship. (RAG 226/37, 33:3-7, No. 1, 23 March 1938.)

As this last case indicates, where the Nazis clearly singled out Jews in certain positions for special treatment, the court retreated to its positivist approach. To say this, however, is not necessarily to agree with the court that these particular statutory provisions were incapable of a more expansive interpretation. Generally, however, the opinions of this phase are difficult to reduce to a common denominator. Formalism, positivism and equity appear to be applied or not without any discernible

\textsuperscript{60} Hueck's commentary—namely, that plaintiff's claim had to be rejected because current law made the entrepreneur's expressed will controlling with regard to pension promises—confirms this view; RAG 34:97.

\textsuperscript{61} Two years later plaintiff's pension rights were once again under attack; RAG 38:285.

\textsuperscript{62} §§ 4 and 6 respectively.
pattern, although again the overriding impression is that of a somewhat good samaritan in hell.

The Lower Courts

The reported lower court decisions of greatest interest during this phase deal with representation by Jewish lawyers. But in several cases involving dismissals the appeals courts engaged in path-breaking judicial legislation such as RAG had not done in the area of anti-Semitism. Thus one court justified the sacking of two Jewish employees – rather than any two non-Jews – in connection with a general reduction of employment at a firm as being in the interest of both parties: gradually non-aryan workers should migrate to “non-aryan” plants from which the aryan workers could be removed. (LAG 9 Sa 126/37, 32:152-53, No. 33, 11 December 1937, Gleiwitz.)

Another court, conceding that plaintiff, who was a technical laboratory assistant at a university, was right in arguing that the Nuremberg laws did not preclude the continued employment of non-aryans in non-tenured positions in the public sector, held that no statutory regulation was required. Public employers, as models for the private sector, had of necessity to be conducted in accordance with Nazi principles. (LAG 15 a Sa 62/36, 28:64-67, No. 17, 24 July 1936, Breslau.)

In order to understand the cases pertaining to Jewish lawyers, it is necessary to summarize the statutory changes that the courts were interpreting in them. The new version of the Labor Court Law, which the labor and justice ministries issued in 1934, provided that only officials and employees of DAF were authorized to represent parties before trial courts as well as attorneys authorized by DAF in individual cases.

The following year this provision was modified by the addition of a clause to the effect that if representation of a party by DAF was out of the question, the chairman of a trial court could admit an attorney or other suitable person to represent the party. The minister of labor subsequently issued guidelines interpreting this new provision. According to them, representation by DAF was out of the question if the party was not a member of DAF or if DAF declined to represent him. If such a situation arose, the chairman of the trial court decided whether in the

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63 Cf. LAG Sa 22/37, 30:228-31, No. 42, 30 June 1937, Chemnitz.
64 § 11 para. 1 ArbGG, 10 April 1934, RGB1 I, 319.
65 Gesetz zur Abänderung des Arbeitsgerichtsgesetzes, 20 March 1935, RGB1 I, 386.
individual case admission of a legal representative was necessary and, if so, what kind of representation was appropriate.66

The significance of this issue of representation was rooted in the fact that Jews were excluded from membership in DAF.67 Focusing on the lower court cases is necessary because before RAG was presented with or seized the opportunity to reconcile the conflicting decisions, Jewish lawyers were disbarred.

At the outset the appeals courts ruled that the decision of the trial court chairman was unreviewable. (LAG Ta 17/35, 25:87-88, No. 23, 17 September 1935, Nuremberg-Fürth; LAG l5 Ta 17/35, 25:85-86, No. 22, 24 October 1935, Magdeburg.) Then one court ruled that the chairman was not authorized to examine the person of the representative, which was to remain in the discretion of the party (LAG 19 Ta 2/36, 26:76-79, No. 12, 22 January 1936, Hanover); another court held that although the view of a lower court that a German-blooded bar was necessary in order to discover purely German law was noteworthy, it did not correspond to the will of the legislator. (LAG Ta 3/36, 26:70-74, No. 10, 12 February 1936, Essen.)68 Still another court justified the admission of a Jewish attorney to represent a Jewish defendant on the grounds that, since aryan attorneys either could not (if they were Nazi party members) or should not represent Jews, if plaintiff was represented, then not only would the principle of equal weapons be violated, but the Jewish defendant would be deprived of his rights – a result not intended by the legislature. (LAG 19 Ta 16/37, 31:9-13, No. 2, 20 August 1937, Hamburg.) As late as 1938 a court sanctioned the representation of a Jewish client by an aryan lawyer on the grounds that no one had yet proposed conceding to Jewish lawyers a monopoly with regard to Jewish clients. (LAG l5a Ta 37/37, 32:98-107, No. 22, 15 January 1938, Breslau.) Finally the last reported appellate court case on this point held that the chairman of a trial court


67 According to "Jüdische Arbeitnehmer und Arbeitsfront," C.V.-Zeitung, vol. 12 n. 45, p. 3 (23 November 1933), it had been officially stated that DAF would found a special organization for Jewish employees (which would not be a part of DAF), but nothing was undertaken toward this end.

68 For an example of the stereotypical Nazi ideological cliches used by the chairman of a trial court in rejecting a Jewish lawyer, see AG 5 Eb 169/36, 28:229-31, No. 1, 1 August 1936, Magdeburg. Volkmar, the most consistent and explicit Nazi among the commentators, who criticized virtually all the LAG decisions favoring Jewish counsel, praised this opinion for finally having put his views into practice.
could in principle not admit a Jewish lawyer to represent even a Jewish party. (LAG Ta 6/38, 33:105-109, No. 24, 21 April 1938, Kassel.)

To the extent that these reported decisions are representative, their major characteristics appear to be a desire to preserve at least the trappings of fairness associated with individualistic notions of advocacy within an adversarial system. Achieving this outcome was facilitated by the state of the positive law. Ultimately the legislator spared the courts the embarrassment of having to acquiesce in mandatory pro se appearances by Jewish parties by denying the latter access to the labor courts altogether.

C. Phase 3: The Decree pertaining to the Elimination of Jews from German Economic Life (November 1938-September 1941)

The evolution of adjudication during this period differs from that of the earlier phases in an interesting structural way. The apparently trendless flow of cases is punctuated on several occasions by the declaration of new fundamental principles that unambiguously constitute turning points on the road to the Final Solution. But these landmark decisions do not arise out of a traditional body of legal reasoning; indeed, the court at times no longer seeks to clothe the sovereign's commands in judicial language. Yet, strangely enough, these precedential ruptures seemingly exhaust themselves, to be followed by new decisions that belong to an earlier period. But then contradictions could not fail to abound in the interim between Kristallnacht and the firing of the crematoria in a court that itself was confused as to whether it was conducting judicial business as usual or engaging in a charade.

The language and tone of the first case reveal that the situation had become exacerbated. In another case involving a musician who was ultimately denied a pension because he had not been admitted to the Reichsmusikkammer – because he had married a Jewish woman – the court was no longer content to let its formalism run amok. Rather, it added that it would hardly be consistent with Nazi legal thinking if defendant were compelled to pay plaintiff (who was relatively young) a lifelong pension solely because he had married a Jew. (RAG 159/38, 35:161-65, No. 34, 1 March 1939.) Yet the same day the court ruled in favor of the estate of a Jewish merchant and against his (apparently

69 Cf. RAG 291/38, 37:29-34, No. 5, 26 July 1939.
non-Jewish) female domestic employee. The issue in the case was whether independent grounds for the bequest could be established if the testament itself proved null and void. The court held that an oral remark that he would include her in his will need not be interpreted as having created a contract with her to provide a pension. (RAG 176/38, 35:173-79, No. 37, 1 March 1939.) In light of the partial taboo which the Nuremberg laws had imposed on the employment of non-Jewish women in Jewish families, the court's refusal to introduce the notion of special Jewish estate property is noteworthy. It is also possible that the decision served as general deterrence vis-a-vis German women who continued to work in Jewish households. In another case the court partially upheld the authority of a Jewish managing director despite an explicit attempt by plaintiff to draw the court into his anti-Semitic campaign. Plaintiff, who had worked for defendant for thirty-five years, was dismissed without notice because his wife had written anonymous letters to Hitler, DAF, the plant-leader and others in which she attacked the managing director. Although affirming the lower court's grant of salary for the duration of the notice period, the court rejected plaintiff's appeal for one year's salary. It noted that aryan members of the plant had also been insulted and that no matter how justified plaintiff’s wife's struggle against Jewry was, her methods had to be disapproved of. (RAG 190/38, 36:49-54, No. 11, 19 April 1939.)

By the summer of 1939 the valiant anti-Semitic wife was vindicated by the first turning point in the court's adjudications during this phase. In connection with a suit by three Jewish apprentices against the new owner of an aryanized plant who had terminated their contracts shortly after having acquired the plant in late 1937, the court enunciated a new principle: the successful societal assertion of the notion of race meant that Nazi racial views rather than economic harm (to the plant) constituted the most important factor in determining whether an important cause for terminating a contract without notice was available in the context of unforeseen/unforeseeable circumstances.70 (RAG 198/38, 36:392-97, No. 70, 5 July 1939.)

Although RAG derived its authority for this new principle from the new situation created for the economy by the Nuremberg laws and the

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70 Despite the fact that defendant had alleged that he would be denied military orders if he retained Jewish apprentices, the lower court ruled that his civilian business was prosperous enough to preclude discharging them on these grounds alone. RAG merely remanded with instructions to re-decide the case on the basis of the new principle.
Kristallnacht decrees, no plausibility attaches to the attempt to read this outcome out of the positive law. In this instance RAG, by virtue of reading prevailing Nazi ideology into a general clause, empowered itself to achieve by common law a result which the legislator had not yet ventured to mandate by positive law.

And yet the structure of this interstitial judicial intervention does not differ fundamentally from that used by the Warren court in the 1960s to reach radically different substantive outcomes by means of fourteenth amendment due process and equal protection reasoning. Indeed, even Learned Hand at times did not recoil from the self-imposed task of taking the moral pulse of the country in order to interpret statutory terms.71 In terms of Hand’s desideratum of a national Gallup poll, who is to say that RAG was not in a position to capture the moral spirit of its time more accurately and at the risk of using less arbitrary discretion in the process than judges in societies without State-mandated moral standards? It is perhaps a sign of the residual force of pre-Nazi notions of natural law that the Jewish apprentices case only inconsistently formulated a principle which one of its subsequent American counterparts – Brown v. Board of Education – asserted completely, albeit with its values reversed.

Shortly after this case was decided the first case under the decree eliminating Jews from the economy reached the court. Specifically reserving the question as to whether § 2 of that decree could be interpreted to relieve an employer of the obligation to pay a pension to a former employee, the court held that where defendant in the course of aryanization had merely contractually agreed with the former Jewish owner to pay a pension to a Jewish employee (with an aryan wife and children) whom he himself refused to continue to employ and to whom he otherwise had no relation, the decree provided defendant no relief. (RAG 44/39, 36:397-401, No. 71, 22 July 1939.)

In the first case decided after World War II began, the court refused to tolerate violations of certain procedures imposed on partners by corporation law even in the context of an aryanization contest in which the Nazi party and the State police had intervened. After one Jewish partner had fled the country and had been convicted in absentia of foreign exchange crimes, unrest in the plant and town caused the State police to forbid the managing director, who was the Jewish uncle of the afore-

71 Repouille v. United States, 165 F.2d 152, 153 (2nd Cir. 1947).
mentioned partner, and plaintiff, who was a Jewish employee, to enter the premises or remain in town. The remaining, non-Jewish, partner, then dismissed plaintiff without notice and without having observed the legal procedures required to create a quorum. The court rejected defendant's submission that his actions had been justified on the basis of a "supra-legal emergency."\(^{72}\)

Since the dismissal itself was void, the court found it unnecessary to decide whether its new principle, enunciated two months earlier, was applicable. But this did not secure plaintiff his salary for the remaining six months of the contractual notice period. First, the court held that §§ 323-326 BGB, which deal with impossibility in contracts, were not applicable to the contractual relation between entrepreneur and Follower as it was in connection with the exchange of goods. In particular, equity and social sentiments played a part in the personal relation within a plant-community that was lacking between ordinary debtors and creditors. Moreover, although the payment of wages as a rule presupposed the performance of labor, the fact that wages constituted the basis of the Follower's and his family's existence could lead to requiring an entrepreneur, in accordance with his duties of welfare and loyalty, to continue paying wages even where the Follower performed no work. But in view of the fact that plaintiff had been employed in the plant-community only eighteen months, that he had had an unusually long notice period, and that although he was Jewish the Jewish character of the company had become merely formal, the court found it unreasonable to require defendant to pay plaintiff's salary until the end of the year. On the other hand, defendant would be violating his duties of loyalty and welfare if he dismissed plaintiff with no notice at all. The court thus hit upon the provisions of § 66 of the Commercial Code, the statutory minimum (six weeks' notice to the end of the calendar quarter), as presumably the just solution. (RAG 8/39, 37:230-45, No. 16, 13 September 1939.)

The structure of this opinion is remarkable. On the one hand it upheld the unity of corporation law whereas the appeals court had accepted defendant's argument concerning the alleged supra-legal emergency. On the other hand, LAG found in favor of plaintiff because the original defendant (i.e., the partially "Jewish" company) had been responsible for plaintiff's inability to perform his part of the employment contract (§ 324 BGB). RAG, consistent with its precedents oriented toward replacing

\(^{72}\) Hueck was gratified that it was possible, even in difficult situations, to find a reasonable solution; RAG 37:241.
code provisions that formally applied to all contracts by standards that realistically applied to the special relations inherent in the offer, acceptance, performance and compensation of labor, substituted equitable general clauses for the code. Yet the equity it applied favored the employer in spite of the fact that historically the struggle against the Civil Code provisions had focused on the fact that they systematically disadvantaged the employee because they did not take into consideration the latter's structurally determined dependence.73

Stranger still is that the outcome was not affected by RAG's abandonment of the Civil Code. For the case turned on the fact that the court imputed co-responsibility for impossibility of performance to plaintiff because he was Jewish. Given this interpretation,74 RAG could just as easily have reapportioned the gains and losses on the basis of the Civil Code.75

On 9 January 1940 the court reached a second turning point. Plaintiff, who had worked for defendant since before the turn of the century and had become its deputy director with a very high income, had asked to retire in 1935. His pension amounted to RM 6,000 p.a. of which RM 4,000 were characterized as revocable. In the wake of the decree eliminating Jews from the economy, defendant ceased all pension payments. The trial court held in favor of defendant, whereas LAG granted plaintiff only the non-revocable portion of his pension. RAG rejected the appeals of both parties. Although, the court held, that decree applied only to Jewish executives who were still active in the enterprise at the time the decree was issued, RAG no longer adhered to the view that race laws as exceptional laws had to be interpreted literally.76 Rather, they were orders (or systems) created by the leadership of the State in order to put into practice points four and five of the Nazi party program, which bore the character of constitutional principles directed toward segregating Jews and Germans. On the other hand, the decree was not designed to serve to punish Jews in general. In this context the subsequent revocation of a pension would subserve the aims of the decree; since the enter-

73 See ch. 4.
74 Since LAG's determination that defendant and not plaintiff was responsible for the impossibility was a factual one, which RAG was bound to accept, it is unclear why RAG felt free to reapportion responsibility especially since LAG's legal error did not affect this issue.
75 Hueck, RAG 37:242-43, also advanced this view. It is instructive to observe how Hueck manages to write five pages of technical commentary without mentioning that the case concretely turned on anti-Semitism.
76 See RAG 28:136.
prise was already "de-Jewed," revocation would merely benefit the private economic interests of the aryranized firm without benefiting the German people's interests. The Volk-consciousness, oriented as it was toward the Nazi Weltanschauung, would judge in the concrete the extent to which legislator had not drawn the conclusion that the events leading to Kristallnacht justified encroaching on those obligations. In the instant case defendant could revoke the revocable part of the pension if its action was not arbitrary and an urgent reason to do so was available. The court found such a reason in the relation between an aryan enterprise and Jews, which was more serious than economic reasons, which might also have sufficed. (RAG 207/39, 38:262-81, No. 52, 9 January 1940.)

Thus in one fell swoop the court transformed the Nazi party program into a constitution - a step that the legislator himself had not found expedient to take - and arrogated to itself the authority to determine whether Jews' pension rights were tolerable. RAG did not elaborate on the causal links between legislative enactments and Volk-consciousness; but the logic of its argument seemed to imply that the former could lag behind the latter, for otherwise the court would not, absent positive law, have had a reliable source to draw upon to guide its Solomonic decisions to split the difference (more or less) down the middle.77

A month later78 RAG implicitly clarified the positions it had set forth on 9 January. Plaintiff was a female office manager who had worked for defendant armaments plant since 1902. She was dismissed with notice in 1933 and granted a pension which defendant expressly characterized as not carrying an entitlement. After defendant reduced the amount of the pension plaintiff sued, pleading that she should not be treated different-

77 See, e.g., RAG 209/39, 38:285-90, No. 54, handed down the same day; RAG 186/39, 38:281-84, No. 53, also decided that day, held that the decree eliminating Jews from the economy also applied to foreign nationals. In the fourth case decided that day, the court again applied its 'on the one hand, on the other hand' approach when it remanded a pension case with instructions to take into consideration: on the one hand that Nazi legal sentiment could not permit the continuation of excessive payments to Jews in order to induce them to leave their positions; and on the other, to what extent the pension payments were reflected in a lower purchase price paid for the firm in the course of aryranization. RAG 261/39, 39:25-37, No. 4. On the connections between statutes and consciousness, see Franz Neumann, "The Governance of the Rule of Law" (Diss., London, 1936), p. 576.

78 In the interim the court upheld the discharge without notice of an executive whose wife had shopped in a Jewish department store (RAG 109/39, 38:226-37, No. 47, 23 January 1940), and ordered payment of commissions to a (non-Jewish?) employee of a Jewish-owned business who, after Kristallnacht, could no longer maintain her route (RAG 152/39, 38:214-17, No. 43, 31 January 1940).
ly than other employees. The lower court accepted defendant’s sub-
mission that Germans and Jews could not be treated equally even if this
meant, in the case at bar, countenancing reduction of plaintiff’s pension
to the level granted hourly workers.

RAG set the judgment aside and remanded. It underscored that,
absent special statutes to the contrary, “the Jew still participates in gen-
eral legal intercourse [der Jude . . . noch am allgemeinen Rechtsverkehre
teilnimmt].” On the one hand, plaintiff’s Jewishness could not be disre-
garded, but on the other hand it in itself did not justify, but merely con-
stituted the prerequisite for, reducing a pension. Although a Jew could
not be afforded preferential treatment, she also had no absolute right to
equal treatment, but only to an “adequate” pension. Having thus created
general clauses within general clauses, the court then remanded to LAG
to strike a balance. (RAG 254/39, 38:252-62, No. 51, 7 February 1940.)
When LAG failed at this task, RAG returned to the case the following
year.

In the interim, however, the court handed down a much more porten-
tous decision. The circumstances that gave rise to it must be briefly out-
lined. Between 1934 and 1939 the government established a number of
legal holidays. As of 1934 the first of May became the national holiday of
the German people; in 1937 New Year’s day, Easter and Whit-Monday
and Christmas and Boxing Day became paid holidays; the same appli-
ced to Hitler’s fiftieth birthday in 1939. During this period a number of
Jewish workers filed suit for payment of their wages for these holidays.
The lower courts did not respond to this litigation uniformly. Two illus-
trations from the appellate courts may suffice. A Jewish worker was
successful in his suit as to Hitler’s birthday and 1 May 1939 in the trial
court; the latter held that since the legislature had expressly reserved to
itself regulation of the Jewish question, and since exceptional rules were
not available, the court was not authorized to interpret the laws expan-
sively. The appeals court disagreed. It bottomed its decision on the claim
that, since Jewish hourly wage workers were a new phenomenon, the

79 Cf. RAG 211/39, 38:290-98, No. 55, 7 February 1940.
80 Gesetz über die Lohnzahlung am nationalen Feiertag des deutschen Volkes, 26 April
1934, RGBl I, 337. See in general Gesetz über die Feiertage, 27 February 1934, RGBI I, 129.
81 AO zur Durchführung des Vierjahresplanes über die Lohnzahlung an Feiertagen, 3
December 1937, RAB I, 320. These holidays were named after Göring, who was the general
deputy for the four year plan.
82 Gesetz über einmalige Sonderfeiertage, 17 April 1939, RGBl I, 763; VO zum Gesetz . . . ,
17 April 1939, RGBl I, 764.
83 The court did not explain what his workplace, “special camp O,” was.
legislature had not considered them at all in formulating these laws. Because the purpose of these holidays was political rather than economic, and because the Jewish worker could take no part in this political aspect, the law did not apply to him. (LAG S a 13/39, 36:126-28, No. 32, 4 August 1939, Koblenz.)

After World War II began, an appeals court in Berlin, affirming the decision of the trial court, held that a Jewish demolition worker was eligible to receive holiday pay for the two aforementioned days and Whit-Monday as well. Whereas the first appeals court had chosen to read Nazi ideology back into the law, this court equated the legislator’s silence with its intention not to make distinctions on racial or other grounds. (LAG 101 Sa 425/39, 37:98-101, No. 19, 13 November 1939, Berlin.)

Despite the fundamental importance of the issue, the court, in view of war-time conditions, did not permit an appeal to RAG. (Ibid. at 100.) Mansfeld, Ministerialdirektor in the ministry of labor in charge of labor law, did not share this view. (Seeking to draw an analogy to Weimar, Mansfeld based his desire to exclude Jewish workers on revenge.84) Perhaps as a result of this cue, two other cases went up on appeal to RAG.

The irony of RAG’s decision lies in the fact that whereas Mansfeld had been of the opinion that the religious holiday, being without political importance, could be judged differently, RAG used it as a vehicle for transforming Jewish workers into quasi-labor outlaws. Since the implementing decree regulating holiday pay for Whit-Monday referred to members of the Following (Gefolgschaftsangehörige), the court excluded Jews from the pay provision by excluding them from the Following. The language it used, however, and the import of this holding make it implausible that nothing more was at stake here than saving an employer RM 6.60.

The community relation with its relation of leader and Follower, which underlay AOG, corresponded to a Germanic idea (Anschauung). The Jew, by virtue of his racial predisposition to promoting personal interests and attaining economic advantages, wrote the court in its longest italicized passage during the Nazi years, remained alien to this

84 According to Mansfeld, just as the non-socialist worker who had been willing to work on May Day during Weimar went without wages because others wanted to celebrate, so now the Jew could not complain if the celebrating community excluded him; LAG 37:100-101. Roland Freisler, “Ein arbeitsrechtlicher Einzelfall als Prüfstein der Frage: Wie weit ist unser Rechtsdenken heute geläutert?” 5 (N.S.) Deutsches Gemein- und Wirtschaftsrecht 265-72 (1940).
community. As a necessary consequence, neither AOG nor other recent labor regulations applied, without more, to Jewish workers. (RAG 77/40 and 86/40, 39:383-91, No. 67, 24 July 1940.) That for six years Jews were considered Followers the court explained as a result of the fact that it had not been immediately clear that they by virtue of their very essence could not be integrated into the plant-community. (Ibid. at 386.)

But the court was still confronted with the problem of how to apply the labor laws to Jews "accordingly" so long as no special labor code had been created for them. In this instance it ruled that where the Nazi State deviated from its principle of paying wages only for labor actually performed, only German workers were benefited. (Ibid. at 386-88.)

Lest readers of the opinion wondered whether the court was retreating from its landmark decision of 9 January 1940, RAG reiterated the talismanic refrain concerning the Jew's continued participation in general civil law intercourse, but added that the manner of that participation depended on the substance of existing statutory provisions and, in case of controversy, was subject to judicial action. (Ibid. at 391.)

In his commentary Mansfeld, who a year earlier had speculated as to whether the use of Jewish labor should not be governed by special regulations (LAG 37:101), praised the opinion for having established the status of Jews in the sphere of labor law until special legislation was forthcoming (RAG 39:391).

If after this crucial decision some can still argue that legal positivism was the primary means by which the judiciary was instrumentalized for Nazi ends, the fourth and final decisional turning point renders that position untenable. This case, which was decided in January 1941, arose in the latter half of 1939 when a segregated group of 160 Jews were assigned to construction work. Plaintiff, who was one of eleven non-local residents in this crew, was discharged in the middle of a work day; he subsequently sued for full wages for that day and three additional days, as provided for in the Tarifordnung for the construction industry. Defendant refused on the grounds that the Jews' employment relation was governed not by private law, but by public law in connection with the political and welfare-oriented goals of the employment office. The trial court, assuming that public law applied, held for defendant; the

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85 For a pre-Nazi exposition of the view that Jews have historically functioned as capitalistic foreign bodies in organic communities, see Werner Sombart, Die Juden und das Wirtschaftsleben (Munich, 1920 [1911]).
86 See ch. I § III.
appeals court, assuming that private law applied, held for plaintiff. The
appeal court recognized that public law applied to the local residents,
but denied its application to the non-local residents because the latter
had not been entrusted to the care of the local employment office. Since
defendant-municipality conceded that it had not intended to employ out-
of-town Jews in a public law-obligatory employment relation – this was
allegedly a reason for discharging them – and yet knew on the basis of
plaintiff’s work papers from the outset that he was not a local resident,
plaintiff could have been hired only within the framework of an ordi-
nary private law employment relation.

In its appeal defendant submitted that for reasons of state security
the employment of the entire group had to be viewed as a unitary mea-
sure from which plaintiff could not be excepted. RAG, accepting the ref-
erence to state security – segregation and supervision of Jewish workers
- was reluctant to characterize the measure simply as an exercise of
public law welfare. Unable however to locate a statutory warrant for
this measure, the court abandoned any attempt at judicial reasoning; it
simply spoke of a “special case . . . which in view of its element of State
and racial politics must follow its own legal rules, which, if necessary,
must be inferred from the law in the making [dem werdenden Recht].”
(RAG 142/40, 41:252-59 at 256, No. 34, 28 January 1941.)

This case unambiguously marks the collapse of the distinction
between the Normative State and the Prerogative State in labor law.
The court openly announced its capitulation to the paramount racist
concerns of the State. Professing its inability to derive a statutory basis
for State action that would not involve the court in legally unacceptable
contradictions, RAG, having literally left the Final Solution to the State,
sanctioned it.87

This view need not necessarily be modified by the court’s decision
several months later in connection with the female employee whose pen-
sion rights case it had remanded to LAG. For although it rebuked the
appeal court for having violated its statutory duty88 to take as a basis
for its decision the binding principles enunciated by RAG in setting
aside LAG’s earlier decision; and although its opinion is replete with
sympathetic references to the plight of plaintiff and similarly situated

87 Bernd Rüthers, Die unbegrenzte Auslegung (Tübingen, 1968), p. 171, misleadingly
characterizes the court’s decision in this case as “consistent.” For the contemporaneous
capitulation in the United States, see Korematsu v. United States, 323 U.S. 214(1944); but
see the strong dissent by Jackson, J., ibid. at 242-48.
88 § 565 para. 2 ZPO.
Jews – the decisive factor appears to have been a communication to RAG from the minister of labor, six days before the decision was handed down, contradicting the lower court’s undifferentiatedly negative approach to the pension rights of Jews already in retirement. (RAG 197/40, 42:75-84, No. 12, 22 April 1941.)

But in September 1941, literally days before Jews were removed from the court’s jurisdiction, in its final decision involving a Jewish party, RAG undertook to restore, at least partially, a principled distinction between the Normative State and the Prerogative State. The fact that the court nevertheless managed to achieve an anti-Semitic result based on other anti-Semitic tenets doubtless facilitated its reintroduction of a modified version of ‘classical’ Nazi pseudo-Rechtsstaatlichkeit.

Plaintiff was the trustee in bankruptcy of the assets of the Jewish owner of a pub that had been wrecked during Kristallnacht and could not be reopened. The issue in the case was the kind of termination notice period owed defendant-employees. What is of interest in this context is that the court rejected the view of the trial court – the case had come up on expedited appeal – that the Jewish bankrupt was co-responsible for all attacks by Jews on Germanity within the meaning of § 276 BGB, which makes the debtor accountable for intent and negligence. Although it agreed that in accordance with the Nazi Weltanschauung every Jew was politically co-responsible for all attacks by his racial comrades on German Volkstum, a private law responsibility could not be inferred from these facts without more. Indeed, since the bankrupt had personally contributed nothing to precipitating the attack on his pub, the BGB provision was irrelevant. Moreover, the fact that he personally had undertaken nothing in opposition to the anti-German tendencies of Jewry also constituted no basis for making him accountable in terms of private law obligations.

Having re-separated private and political law, the court was then free to interpret its doctrine of plant-risk anti-Semitically. Thus, although it had recently held that Followers might be obligated to forego a wage claim if asserting it would jeopardize the continued existence of the plant, this rule did not apply as between a Jewish entrepreneur and arian Followers, who would not be permitted to suffer the consequences

89 According to Adam, Judenpolitik, pp. 270-73, the ministerial bureaucracy resisted efforts in 1940 to eliminate or reduce the pensions of Jewish civil servants.
90 RAG 49/41, 43:45-52, No. 7, 18 August 1941, was a pension case similar to RAG 38:262.
91 RAG 104/40, 41:43-54, No. 8, 26 November 1940.
flowing from the struggle of Germanity against Jewry. (RAG 81/41, 43:167-76, No. 23, 16 September 1941.)

Explanations of why the court chose to retrace its steps back towards a shrunken Normative State for Jews would be speculative. It is possible that RAG, aware of the impending withdrawal of its jurisdiction over Jews, wished to go on record restoring the unity and autonomy of private tort, contract and property law. It is also possible that it was motivated by the fact that since Jews as of 1 January 1939 were prohibited from being plant-leaders, such cases could no longer arise. Alternatively, this decision can be interpreted as consistent with a line of cases involving Jewish employers that tended to assimilate their rights and prerogatives to those of employers in general more strictly than was the case with regard to Jewish employees.

Regardless of the judicial or extra-judicial origins of the court’s reasoning, it is noteworthy that judges, who for the past two years had piecemeal yet methodically anticipated the legislator’s expedited administrative measures by shaping the common law of the Final Solution, retired from their chosen trade without availing themselves of the opportunity to transform the core of private law into a vehicle for the politically sanctioned plundering of the property of Jews.92 Yet, even having stopped short of the complete formal identification of law and politics or rather the complete absorption of law by politics, they secured what they knew to be the desired political outcomes by incorporating still another layer of anti-Semitism into the already rich catalog of available equitable interpretations of AOG.93

III. Conclusions

This review and analysis of the Jewish labor cases still leaves unanswered a crucial set of questions: What was really at stake? Why did the Nazi leadership permit these socio-economic and political conflicts to continue to crystallize into judicially cognizable legal issues long after it had revealed to the world that it was in the process of resolving the Jewish question “administratively”? And finally: How did

92 Fraenkel, *Doppelstaat*, pp. 124-25, argues that this step had been taken in general in private law by 1938.
93 Ingeborg Maus, *Bürgerliche Rechtstheorie und Fa schismus* (Munich, 1976), pp. 135-36, is correct in attributing to AOG the character of a general clause, but she overlooks the labor courts’ role in interpreting it.
the methods of reasoning, principles and outcomes of these cases affect the court's adjudication in general?

Even within the framework of the already shrunken subject-matter jurisdiction of the labor courts, the Jewish cases represent a very limited and skewed selection of the universe of justiciable issues. The overwhelming majority relate to discharges and, especially, pensions. Among the former, which predominated in the earliest period, the claim was not for reinstatement but merely for salary for the duration of the relevant notice period. Whether Jewish employees viewed reinstatement litigation as hopeless, or whether such suits were not entertained by the courts, or perhaps were merely never reported, is unknown. In the course of time pension claims came to the fore. In their atypicality these cases mirror the progressive destruction of the economic basis of existence of German Jews, who were being ousted from their old positions or from the work force altogether. The cases thus constitute the legal response to State-imposed marginalization and planned obsolescence.

Especially for older Jews who were unable to find other employment or whose accumulated wealth was insufficient to sustain them through old age, successful resolution of their private pension claims may have seemed at the time to be the paramount problem of their lives. Regardless of whether Nazi leaders knew that German employers would not long be burdened with such payments, two points are clear: 1. as compared to the aryanization of productive, profit-generating business assets owned by German Jews, the curtailment or elimination of Jewish employees' (vested) pension rights, for which German employers had

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94 See the unsubstantiated claim by Frieda Wunderlich, *German Labor Courts* (Chapel Hill, 1946), pp. 169-70.
95 The age and occupational distribution of the Jewish population remaining in Germany in 1939 underscored the importance of old-age pensions. In May of that year 28,977 of 138,819 male *Volljuden* were sixty-five years of age or older (20.9%); 39,101 were returned as living on their capital ("*Vom eigenen Vermögen lebende Rentner*") and an additional 45,449 as small pensioners or living on disability pensions. Only 24,546 male *Volljuden* were counted as being in the workforce ("*Erwerbspersonen*`). Among women, 41,374 of 191,720 *Volljudinnen* were sixty-five or older (21.6%); 68,534 were listed as living on capital or pensions. Only 17,481 were returned as in the workforce. See *SDR*, vol. 552,4: *Die Juden*, pp. 56, 74. For an overview of the socio-economic conditions of Jews during Weimar, see Arthur Ruppin, *Soziologie der Juden* (2 vols.; B., 1930-1931), passim.
97 See in general Helmut Genschel, *Die Verdrängung der Juden aus der Wirtschaft im Dritten Reich* (Göttingen, 1966).
Enemies of the regime

presumably made financial provision, was not economically significant; and 2. as a general legal issue employee pension rights did not rise to such a level of importance that employers would have been crucially benefited by the partial transfer of precedents regarding the pension rights of Jews to those of non-Jewish employees (abstracting from the fact that no such reflection back onto non-Jewish cases ever occurred).

But these macro-social links may be too undifferentiated to be fruitful for analysis. What may be relevant in this context is the fact that aryанизation of Jewish-owned businesses did not benefit German capitalists uniformly; rather, its beneficiaries were chiefly large conglomerates of capital. Moreover, the methods of aryанизation, whether 'voluntary'-contractual or coercive-administrative, did not normally require recourse to the courts. Under these circumstances smaller employers may have regarded various forms of contractual and extra-contractual harassment, exploitation and oppression of Jewish employees as a means of sharing the plunder. Since Hitler's government had regulated the treatment of pensions of Jewish public employees in greater statutory detail, leaving courts less room for creatively manipulating equitable discretion, litigation was primarily a result of action taken in the private economy. But it is obvious that the courts did not serve as a safety-valve for disgruntled small employers. Not they, but their Jewish employees brought suit after employers had acted to take advantage of what they perceived as State-encouraged helplessness of German Jews. The question then becomes: Why did the Nazi leadership subject such employer self-help to judicial scrutiny? This question, however, is only the obverse of the question: Why were the Jews not deprived of all their rights earlier?

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98 It is significant in this context that a disproportionately large percentage of the Jewish population was self-employed and hence not eligible for private pensions that would have financially burdened other employers. See the analysis of the census of 1933 by E.R-z., "Die Juden in der Wirtschaft," C.V.-Zeitung, vol. 14, no. 47 (22 November 1935), 4th Beiblatt.


100 Unfortunately the reports of the labor court cases, unlike those of the social honor courts, do not reveal the size of the employing business.

101 That Jews were not deprived of all of their rights earlier has not always been recognized. See, e.g., Jacob Robinson and Philip Friedman, Guide to Jewish History under Nazi Impact (NY, 1960), p. 229: "The Jews received no relief from anti-Jewish legislation through the interpretation and application of the laws by the courts in general and by the Reichsgericht in particular." See also The Black Book. The Nazi Crime Against the Jewish People (NY, 1946), p. 95.
To this question many answers may be given. But in this context, it is clear that until the Final Solution was prepared, a certain measure of legitimation derived from having independent judges, many of whom were appointed before the Nazis took power, apply anti-Semitic laws within a venerable tradition of neutral procedures and empty general clauses. Occasional decisions at odds with Nazi policies have recently been explained as the price the regime was forced to pay for this legitimation.\textsuperscript{102} In an alternative but less plausible version, the labor courts are seen as having relieved the executive of the task of taking unpopular measures.\textsuperscript{103} Apart from the issue of the 'popularity' of anti-Semitism,\textsuperscript{104} such an approach fails to explain how any labor court decision could have more closely approximated "the actual dirty business"\textsuperscript{105} than the Nazi statutes themselves.

Fraenkel's view, namely, that so long as Jewish businessmen remained an integral part of the capitalist system, the strict application of the methods of the Prerogative State to them would have created dislocations in the normal economy, appears to form a more promising starting point for an explanatory framework. In particular, Fraenkel's thesis that the courts served to protect the economy from shocks emanating from actions of the Prerogative State even if Jewish employers were occasionally also protected as an inevitable (but unintended) by-product,\textsuperscript{106} fits somewhat plausibly into the foregoing interpretation of RAG cases involving Jewish employers. Its validity with regard to Jewish employees, however, is considerably more doubtful.


\textsuperscript{103} Bertram Michel, "Die Entwicklung der Arbeitsgerichtbarkeit in den [sic] Faschismus," Das Recht des Unrechtsstaates, ed. Udo Reifner (F., 1981), p. 170. Inattentive to the deeper immanent contradictions of RAG adjudication, and failing to distinguish between RAG and the lower courts, Michel sees the court only in its role as judicial legislator, anticipating the next wave of statutory anti-Semitism.

\textsuperscript{104} According to a report by the security service (SD) of the SS dated 25 April 1941 and entitled, "Die Juden im Rechtverkehr," many judges did not understand why German courts still had to entertain suits involving plaintiffs and defendants both of whom were Jewish and represented by Jewish consultants. See Meldungen aus dem Reich, ed. Heinz Boberach (Neuwied, 1965), p. 139. It was also reported that the uncertain legal status of the debts of Jews owed to non-Jews was being compared by the population with the favorable treatment which courts accorded Jewish employees of formerly Jewish-owned businesses who sued the aryan successor-firms for the continued payment of their pensions; the population believed that such claims were denied only in isolated cases and in opposition to the adjudication of the Supreme Court. Ibid., pp. 140-41. Cf. ibid., p. 141 n. 2, on popular criticism of a trial court that upheld a Jew's claim to a vacation.

\textsuperscript{105} Michel, "Entwicklung," p. 170.

The disruptions that were feared in the case of employers were not, at least in the first instance, subjective, psychological, political or ideological ones acting directly on German businessmen, but rather 'objective' interference with the distribution and profitability of capital. No analogous apprehensions applied to labor; that is to say, the problem did not lie in the possibility that failure to contain the application of new judicial principles to Jewish workers would, for example, lead to dysfunctional re-allocations or outright withdrawal of German workers from the economy. Rather, the only relevant fear on the part of the ruling strata would have related to the impact of the breakdown of categorization on German workers politically. Yet this causal link, which Tushnet has analyzed with regard to slaves, slaveowners and non-slaveowning whites in ante-bellum America,\textsuperscript{107} loses its force in the Nazi class structure. For not only were Nazi foreign-military goals absolutely dependant on gaining at least the passive acceptance of the working class,\textsuperscript{108} but anti-Semitism functioned precisely to secure that alliance among workers, capitalists, armed forces and Nazi party leaders.\textsuperscript{109}

The labor court decisions as a whole refute the thesis that anti-Semitic legal principles ever "infected"\textsuperscript{110} cases involving non-Jewish employees. The political problem in the ante-bellum South may have consisted in the possibility of subordinating non-slaveowning whites to common law principles worked out in reference to black slaves. But in Nazi Germany the political problem consisted in not permitting judicial interpretations that benefited non-Jewish workers to redound to the benefit of Jewish workers. This difference derives from the fundamentally different constituent organizing principles of the two societies: a slave society by definition could not permit racist ideology to lead to the "final solution" of the slave question; not being structurally dependant on Jewish labor,\textsuperscript{111} Nazi leaders could allow themselves the ideological luxury, as it were, of such a policy.\textsuperscript{112} And what is even more important in this con-

\textsuperscript{107} Tushnet, \textit{American Law of Slavery}, p. 38.
\textsuperscript{108} Timothy Mason, \textit{Sozialpolitik im Dritten Reich} (Opladen, 1977).
\textsuperscript{110} Tushnet, \textit{American Law of Slavery}, p. 44.
\textsuperscript{111} On the subsequent use of Jewish workers, see Benjamin Ferencz, \textit{Less than Slaves} (Cambridge, Mass., 1979).
\textsuperscript{112} The annihilation of the Jews took to its logical conclusion Carl Schmitt’s thesis that politics was the relation of friend to foe, whereby the latter was any person who in the last analysis had to be physically exterminated. See Carl Schmitt, \textit{Der Begriff des Politischen} ([West] B., 1963 [1932; first published in 58 \textit{AfSwSp} 1-33 (1927)]).
text: as a public-totalitarian, capitalist society, Nazi Germany could enforce anti-Semitism statutorily, administratively and judicially. Slave society in ante-bellum America, however, as a private-totalitarian, slave-capitalist society would have undermined its own socio-economic and political prerequisites had it undertaken to engage in similar actions.113

But if the Jewish labor court cases generate any jurisprudential interest at all, it is that the Nazis never succeeded in preventing the categories of general labor law adjudication from finding some applicability to Jewish workers. The fact that through 1939 not merely an occasional Jew, but the majority of Jews were successful in their suits before RAG114 cannot, to be sure, be credibly viewed as the primary factor motivating the Nazis to abolish labor court jurisdiction over Jewish employees. For the transformation of the court's adjudication in 1940 and 1941 held out the certain prospect of a vast reduction in the 'price' the Nazis would have to pay for retaining the division of labor between the judiciary and the SS. Rather, consignment of the fate of the Jews to the Prerogative State root and branch was dictated by the planned expulsion of the Jews from civil society altogether.115

Yet the fact that the establishment of a special Jewish labor code was accompanied by the withdrawal of Jews from the jurisdiction of the ordinary labor courts was not coincidental. For retention of jurisdiction would have led to one of two dysfunctional alternative approaches: either the court would have been occasionally compelled by the logic of precedent to continue categorizing Jewish employees together with non-Jewish employees, thus leading to occasional plaintiff victories (which would have become unacceptable on the eve of the implementation of the Final Solution when anti-Semitism had become unyieldingly rigid); or the court would have self-consciously accommodated that rigidity by systematically proclaiming its capitulation to politics and openly abandoning any pretense of judicial reasoning, as it had begun to do in 1940 and 1941. But then the judge would no longer have possessed the func-

114 This pattern as well as that in many other areas of RAG's adjudication shows that the Nazi Normative State did not serve only capital-functional norms as is claimed by Bernhard Blanke, "Der deutsche Faschismus als Doppelstaat," 8 KJ 221-43 at 226 (1975).
115 On the stereotypical treatment meted out to Jews by other courts, see Hans Robinsohn, Justiz als politische Verfolgung: Die Rechtsprechung in "Rassenschandefällen" beim Landgericht Hamburg 1936-1943 (Stuttgart, 1977); Diemut Majer, "Fremdvolkische* im Dritten Reich (Boppard, 1981).
tions of a judge: "He has become a mere bailiff, a mere policeman." At that point the courts would have lost their reason for being. It was precisely such a predicament that led a leading Nazi professor of constitutional law to express the fear that abandoning the distinction between judicial and administrative functions meant "cold Bolshevisation, and then we no longer need to rack our brains about the distinction between National Socialism and Bolshevism in this area." At that point the courts would have lost their reason for being. It was precisely such a predicament that led a leading Nazi professor of constitutional law to express the fear that abandoning the distinction between judicial and administrative functions meant "cold Bolshevisation, and then we no longer need to rack our brains about the distinction between National Socialism and Bolshevism in this area."

Once Jews were forbidden to be employers or even to conduct independent businesses, class distinctions collapsed in favor of the overriding racial distinction between aryhan employers and employees on the one side and Jews on the other. Consequently, the system "based on a dual policy of 'prerogative' constables and 'normative' judges, on a law-exempted police for the various assortments of rogues and on a calculable rule of law for the law-abiding citizen and corporation of substantial means" ceased, as applied to Jews, to serve any economic or political purpose for capital or the Nazis. The time for adjudication had passed. Special codification and "administration" became the order of the day.

119 Raul Hilberg, The Destruction of the European Jews (Chicago, 1967 [1961]), offers a broad view of the administration of the Final Solution; see ibid., pp. 292-96, on the subsequent role of the judiciary. For an overview of the steps leading to the "special treatment" of Jewish workers, see Hans Kipper, "Die vorläufige arbeitsrechtliche Behandlung der Juden," RABI, V, 106-10 (1941). Some of the ministerial correspondence relating to the planning of this "special treatment" during the period from 11 September 1939 to 9 January 1941 may be consulted in document NG-1143, Office of Chief of Counsel for War Crimes, U.S. Army (mimeograph on file at the Harvard Law School library).