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The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

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Part II

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

Chapter 3

The Plant-Community

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

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

3 Neumann, Behemoth, p. 191.
Reconceptualization

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

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

I. The Plant-Community and Master-Servant Law

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

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

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6 It was commonplace for German labor law scholars to claim that the Germanic roots of German labor law were more closely related to the English law of master and servant than to the Roman law roots of modern labor law. See, e.g., Erich Molitor, *Der Arbeitsvertrag und der Entwurf eines Allgemeinen Arbeitsvertrags-Gesetzes* (Mannheim, 1925), p. 7. But see H. Dankwardt, "Der Arbeitsvertrag," 14 *JDhrudP* 228-83 (1875).


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

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

The highest courts in Weimar (and in the Federal Republic of Germany¹¹) accepted, developed and based some of their decisions on versions of the plant-community. What is of interest here is not so much that their vision of the substance of that community was not identical with the Nazi view, but rather that the plant-community itself did not occupy the same dominant position, capable of shaping virtually all other relations. In this sense, then, the substance of the personal labor relationship was not univocally tied to that of the plant-community in the pre-Nazi and post-Nazi period. For the Nazis, however, the plant-community constituted the absolute bedrock of labor relations in more or less the same way as scarcity does within orthodox economics. It transformed the content of the personal labor relationship, which did not stand in a similarly active relation to it.

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

¹⁰ See, e.g., Roswitha Schmidt, "Die Betriebsgemeinschaft" (Diss., Munich, 1936).
Reconceptualization

plant-community, anchored in statute, 'logically' anteceded the personal labor relationship in the following sense: it was only under the influence (or pressure) of the doctrine of the plant-community, as developed in juristic literature, that RAG eventually incorporated the personal labor relationship into its formerly contractualist conception of the labor relationship. Under this set of historically contingent circumstances it is appropriate to treat the plant-community before the personal labor relationship.

II. The Plant-Community before the Nazis

A. Political Ideology

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

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

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13 G.W.F. Hegel, Rechtsphilosophie, §§ 230, 250-56.
14 See Heinrich Herrfahrdt, Das Problem der berufsständischen Vertretung (Stuttgart, 1921); Ralph Bowen, German Theories of the Corporative State (NY, 1947); Charles Maier, Recasting Bourgeois Europe (Princeton, 1975).
Reconceptualization

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

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

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

\(^{16}\) Cited according to the reprint of the final edition (Darmstadt, 1963), pp. 8-39.
\(^{17}\) See \textit{ibid.}, p. 61; cf. \textit{ibid.}, pp. 40-83.
\(^{18}\) See Karl Polanyi, \textit{The Great Transformation} (Boston, 1971 [1944]).
\(^{19}\) See the cautious concessions by Johannes Gerhardt, \textit{Deutsche Arbeits- und Sozialpolitik} (B., 1939), pp. 50-60. The more typical dogmatic work is represented by Gerhard Hachtman, "Die Wandlungen des industriellen Arbeitsverhältnisses" (Diss., Halle, 1936). Cf. Anton Riedler, \textit{Politische Arbeitslehre} (B., 1937).
reduction of the labor relationship to market confrontation between buyer and seller would make the world ripe for socialism.\textsuperscript{20}

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

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

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


\textsuperscript{21} See Karl Marx, \textit{Das Kapital}, I (1st ed.; H., 1867 [reprint]), xi.

\textsuperscript{22} Ehrenberg, “Das Arbeitsverhältnis,” pp. 192-93.

\textsuperscript{23} \textit{Ibid.}, pp. 177-78.

\textsuperscript{24} \textit{Ibid.}, pp. 201-202.
United States. The revolutionary overthrow of the old regime, the ascendency of the SPD, the emergence of a German bolshevik party, and the creation of the Weimar system with its statutorily mandated institutionalization of worker participation in micro- and macro-economic organization and its openness to socialization, all contributed to undermining the authority of capital on the macro-economic level and management on the micro-economic level.

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

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

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27 On Bang, see the entry in 1 Neue Deutsche Biographie ([West] B., 1953). Bang, who was a Staatssekretär in the ministry of economics at the outset of Hitler’s regime, initiated the first anti-Jewish legislation in March 1933. See Raul Hilberg, The Destruction of the European Jews (Chicago, 1967 [1961]), n. 5 at pp. 19-20; Uwe Adam, Judenpolitik im Dritten Reich (Düsseldorf, 1979 [1972]), pp. 44-45.
lective bargaining to plant-level agreements,30 the possibility of creating "a modern patriarchalism" inspired both wings.31 Within the new constellation of societal forces created after 1918 the communitarian movement represented an approach that could be adopted by capitalists, who were no longer "master" of their own plants, to retain their positions as "leader."32 Indeed, the plant-community was regarded as having a good chance of succeeding within the limits set by the Plant Council Statute – provided that the entrepreneur was by nature a social leader and that his employees were not "communistically infected."33

This latter aspect assumed general significance in connection with efforts to transcend the level of the merely rational and to create feelings of attachment and obligation that emanated from other strata of the soul.34 For Marxism, as a substitute for a religious faith, could not be demonstrated away by logic, but only experienced away by another, coherent world view that would grip and re-orient workers.35 In language that anticipated virtually the entire gamut of Nazi themes, a participant in a symposium on The Social Problems of the Plant (1925) apparently believed that he had discovered the kinds of appeals that would resonate in the souls of workers. After having pointed to various feelings of community that would unite the chairman of the board and unskilled labor (such as feelings of humanity, consciousness of Volk-community, communality of religion, locality, prejudices, cooperation, etc.) as potentially of equal value, he declared that the chairman of the board and the unskilled laborer were also precisely that – chairman of the board and unskilled laborer. The business of the one was to give orders and that of the other to obey.36

Regardless of whether this apology for the old regime was too crude and transparent to serve its supposed propagandistic purposes, other promoters of the movement were content to rest their case on much

33 Ibid., p. 273.
34 Gerhardt, Deutsche Sozialpolitik, p. 68.
36 Ibid., p. 267.
more modest grounds. For many the plant, which "as the life source of the individual, rebels against everything unorganic, unnatural of an economic revolution," became a kind of "emergency community" to which employer and employees could cling in chaotic times.\(^3^7\) In a related vein, the plant-community could generate the feelings of connectedness that could overcome the senselessness of the division of labor, which together with the feeling of being exploited, had made Marxism the religion of millions.\(^3^8\)

**B. Statutory Law**

The evolution of the notion of a plant-community under the Nazis would be incomprehensible if its statutory basis and adjudicatory application in Weimar were neglected.\(^3^9\) The Weimar constitution itself provided for the establishment of plant councils (art. 165). In them employees could attend to their social and economic interests; but employees, now that they were endowed with equal rights, were bound to regulate their wages and working conditions in association with employers. This statutory obligation of concerted action was not unique. During World War I Kaiser Wilhelm II was signatory to a law requiring that war-related plants with more than fifty employees establish worker committees; they were subject to a duty to promote harmony (*gutes Einvernehmen*) among the workers and between the workers and the employer.\(^4^0\)

The communitarian undercurrent in the Plant Council Statute itself was more pronounced still.\(^4^1\) In its first section it assigned a two-fold purpose to the plant councils: representation of the common economic interests of the employees vis-a-vis the employer and "support of the employer in the fulfillment of the purposes of the plant." Chief among the plant council’s tasks (§ 66 BRG) was to support management with its


\(^{3^9}\) This oversight mars Mason, "Entstehung.

\(^{4^0}\) §§ 10-11 G. über den vaterländischen Hilfsdienst, 5 December 1916, RGBI p. 1333. For a still more remote precursor, see the amendments to the § 134 GewO: Gesetz, betreffend Abänderung der Gewerbeordnung, 1 June 1891, RGBI p. 261.

\(^{4^1}\) BRG, 4 February 1920, RGBI p. 147.
advice in order to provide for as high a level as possible of plant output to be produced with the greatest possible economization. In language that virtually reproduced the aforementioned wartime act, § 66 para. 6 required the plant council to espouse concord between employees and employer.

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

Given the socialist orientation of significant segments of the German labor movement and the principled openness of the constitution to socialization, it is manifest that the cooperation between labor and capital at the plant level mandated by BRG laid the basis for a self-contradictory political movement. Nowhere is this ambivalence more vividly on display than in the work of Hugo Sinzheimer, who was the author of art. 165, one of the founders of the new discipline of labor law during Weimar and a leading spokesman of the trade unions and the Majority SPD. Although responsible for the incorporation of certain Marxist insights into German labor law literature, he also took the ambiguity of the constitution and BRG very seriously. Thus in the course of the debates in the Constitutional National Assembly in 1919, Sinzheimer spoke of an antagonism and a community between labor and capital; the latter he saw grounded in the interest which employers and employees had in production. In his textbook on labor law, Sinzheimer noted that a community or joint relation was present where the performance of

45 See Sinzheimer's speech of 21 July 1919, *Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung*, vol. 328, Stenographic Reports (B., 1920), p. 1750. To be sure, Sinzheimer may have been restricting the community to national economic planning rather than locating it in the plant.
several persons was united to fulfill a community or joint purpose; both parties shared in and enjoyed the benefit of such a purpose. The result was a community of assets. But, Sinzheimer continued, such was not the case in the labor relationship. Here the performances were not united but executed for the opposite party. Consequently, the labor was due the employer and the wage the employee.46

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

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

C. Decisional Law

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

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

47 Ibid., pp. 208-209.
48 Ibid., p. 212 n. 2.
49 Ibid., pp. 218-19.
offered their services, which plaintiff refused to accept because the strikers had closed the power plant leading to the closing of streetcar operations. Plaintiff sought a declaratory judgment that defendants were not entitled to their wages for the duration of the strike. The lower courts held for defendants pursuant to § 615 BGB, which provided that an employee was entitled to his wages, without having to perform subsequently, where the employer was in default of accepting his performance.

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

Three years later, in connection with a plant closing, the Supreme Court held that within the meaning of the Plant Council Statute a plant was not the business enterprise in the external sense of the totality of machines, etc., operating, but "rather a living organism within which entrepreneur and workers close ranks to form a production-community and in common aim at the same goal" – namely, that specified in § 66
Soon after its formation RAG adopted the view of the Supreme Court. Now that the worker had become an "organic member of the plant," the extension of his rights corresponded to an extension of his obligations to include a certain responsibility for the plant. The fact that the worker had no direct share in the output or profit did not in principle affect his responsibility, but merely limited the sphere of dangers or risks to the plant for which he bore partial responsibility. (RAG 72/28, 3:116-25, No. 35, 20 June 1928.)

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

Judicial articulation of the legal import of the plant-community was subjected to intense criticism by contemporaries. Franz Neumann, for example, warned against adopting a romantic notion of community in the tradition of Tönnies. Instead, he sought to analyze the substance of this community in terms of the dependence of the employee on the means of production owned by the employer. Neumann pointed to three functions performed by property: 1. a capital function (possession of the means of production); 2. an administrative function (management of the means of production including human beings); and 3. the use and usufruct of the means of production. BRG, however, afforded employees participatory rights only with regard to the administration of the plant and here only in a limited fashion in relation to human beings. Moreover, the workers were linked to the employer in a "compulsory community" under the employer's command. Given the exclusion of employees from any entitlements to participation in property in its first and third functions, the plant-community constituted for them only a community of losses but not of profits.54

52 In this case the recognition of a plant-community favored plaintiff-employee.
53 RAG was formed from the third civil senate of the Reichsgericht, which had decided the two aforementioned cases.
54 See Neumann, Bedeutung, pp. 31-32. Cf. his even sharper criticism in Behemoth, p. 420.
Towards the end of the Weimar Republic, Otto Kahn-Freund, himself a trial court judge in a labor court in Berlin, published two global and systematic critiques of the adjudication of RAG in which he devoted considerable attention to the plant-community. For him, once it became clear that plant councils were not associated with any micro- or macro-economic tendencies toward socialization, the plant, as an impartial third party standing above and uniting employer and employees, became a fiction with a reified purpose.\(^{55}\)

By the time the Nazis came to power, statute and common law, scholarship, industrial welfare practice and perhaps reformist trade union practice as well\(^ {56}\) could all look back on a solid tradition of acceptance (and in part of active involvement in the furtherance) of the existence of a plant-community. It remains, then, to be seen how the Nazis adopted the plant-community for their own purposes.

III. The Plant-Community under the Nazis

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

\(^{55}\) Otto Kahn-Freund, "Der Funktionswandel des Arbeitsrechts," \textit{AfSwSp} 146-74 (1932); cited here according to republication in \textit{Arbeitsrecht und Politik}, ed. Thilo Ramm (Neuwied, 1966) pp. 211-46 at 239-42. Kahn-Freund argued that with the rejection of legal formalism and natural law the courts were compelled to make use of fictitious, reified purposes in order to be able to operate on the basis of general concepts of value and ethical ideas. Since the judiciary in a bourgeois Rechtstaat could not resolutely play off one social interest against another, it had to protect certain fictitious objective principles instead. The court's need to blind itself to the tensions of social classes stood, of course, in contradiction to the modified equilibrium of social classes that constituted the basis of the stand-off of Weimar collectivism. \textit{Ibid.}, pp. 224-26, 228-32, 241-42. Cf. Kahn-Freund, \textit{Das soziale Ideal des Reichsarbeitsgerichts} (Mannheim, 1931), pp. 8-48. Kahn-Freund argued that although the notion of a plant-community was in principle antagonistic to working-class interests, it was concretely used by RAG to favor employees in connection with the employer's welfare-duty. But see the undocumented opposing view advanced by Neumann, \textit{Behemoth}, p. 421.

\(^{56}\) Clemens Nörpel, a trade union jurist, commented in his review of Kahn-Freund's book that it was unfair to criticize RAG for developing a line of precedent that was in fact an accurate reflection of the peaceful practice of the trade unions. Clemens Nörpel, "Ein Sozialideal des Reichsarbeitsgerichts," \textit{Die Arbeit} 561-66 (1931).
Reconceptualization

A. The National Labor Regulation Law

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

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

58 § 69 para. 2 AOG abrogated § 152 GewO (21 June 1869), which had eliminated all prohibitions on and punishment for agreements and organizing for achieving more favorable working conditions, especially by work stoppages or discharges.
59 VO des Führers und Reichskanzlers über die Deutsche Arbeitsfront, 24 October 1934, 2 DAR 348 (1934).
61 Pace Neumann, "Ordnung," p. 164, it is not per se senseless to analyze the ideology of this law.
62 This term, which could also be translated as "vassals" or "retainers," was a conscious imitation of feudal terminology. Cf. Robert Koehl, "Feudal Aspects of National Socialism," 54 American Political Science Review 921-33 (1960).
Reconceptualization

ees, has the duty to intensify mutual confidence within the plant-community. Finally, the sections establishing a system of social honor courts (especially §§ 35-36) impose on all members of the plant-community responsibility for the conscientious fulfillment of all duties devolving on them within this community. Gross violations of these social duties are to be prosecuted before these courts. (See ch. II § VI above.) In order to evaluate the intentions that motivated this restructuring of the legal framework of capital-labor relations, it is necessary to examine the Nazi view of the plant-community before 1933.

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

Although the Supreme Court was praised by jurists after 1933 for its recognition of the legal role of the plant-community during Weimar,\(^6\) the Nazi party itself was of course suffering from no illusions concerning the presence of class struggle as an organizing principle of Weimar society. Indeed, the Nazi party's pseudo-struggle against classes and class struggle among Germans constituted a significant element of its political program.\(^6\) What is noteworthy, however, is the fact that after the Nazi takeover writers conceded, by implication, that the judicial doctrine of the plant-community could never have possibly reflected social reality adequately during Weimar; consequently, that doctrine must have functioned to impose on capital-labor relations a judicially sanctioned structure that served goals other than those appearing on the face of the decisions.\(^6\)

Thus, for example, Werner Mansfeld, under whose aegis AOG was drafted and enacted,\(^6\) in underlining the fundamental differences between the new confidence councils and the old plant councils, noted that the latter, even according to the conception of BRG, were designed to be the antagonist of the employer and in practice often became the extended arm of the unions as organizations of class struggle. In this way, the plant councils became the advocates of the employees' interests only towards the goal of establishing formal economic democracy.\(^6\)

Johannes Denecke, an appellate court judge who later served on RAG,

\(^{63}\) See, e.g., Stoll, "Die Lehre vom Betriebsrisiko und die Neuordnung des Arbeitsrechts," 2 DAR 199-205 at 203 (1934).

\(^{64}\) See Neumann, Behemoth, pp. 186-92.

\(^{65}\) Cf. Hentschel, Arbeitsrechtslehren, p. 8.


\(^{67}\) Mansfeld and Pohl, Kommentar, p. 22.
declared that if BRG was intended to create equality of status between employer and employees, then this was a dream. Brimming with Schadenfreude, Denecke asserted that the clearest demonstration of the fact that the trade unions had been lacking in the communitarian spirit based on ties of natural necessity was their failure to resist their takeover by DAF.

But perhaps the most systematic discussion of the reality-content of the plant-community during Weimar from a legal perspective took place in the context of an uncharacteristically straightforward attempt to confront the problems bequeathed the Nazis "at the end of the late-capitalist epoch." Erich Fechner traced the root problem to the opposition between the plant and the enterprise as economic entities, on the one hand, and the plant-community as a new social form on the other. Since the former were foreign to, but also necessarily the given basis of, the latter, a tension arose between reality and the demands of the statute. Fechner then listed a number of difficulties standing in the way of the realization of a plant-community in a modern plant: 1. the plant as a rational means for creating profit was not coordinated with any community; 2. the position of the individual employee within the plant was also not a communitarian one; 3. originally there was also no "common pursuit of the same goal": whereas the entrepreneur endlessly strove for profit, the worker merely sought a livelihood; 4. although the individual worker became increasingly fungible as the division of labor was refined, precisely this unskilled laborer was supposed to feel like an "indispensable link in the whole"; 5. the increasing objectification of the labor process and the pace of modern production deprived plant relationships of the warmth and intimacy that were peculiar to emotional communities such as the family; and 6. membership in a plant was normally limited in time and bore a secular character, thus lacking the timeless, eternal significance on which the most profound and enduring communities were founded.

68 [Johannes] Denecke, "Vermögensrechtliches oder personen rechtliches Arbeitsverhältnis?" 2 DAR 219-24 at 221 (1934).
70 Erich Fechner, Führertum und Unternehmertum im Gesetz zur Ordnung der nationalen Arbeit (Bonn, 1937), p. 19.
72 Fechner, Führertum, p. 20. Fechner is quoting from Mansfeld’s commentary on AOG. Cf. the coded analysis of labor relations in Nazi Germany by Fechner, "Die Wirklichkeit als Rechtsquelle im Arbeitsrecht," 102 ZfDrStw 78-100 especially at 89 (1942).
Fechner perceived that creation of a plant-community presupposed the elimination of the technological and organizational basis of alienation among employees in large technical works. Given the structure of technological progress in Nazi Germany\textsuperscript{73} and Fechner's view of the interfusion of technology and socio-economic relations, it comes as no surprise that he was sceptical about the possibilities of stemming the dehumanization of work.\textsuperscript{74} Whereas those authors who sought to treat the issues of the distribution of income and power frontally displayed none of Fechner's realism, Fechner himself tried to escape from his dilemma by seeking refuge in militarily romanticized imagery. Just as front combat, by directly threatening man's existence, tearing apart all veils and smashing all ideologies, forced man to reflect on the foundation of his existence and thus to rediscover the community, so AOG sought to transfer this kind of experience from the sphere of the uncommon into everyday life.\textsuperscript{75} Although World War II transferred front combat into everyday life, this may not have been the model envisaged by Fechner.\textsuperscript{76}

C. The Plant-Community as Ideology

Although it was admitted that antagonistic interests still obtained between entrepreneurs and employees,\textsuperscript{77} their precise nature and ramifications were not explicated. Instead, the community of interests was evoked in a hortatory manner without any explanation as to why the motives and consequences of entrepreneurial decisions and actions should have changed since Weimar\textsuperscript{78} – or tautology was invoked. Thus, for example, the head of the DAF office in fascist Italy, in contrasting the conception of the plant there with that in Nazi Germany, characterized the community among all the productively active (Schaffenden) as the "necessary consequence of the plant-community which necessarily exists between both sides." Whereas the Italian fascists affirmed the


\textsuperscript{74} Fechner, \textit{Führertum}, pp. 19-20.

\textsuperscript{75} \textit{Ibid.}, p. 16.

\textsuperscript{76} Heinz Rohde, \textit{Arbeitsrecht-Sozialrecht – Gemeinschaftsrecht} (B., 1944), pp. 90-91, adduced the SA as exemplary.

\textsuperscript{77} Mansfeld and Pohl, \textit{Kommentar}, p. 22; Hueck, \textit{Arbeitsrecht}, pp. 31-32.

\textsuperscript{78} See, e.g., Alfred Hueck, "Die Methoden für die Festsetzung der Arbeitsbedingungen im deutschen Recht." 11 \textit{Zf ausländisches und internationales Privatrecht} (Sonderheft) 412-26 at 424 (1937).
plant-community because they considered it necessary and useful, the Nazis affirmed it because all the productively active had to live and work together even if they did not want to; as a result, the German plant-community was “ultimately a fact that exists independently of our will and is grasped emotionally.” This image of the plant-community as an irrational entity to which mental access could be gained only by a quasi-mystical experience will be recurred to below.

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

80 A year after the collapse of Nazi rule Hueck was mocking the bombastic communitarian language of the legal literature. See his lecture of 6 September 1946, “Der Treugedanke im modernen Privatrecht,” Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Philosophisch-historische Klasse, 1944/46, fasc. 7 (Munich, 1947), p. 3.
81 Lersch, “Neue Rechtsgedanken im Urlaubsrecht,” 7 DAR 122-25 at 122 (1939), quotes from Hitler’s speech of 2 April 1939 in which he declared: “‘We have founded a new economic system, a system: that is: capital is labor.’”
82 Mansfeld and Pohl, Kommentar, p. 13.
had predicted that the honor courts would constitute still another instrument of blatant Nazi-capitalist oppression of the working class.\(^{85}\)

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

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


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


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

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

RAG adjudication pertaining to the confidence council was very sparse. Most of the relevant cases dealt with discharges of confidence councillors. The first case, dealing with an issue peculiar to the transition period, held that a collective bargaining agreement was not, after the abolition of the plant council, to be interpreted in such a manner that the new confidence council would take the latter's place. Rather, until the collective bargaining agreement was modified to take the new situation into account, it could only be assumed that the plant-leader would make the relevant decision (concerning the wages of a partially disabled employee) in accord with the conscientious use of discretion,
which, if need arose, could be reviewed by the court. (RAG 278/35, 26:279-83, No. 58, 8 April 1936.)

The court appeared to take its role seriously in enforcing the statutory requirement that the plant-leader formally consult with the council before making certain decisions.92 Thus where the statute (§ 28 para. 2) provided that the plant-leader had to consult with the council before imposing a fine on an employee, the court determined whether the formal prerequisite had been met. (RAG 167/41, 44:228-34, No. 38, 14 April 1942 [case decided against plaintiff-employee on merits].) Three days later the court revealed that even this farcical formality was a charade. Plaintiff submitted that the fines imposed on him were impermissible because the plant-leader had not consulted with the council beforehand but merely with the delegate of the NSBO represented on the council. Although the trial court had held in favor of plaintiff, RAG declared that § 6 para. 3 AOG, which provided that the council could transfer its tasks individually to certain confidence councillors, applied to this instance. (RAG 171/41, 44:285-90, No. 50, 17 April 1942.)

This judicial acknowledgment that the confidence councils were merely empty shells was consistent with the method by which candidates were selected by the plant-leaders, the NSBO delegate and the labor trustees,93 as well as with the fact that the results of the elections in 1934 were so disastrous for the Nazis,94 and those of 1935 so implausible95, that Hitler forbade all further elections.96

D. Plant-Risk

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

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

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

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

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

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

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

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

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

E. The Political Function of the Plant-Community

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

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

F. Supra-Plant Economic Regulation

Timothy Mason, one of the leading social historians of Nazi Germany, has suggested that the choice of the plant as the focus of regulation of class relations rested in part on the economic needs of small plants.
owned by the petty bourgeoisie as well as the need of the uncompetitive or labor-intensive branches of industry to reduce their wage costs; in part it also rested on the new plant-level social policies – associated with the new wave of industrial rationalization – that were applied in the economically strong and technologically advanced firms. Mason regards this latter aspect as paradoxical because it was precisely such advanced firms that preferred uniform collective regulation of wages. This paradox Mason seeks to resolve by reference to the fact that by 1933 collectively bargained-for wage rates had been reduced to such a low level that they were acceptable to all parts of industry.107

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

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

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

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

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


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

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

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

114 Rohde, Arbeitsrecht, pp. 6-21. Rohde was a member of the Arbeitswissenschaftliches Institut of DAF.
116 Cf. Böhm, Ordnung, pp. 81, 83.
117 Rohde, Arbeitsrecht, pp. 89, 114.
118 Ibid., p. 116. Michael Stolleis, Gemeinschaftsformeln im nationalsozialistischen Recht ([West] B., 1974), p. 138, argues that communitarian welfare formulas benefited employees during the period in which unemployment was being overcome but later imposed a burden on them.
119 Mason, “Entstehung,” pp. 349-50. Ingeborg Maus, Bürgerliche Rechtstheorie und Faschismus (Munich, 1976), p. 135, commits the same error on a higher level of abstraction without making any effort to document her claims in terms of decisional law. For late and coded confirmation of the fictitious nature of the plant-community, see Wilhelm Herschel,
G. RAG-Adjudication

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

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

In one of its early decisions in this area the court sought to identify the practically acceptable outer limits of a communitarian litigational strategy. In a case involving a two-fold appeal to the general welfare and the plant-community, plaintiff was the widow of an employee whose employer’s failure to make contributions to an insurance fund led to plaintiff’s not being entitled to a pension. Plaintiff’s tort suit was bottomed on § 823 para. 2 BGB, which provides for tort recovery where a party violates a law intended for the protection of another party. In accord with precedent the court ruled that the social insurance law that required defendant to make contributions was not intended for the protection of individuals but rather to secure the orderly management of the insurance system as a whole.120 Rejecting plaintiff’s submission that such a viewpoint was appropriate in an earlier liberalistic-individualistic system but was inconsistent with the new Nazi legal principles, RAG cautioned that in order to avoid a slippery slope (will man nicht ins Uferlose geraten) it was necessary to define a law designed to protect individuals as one the primary purpose of which was to do so. Once the court had distinguished such a law from one which primarily served the general welfare and only incidentally individual protection, it found no


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

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

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

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

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

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

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

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

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

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

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

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

These cases transparently identified the plant-community with management’s prerogative to demand a certain kind of demeanor, deference and obedience from the Followers.123 Such cases put workers on notice that the courts were willing to enforce such authority by abrogating semi-vested rights. The court indicated the weight it attached to this disciplinary aspect of the plant-community when it denied plant-fines the character of contractual penalties (within the meaning of § 343 BGB). Instead it classified them as sui generis: “means of coercion peculiar to the plant-community, which, because they were designed to maintain order and security in the plant, possess plant-police or at least police-like character.” (RAG 167/41, 44:228-34, No. 38, 14 April 1942.)

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

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

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123 According to Entwurf, p. 54, the leader-principle of § 31 AOG dictated that the Follower’s tone vis-a-vis the entrepreneur be more respectful than that of the latter to the former.

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

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

Plant-Custom and "Concrete Order"

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

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

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

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

127 Ibid., p. 64.
revealing that even so prosaic a thinker as Mansfeld was moved to caution against trying to "capture this great idea of the community juridically." Instead he proposed trying to gain access to it by "listening intently to living life [dem lebendigen Leben abzulauschen]" and to understand it on the basis of its concrete forms of existence.\textsuperscript{128}

Although this quasi-institutionalist approach to law served obvious apologetic ends by inverting the meaning of virtually every aspect of capital-labor relations,\textsuperscript{129} it has also been interpreted as having fulfilled a somewhat more subtle corporativist function. If the Nazis were to recreate conditions under which capital could control its own process of social reproduction, then it was necessary to set certain limits on the politicization of capitalist society. Once the decisionistic \textit{deus ex machina} excluded trade unions from the universe of communities and concrete orders,\textsuperscript{130} \textit{konkretes Ordnungsdenken} could serve to legitimate the foundation of "non-political," corporativist enclaves of sovereignty.\textsuperscript{131}

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

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

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


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

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

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

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

Reconceptualization

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

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

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

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

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

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

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

\textsuperscript{136} Reuss, "Die konkrete Ordnung im Betrieb."


\textsuperscript{138} Reuss, "Die konkrete Ordnung im Betrieb," p. 37.
attention to two facts of modern industrial life: first, management of a plant called for the creation of uniform, typical working conditions: individual treatment was permissible only where the purposes of the plant made special demands on individual Followers; and second, the principle of equal treatment, which was "an essential element of the notion of justice and of every legal order," created in the following an expectation – rising to the status of a legal conviction (Rechtsüberzeugung) – that, absent unique circumstances, similarly situated Followers would be treated similarly. If employers wished to avoid disappointing such expectations, they were required not only expressly to reserve the right to revoke the benefit, but actually to make use of that right.139

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

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

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

140 Hugo Seiter, Die Betriebsübungen (Düsseldorf, 1967), pp. 28-32, 35-36, 48-49, appears to underestimate the degree to which the court subscribed to this doctrine.
mas bonus case, for example, the court significantly relaxed the knowledge requirement to the disadvantage of plaintiff-employee. Arguing that the legal basis for a claim to the bonus was not an individual agreement but a standing practice, which in turn could only be uniformly relevant for all Followers, it concluded that only the same legal claim could be relevant for all. Consequently, it was not decisive whether every Follower or new hiree was aware of the existence of the practice. Those who were hired later simply had to accept the fact that the practice in this plant was that the bonus was conferred only on those who performed a certain amount of overtime. (RAG 70/40, 40:215-21, No. 35, 2 October 1940.) This case, which was criticized for the uncertainty it generated, was followed by a case in which the court was very solicitous of the certainty of expectations and appeared to revert to a more realistic appraisal of the importance of knowledge of the existence of a custom. It noted that a Follower in a plant with a regular Christmas bonus not only adjusted his household budget accordingly, but took it into account in determining whether to enter or remain in the employ of the plant. Moreover, the parties had already adapted their behavior to the court’s precedents in this area. The entrepreneur did not render the bonus revocable merely by calling it a donation, he was required to stipulate clearly that he was reserving the right to revoke it. Although in quantitative terms granting a bonus two years in succession did not indicate a will to be obligated whereas five years did, this term referred to the plant as a whole and not to the individual plaintiff. (RAG 106/40, 40:369-76, No. 65, 19 November 1940.)

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

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

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

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

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