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State Structure and Law in the Third Reich

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THE RULE OF LAW AND JUDICIAL INDEPENDENCE

To what extent traditional views of the rule of law are reconcilable with the essence of National Socialism remained a controversial issue in German legal thought and practice for a considerable period of time. But after the authoritative comments by Minister of the Reich, Dr. Frick, Reich Law *Führer* and Minister of State, Dr. Frank, the Secretary of State for the Chancellory of the Reich, Dr. Lammers, and Secretary in the Reich Ministry of Justice, Dr. Freisler, all practical reservations against conceiving the National Socialist state as embodying the ideals of the rule of law dissipated. Theoretical clarity concerning how we are to understand the National Socialist version of the rule of law, the so-called "German *Rechtsstaat* of Adolf Hitler," can be gained in particular from the writings of a member of the state council, Professor Carl Schmitt. A penetrating examination of the history of the nineteenth century seems to have taught Schmitt that the rule of law was merely a clever construction of the ruthless and unscrupulous individualism of the liberal epoch. To demonstrate that the rule of law functioned merely as a pretence for security and calculability, he relies on old Rothschild's remark to the effect that whoever wants to sleep peacefully needs to buy Prussian government bonds. The predictability of law, as Max Weber demonstrated, provided the basis for the functioning of a developed commercial capitalist social order. All acquired social positions were protected by a legal referent, the development and potential riskiness of which was calculable to all parties in advance. This hollow law-based state [*Gesetzesstaat*], which acknowledged the existence of reciprocal obligations between citizens

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and the state, now has been superseded by the National Socialist version of the rule of law. The technical concept of the rule of law henceforth takes on an altered significance. The rule of law of old Rothschild was identical with a form of society organized according to the principles of competitive capitalism. It was the function of the state to place an elaborate and minutely composed legal order at the disposal of individuals in pursuit of their rights. Society was proud that the legal order and the coercive apparatus resulting from it was, at least theoretically, at the disposal of every citizen in a nondiscriminatory fashion.[1]

The transition from competitive to monopoly capitalism meant that the need for such legal forms tended to vanish. Large capitalist firms—large banks as well as monopoly concerns—long ago ceased to depend on court proceedings in order to conduct their affairs with members of other social groups. Because they could announce a ban on lending or could simply rely on the fact that they employed an army of hirelings, they came to dominate the government. Governments fulfilled the particular needs of these firms by means of statutes and emergency decrees. A number of developments rendered the traditional court system virtually meaningless: the economic crisis made it questionable whether legally binding claims would be fulfilled, the government tended to hinder legal foreclosures even of relatively sizable agricultural properties, and the responsibility of paying off foreign debts ultimately no longer depended on the legal validity of a judicial decision but rather on decisions made by administrative bodies concerned with the operations of the foreign exchange market.

Even those activities that traditionally belonged to other areas of the law now take a different form. First, the economic crisis generated a purely quantitative increase in the activities of the criminal courts and thus dramatically reduced the significance of traditional legal protections. The criminal courts then took over a new set of activities: the elimination of all political opponents, undertaken in conjunction with the realignment of all judicial activity with the political ideals of National Socialism. In this way, the face of the criminal justice system was decisively changed.

Even before the seizure of power by the National Socialists, unemployment and the attack on the labor union apparatus had already limited the scope of labor court activity. The process of replacing marxist-oriented workers with followers of National Socialism occurred uninhibited by the labor courts. The demise of collective labor law litigation—the regression of labor law to a system befitting the regulation of personal service (*persönliches Dienstrecht*)—has totally eliminated law from an area of social life into which it had first made its way during the Weimar period.

After National Socialism tried anew to stabilize the hegemony of monopoly capital and big landed property, the National Socialists proceeded to furnish the new situation with an appropriate timely ideology. Traditional views of law underwent a fundamental revision. The restriction of law to an

ethical minimum was abandoned, and the identity of law and morality has been elevated to a guiding principle of the new order. In practical terms this meant the following: now that the affairs of the state's dominant social strata are regulated by means of the Führer's statute or by means of direct agreements between the bureaucracy and monopoly capital, the National Socialists want to provide the middle and poorer social strata with the illusion that for them as well there is an escape from the monotonous misery of their everyday existence; there is a right to satisfy their individual needs that is found outside the text of the law. The National Socialists are trying to trace the growing impoverishment of ever-broader social strata in part back to the failure of formal law to permit the recognition of the masses' legitimate demands on the entire nation. Law—in particular, much-maligned Roman law—hence gets blamed for conditions caused by unemployment, economic decline, and monopoly capital.[2]

Auxiliary legal means (*juristische Hilfsmittel*) were supposed to enable the generous use of vague legal standards (*Generalklauseln*), in accordance with the principle of "good faith" (*Treu und Glauben*). A vehicle for a newly awakened natural law, vague legal standards did in fact offer the possibility of stripping the whole law of its normative and obligatory character without requiring the alteration of a single positive legal statute.[3] Embodied in a novel version of the doctrine of judicial independence, a new dynamism has seized control of German legal thought and practice. After being purged of those elements hostile to National Socialism, the irremovability of the judiciary was freshly secured. But this type of judicial independence, as many have correctly noted, is no longer comparable to the type of independence previously possessed by the judiciary. Independence formerly meant the freedom of judging on the basis of statutes while at least trying to maintain neutrality in relation to distinct social and political groups. The new form of judicial independence is characterized by the fact that law at any juncture can be changed by the Führer and retroactively canceled at any point in time, without any legal formalities having to be respected. Furthermore, as shown above, law is only valid provided its "conformity with the National Socialist worldview." "In the National Socialist way of thinking, a certain instinctive political sense is a presupposition even of judicial independence. It implies independence in one's attachment to the main principles of the folk-based state of the Führer."[4]

Whereas the rule of law once represented a quest for objectification by means of legal guaranties and the formulation of clear standards, an opposing ideal is now transformed into the quintessence of Adolf Hitler's German rule of law. Guarantees of justice are no longer located in the statute, but in the extent to which the individual decision accords with National Socialist thinking.

What consequences does this have for specific areas of the law?

MATERIAL AND PROCEDURAL CRIMINAL LAW WITH REGARD TO THE QUESTIONS RAISED AT THE ELEVENTH INTERNATIONAL PENAL AND PRISON CONGRESS[5]

Domination by National Socialist modes of thought was achieved much more swiftly and radically in the realm of criminal law than in other legal fields. Even before the complete reworking of criminal law could be engineered, National Socialism attended to the elimination of the final remnants of "folk-destructive liberalism" from the penal law. It also made sure that the most important National Socialist lines of thought were put into practice. An "outmoded concept of legal security with its emphasis of bourgeois calculability, which in no way corresponds to the type of human being now created by National Socialism," was dropped from the administration of criminal law.[6] National Socialist criminal law is organized according to two basic ideas: the protection of the German folk's "present roaring, intoxicating life and its future," and the tearing down of all barriers that might hinder the court's attempt to achieve material justice.[7]

In particular, the criminal trial has undergone comprehensive reforms. These reforms aim to ensure that the concerns of the individual and individual protections are forced to recede behind the interests of the government and of "material truth" [*materielle Wahrheit*]. But this poses a serious dilemma both for criminal law and the procedures of the criminal trial. What is material truth in the context of criminal law? In his widely heeded *Politische Strafrechtswissenschaft*, one of the most well-known contemporary German criminal law experts argues for the "necessary alignment of the institutions of criminal law with the principle of political consistency." Yet we need to ask whether methods "based on the principle of political consistency"—that is to say, methods corresponding to the interests of the political and social elite—can still serve the quest for material truth. It has become quite customary to interpret procedural guarantees of the criminal law that are now being liquidated purely from the standpoint of the individual. But that is clearly inadequate. For criminal trial procedures—the guarantee of having a defense, or a hearing of the evidence, for example—are primarily supposed to provide a complete picture of the facts and thus knowledge of the material truth.

Perfect justice is no abstract ideal in the legal world of National Socialism. Instead, National Socialism identifies perfect justice with its interpretation of the vital life interests of the German folk, thus rapidly descending from the heights of an abstract ideal to the subordination of the coercive tools of criminal law to the political goals of National Socialism. "We know that the essence and purpose of the criminal law cannot be recognized independently and in isolation. Rather, they have to be seen as emanating from the highest political principle forming the state in question."[8]

The first result of the subjection of justice to politics is the expansion of the sphere of penal law. The protective functions of criminal law are being sacrificed to a drive toward greatly expanding its sphere of application. This is taking place even though countless new individual regulations have created some new criminal offences and have made the punishment for existing offences more severe during the past two years. The explicit introduction of analogous legal reasoning[9] is not only likely to have practically unforeseeable consequences, but it undermines the very foundations of judicial procedure. The new wording of paragraph 2 of the criminal code—"Punishment is to be inflicted on anyone who commits an act which has been declared punishable under the law or who deserves to be punished according to the fundamental principles of a criminal statute and healthy popular sentiment"—at first seems to suggest that only analogous reasoning in reference to a legal statute [*Gesetzanalogie*], but not in reference to the spirit of the legal system as a whole [*Rechtsanalogie*], is intended by the alteration of the criminal code. An act can be punished when it conflicts with the basic idea of an existing statute but cannot be subsumed under a precisely formulated definition of the criminal offence. First of all, the practical necessity of a determination of this type—which, by the way, is unknown in other central and western European countries—is questionable. In an authoritarian state where the Führer can issue any laws he deems appropriate at any time, any demonstrable lacuna in the law can be immediately filled. In addition, the express wording, which explicitly refers to the "healthy popular sentiment," does not seem to eliminate reliance on analogous reasoning in reference to the legal system as a whole. This second type of analogous reasoning does not simply consist of applying a legal statute to a situation that seems equivalent to that referred to in a statute; instead, it leads to legal deductions that generate entirely new criminal offences based merely on National Socialist ideology. It constitutes an authentic example of judicial legislation, and its introduction into any political system anywhere would signify that the judiciary had become a political authority. If tomorrow German judges decide to punish racially mixed marriages on the basis of the new criminal code, even though existing laws only have illegalized them for civil servants and members of the armed forces, they are acting as legislators and not as judges. Their independence—which until now was seen as resulting from the fact that they were strictly bound to the letter of the law—is thereby destroyed. The judiciary is required to take into account National Socialist ideology not only as it has been imprinted into the structure of the legal statute. Even more significantly, courts are supposed to comply with everyday political currents, "healthy popular sentiment," as they have been interpreted by politicians of the ruling party. Of course, in the totalitarian state "healthy popular sentiment" is simply what the Führer takes it to be.

National Socialism waited until June 1935 before explicitly legislating the abolition of the principle of *nulla poena sine lege*.[10] But it tossed another equally important and universally respected legal guarantee of individual freedom overboard as soon as it gained power: the prohibition of retroactive laws. It is revealing that the Eleventh International Congress of Criminologists will only be concerned with the issue of retroactive laws to the extent that a *liberalization* of criminal punishment is in question.[11] From the perspective of a forum of international jurists, the mere possibility of making criminal punishment more *harsh* by means of retroactive criminal penalties is simply inconceivable. Merely to discuss it would mean robbing all of European criminal law of its most basic foundations. It would mean applying an inherently unjust standard to lawbreakers, a standard that, at the time an act was committed, not even the highest court or most powerful judicial authority would have considered justified.

National Socialism, however, has been infringing on precisely this universally accepted legal ideal since March of 1933. Only on the basis of a punishment that was retroactively made more severe was it possible to condemn van der Lubbe to death and then execute him.[12] Only with the help of such murderous legal constructions—the very possibility of which the International Criminologists' Congress refused to discuss—was it possible to execute political opponents; jurists of the Third Reich someday will have to answer for these deaths. Even if we forget for a moment that many have been condemned to death and hanged even though *fact-based* findings simply could not be made, we still must deal juristically with a situation where laws from 1933 to 1935 were applied to acts that took place between 1930 and 1932. An act that would have been treated as a disturbance of the peace before Hitler's seizure of power or, if the necessary set of causal relationships could be proven, as an assault having fatal results, at the very most would have been punished with a prison sentence. Now, the very same act is punished with death. At times the courts are punishing "offences" that are alleged to have taken place years before Hitler's seizure of power. The mere fact that the prosecution's proceedings against many who are now condemned to death were originally abandoned proves that the instruments of a regularly functioning judiciary were not able to prove anything against them. Just to mention a few examples, this is how

Twenty-one-year-old Paul Foelz and nineteen-year-old Ewald Szody were condemned to death on July 24, 1933, for an incident that took place on May 12, 1932;

Ernst Sander was condemned to death in Hamburg on December 23, 1933, because he allegedly killed a policeman on December 3, 1930;

Twenty-year-old Joseph Reitinger was executed on November 21, 1934, because he allegedly shot a member of the SA on June 4, 1932;

A member of the Reichsbanner, Karl Jänicke, was hanged on July 5, 1935, because SA members claimed under oath that he shot a member of the SA in a clash with them on March 28, 1931;

Johannes Becker from Kassel was hanged on December 7, 1935, because he allegedly shot a policeman on June 12, 1931.

The tendency to focus less and less on visible features of the offence than on the *will* of the perpetrator is noticeable both in the revised edition of the criminal code and in several special laws establishing new political offences. The partial justification for this is that it corresponds to the special nature of the Aryan conception of law that the will, and not the act, is at the core of investigation; moreover, reference has been made to the fact that a writer of a related Aryan people titled one of his works *Crime and Punishment* and not *Act and Punishment*.[13] But here as elsewhere, arguments based on a vague concept of race simply function to veil the true state of affairs. The bourgeois legal system is anachronistic not because it is the product of Roman legal traditions and Jewish intellectual influence, but rather because it is the expression of a capitalist social system that has reached its final stages. Similarly, we should hesitate before interpreting the unchecked growth of subjectivistic theories of criminal law as a renaissance of Aryan customs and mores. Instead, this trend constitutes a desperate defensive measure by a universally threatened social order that fancies it can gain security by making maximal use of the criminal law.

The introduction of the volitional concept of penal law (*Willensstrafrecht*), emphasizing the criminal will rather than a concrete act, simultaneously serves to isolate individual will and to deny the roots of criminal behavior in social conditions. It used to be a general maxim of the criminal law that the extent to which a person's capacities and resources allowed him a real chance of respecting the statute should be taken into consideration; now the social situation of the accused is ignored completely. The principle of "you can, because you shall"[14] is established. In the process, the criminal law is clearly founded on the interests of the dominant class, instead of an understanding of the actual opportunities that are provided to individuals by the existing social order. As a result, the penal law's remedial functions are eliminated from the very outset. If the rules of the penal law serve nothing but the preservation of a system of domination in which conformity to civilized norms is only possible in exceptional cases, then the criminal law's remedial aims have been rendered null and void. In that case, the penal law is nothing but a form of pure repression directed against social, religious, and political foes. So, the first question discussed in Section II of the International Criminologists' Congress is answered with a resounding "no" in Hitler's Germany.[15] The argument made in an authoritative article in the

Völkischen Beobachter from December 2, 1934, refers to the combative character of National Socialist criminal law: criminal law should not simply react to illegal actions, but should additionally ensure that all hostile political groupings are eliminated by a permanent series of purges. This is an open admission that the volitional concept of criminal law is based on political revenge and thus transcends any penal concerns.

Even if we disregard such general objections against the recasting of penal law into a political weapon of the ruling political group, a number of serious reservations of a purely juristic nature regarding the application of the volitional concept of criminal law still remain. Its concrete meaning becomes most apparent in the manner in which the legal definition of an *attempt* (*Versuchsbegriff*)[16] has taken on inflationary characteristics and has been robbed of any basis in an objective determination of the facts of the particular case. Claiming that the best defense of the political order lies in fighting against attempted crimes[17] may sound impressive. But in reality it leads, as an author as enthusiastic about National Socialism as Oetker has noted, "to plague comrades who act in accordance with the law with doubts about whether or not their doings can be justifed or whether they are already violating penal prohibitions against placing others in jeopardy (*Gefährdungsverbot*); excessive regulations in this area are handicapping initiative and the motivation to act."[18]

It is important to note that initial applications of the basic principles of the volitional concept of criminal law have greatly damaged the international reputation of German legal practice. The fact that political opponents of the regime in Germany are sentenced to death merely on the basis of so-called intellectual authorship—where even the most minimal evidence of their actual participation in a criminal act is lacking—has not met with much understanding abroad.[19] Special damage is done to the reputation of the German judiciary when foreign civil servants have to deal with such theories. The Swiss Bundesrat, for example, was recently presented with a formal petition to extradite a former member of the German Parliament, the communist Heinz Neumann, who was accused of having committed murder. The act of murder—more precisely, the incitement to murder—was seen as demonstrated by the fact that Neumann had once allegedly talked about two police officers and asked whether "that pig is still alive?" Since the policemen to whom Neumann was referring were soon thereafter shot by unknown assailants, Neumann was accused of incitement to their murder, even though no argument was made that he had any connection to the murderers. Of course, the Swiss Bundesrat was forced to reject this rather mysterious application of the volitional concept of crime; it did not even bother to ask the upper federal court to take a position on the extradition request. In the face of such developments, it is no surprise that

a prominent legal expert from Poland—a nation with such friendly ties to our own—feels forced to come to the following less-than-flattering assessment of the international reputation of German jurisprudence: "The period of contemporary lawmaking is undoubtedly diminishing the international interest in the reforms of the German criminal law."[20]

Apart from the sphere of politically oriented legal persecution, it is especially striking that reforms of the material criminal law since the so-called national revolution have not been characterized by the creation of new definitions of criminal offences. The alteration of legal clauses (as in the case of the reference to "breach of trust" in paragraph 266) has generated nothing objectively new in character. Such changes have merely provided preexisting court practices with a legal sanction. On the contrary, the National Socialists have exercised great restraint in many important areas of the law such as, for example, in the corporate finance laws. The underlying intent there surely has most likely been to avoid placing excessive restraints on business initiative. Yet the recent Lahusen case,[21] which continues to unfold under the new regime (unfortunately employing very old window-dressing tactics), has proven that especially in this area of the law drastic reforms are needed.

While profoundly changing its spirit, the totalitarian state has generated an unprecedented boom in the legal persecution of political opponents. A law issued on May 26, 1933, broke with an old tradition by abolishing the punishment of political offences with a period of imprisonment (*Festungshaft*). According to Under-Secretary of State Roland Freisler, political disturbances must be seen as constituting particularly dishonorable crimes. For Freisler, the reason for this is that the state is "nothing but the expression of the *folk*, from which it originates and whose basic customs and morals the state is in agreement."[22]

It is difficult to consider it a moral victory for National Socialism that it has hammered into people's heads the idea that those with different political views are "subhuman." As far as the idea of a moral order under attack by political opponents is concerned, however, criminal law would do better to leave it to history to decide which political party or group can be rightfully identified with the moral order of the people. Although the discriminatory treatment of political prisoners unfortunately suggests that Freisler's view of the morally subhuman character of the political opposition is increasingly dominant, not everyone has accepted his view. For example, Zimmerl argues that since "heroic types"—one thinks of George Dimitrov or Ernst Thälmann—also make up the ranks of the political opposition, not all political opponents can be classified as "cowardly subhumans." According to Zimmerl, such individuals cannot rightfully be ranked alongside common criminals.[23]

The dominant interpretation of a politically motivated crime defines it according to whether the offence has been committed by followers of the ruling party or by its opponents. Whereas even the most minimal offence committed by the political opposition will be pursued and severely punished, followers of the ruling party generally go unpunished. Even when courts find them guilty, political allies of the regime are likely to gain a quick pardon or amnesty. The wording of the Criminal Immunity Law from August 7, 1934, was consciously formulated so that criminal offences committed by members of the ruling party, including the looting and physical abuse of defenseless prisoners, fall under the law as long as such acts occur "in the excessive zealousness of the struggle on behalf of the National Socialist movement." The possibility of gaining amnesty, however, is unavailable to the regime's political opponents. Amnesty is inapplicable to the most important political offences, treason and high treason, but it is also inapplicable to other offences "if the inspiration for the act reveals a vicious spirit." The National Socialist judicial system simply presumes that all expressions of political opposition fall under this category.

The scope of political offences has been expanded beyond all limits. Any activity of a political, social, or religious nature that is not expressly condoned by the government can be punished with a severe prison sentence or the death penalty. Judicial decision makers give themselves the widest possible freedom in the interpretation of criminal regulations that already are formulated rather broadly. This is how it was possible to punish participants of a recent Catholic youth meeting on the basis of government decrees issued against revolutionary communist acts that threaten the state (issued on February 28, 1933): the justification provided was that activities of the Catholic youth group might lead to such unrest that a revival of communist terrorism could thereby be promoted.

Another rather idiosyncratic feature of this type of legislation makes it possible to punish undesirable expressions of opinion even when their truthfulness can be demonstrated. The pertinent legal texts (the March 21, 1933, Decree for the Repulsion of Malicious Attacks Against the Government of National Renewal, as well as paragraph 90 of the Criminal Code, which deals with treason by inflammatory slander), refer to "slanderous claims that distort the truth." But the special courts (Sondergerichte)[24] fail to provide the accused with a chance of proving his assertions in his own behalf. Rather than undertaking a nonpartisan examination of the evidence of the case, the regime's view is automatically assumed to be truthful, and everything else is dismissed as slanderous claims that distort the truth. For the regime, even worse than the injustice done to the accused is that this approach permits no criticism of state authorities. Instead of channeling dissatisfaction by legalizing the most harmless forms of expression, the regime forces all discontent into the uncontrollable sphere of illegality. The criminal persecution of the political opposition in contemporary Germany

hence is not subject to severe criticism simply from a liberal or humanitarian viewpoint; even from the perspective of Germany's ruling elite, its usefulness is limited. Legal procedures of this type are purely repressive, and they fail to perform any positive maintenance functions. It is well known that the success of a purely repressive system is very questionable in the long run.

Because they aim to secure the rights of the criminally accused, traditional criminal procedures are accused of embodying liberal ideals alien to the spirit of the German folk and state. The attempt has been made to obliterate all such "humanistic confusions" and to alter criminal regulations inspired by them. The formal law of evidence has been mostly done away with, the accused's possibilities for legal appeal have been limited substantially, and the prohibition on *reformatio in peius*[25] has been wiped out. Is the administration of justice improved by these changes? Is the investigation of material truth, which even the National Socialists take to be the central task of the penal law, served well by these trends? Experience has shown that courts and public prosecutors have no greater inherent skills than do any other bureaucratically organized institutions. But since the task of making decisions about the rights and welfare of their fellow human beings is both much more difficult and demanding of so much more responsibility than are the activities of most other bureaucratic instances, judicial authority traditionally has been outfitted with greater safeguards—most significantly, rights that are guaranteed to anyone whose fate is being determined by the courts. An American lawyer recently published statistics comparing the frequency of acquittal among the criminally accused who freely chose their own lawyers and among those given a public defender. He found that when the accused pick their own lawyers, the number acquitted is 40 percent higher than when the accused are forced to rely on a public defender. German criminal statistics do not permit us to determine with certainty whether the situation in Germany is identical. But anyone with practical experience in these matters will confirm that the results would be no different if a similar study were undertaken in Germany. Only the possibility of an effective legal defense, laws that demand the examination of all relevant evidence, and liberal possibilities for legal appeal make it possible to ascertain material truth in the courtroom. But to the extent that the judicial process becomes bureaucratized and nothing more than another instrument of administrative authority, and as the criminally accused is reduced to an object controlled by administrative power, the chances of ascertaining the material truth are substantially diminished.

When the delegates at the International Criminologists' Congress grapple with the second question of Section I of their meeting—"What measures are to be recommended in order to shorten the so-called monster

trials?"[26]—they will have to take all the points mentioned in my argument into consideration. The abridgment of legal procedures can result in nothing but the curtailment of the rights of the criminally accused and the defense. In addition, it means increased power for the judicial bureaucracy to the point where it is outfitted with full discretionary authority. Regardless of how we attempt to define the concept of the "monster trial," it will always include trials that gain substantial public attention and that could for various reasons become unpleasant for ruling groups. The development of German criminal law described here should at least help show non-German jurists what measures are to be avoided if the judiciary in their respective countries is to be kept from regressing to arbitrariness and barbarism.

The destruction of all protections for the criminally accused does not exhaust the changes endured by German criminal procedure in recent years. In addition, court structure has been altered so that opportunities for popular participation in criminal proceedings have been extinguished. Representatives appointed by the ruling party replace jurors and lay assessors. This eliminates any influence on the criminal judiciary by the population at large; the judiciary becomes nothing but an apparatus of the party. In addition, every form of public control is eliminated. To the extent that the proceedings fail to offer possibilities for embarrassing dominant political, social, and military groups, they are allowed to maintain their public character. But there no longer is any independent court reporting. Instead, the judicial bureaucracy, with the help of the court's public relations department, makes the materials available to the court reporter, which he alone is allowed to publish.

Such conditions surely make it extremely difficult to ascertain material truth in the criminal process. But a set of additional conditions makes it virtually impossible to do so where *political* cases are concerned. First of all, the prosecuting authority in such cases is not the ordinary state prosecution operating in accordance with traditional bureaucratic imperatives; now it is the central state prosecution belonging to the Ministry of Justice, which receives its orders for every individual case directly from the government. Moreover, the police in such cases are no longer ordinary policemen, but members of the secret state police (Gestapo). The government is undoubtedly finding their services to be of exceptional value: they are permitted to use any methods they deem necessary to get the results sought by their supervisors. Whether they submit evidence, acquired by means of oftentimes suspect methods, to the state prosecutor and thereby initiate a trial or whether they simply stick the prisoner in a concentration camp without a conviction is left up to the discretion of the Gestapo. It is thus perfectly legitimate to conclude that political justice in Germany is primarily administered by policemen who punish the accused by means of discretionary

powers and with methods unheard of in legislation elsewhere. Only if it happens to be opportune for them do they even bother to complete their investigations and hand the case over to a people's court (Volksgericht)[27] or a special court for an additional hearing. Even then, court proceedings take place on the basis of evidence gathered by the police by means of its rather impressive powers.

As for the people's court itself, it is an ad hoc appointed commission composed of administrative functionaries from the civil service, military and NSDAP and judges who have proven their trustworthiness to the regime. It autocratically decides how much evidence should be examined. Its decisions cannot be contested. Even the right to a lawyer of one's own choosing—the last remaining, though in itself inadequate, protection for the accused against a partisan instrumentalization of the penal law—has been made into a farce. In Hitler's state, the lawyer generally has the responsibility of representing the interests of his client only as long as they remain compatible with the welfare of the National Socialist regime. If the lawyer takes a step beyond these limits, he can count not only on being subjected to disciplinary action,[28] but also on a prison sentence having an indeterminate period of time. (An example of this is provided by the imprisonment of the Berlin lawyer Rötter, who could be accused of nothing except having announced that he was willing to defend the leader of the Communist Party, Ernst Thälmann, in court.) The law regulating the procedures of the people's court reveal in the clearest possible form this trend toward undermining any possibility of truly defending the interests of the accused. A defense attorney who not only has to ask for the court's permission to be allowed to take over a case, but then can be stripped of that right at any stage in the proceedings and without any reason having to be supplied, is robbed of any real autonomy and is hardly in a position to provide real help to his client. Hence, the people's court cannot be described as a court at all. The nature of its composition, its dependence on the preparatory work of the secret police, and the restraints it places on the counsel for the defense prove that the people's court is interested simply in eliminating political opponents, and hardly in an unbiased investigation of the facts of any particular case. The people's court is nothing but a politically motivated administrative body that has been outfitted with unlimited discretionary power over the fate of all German citizens.

Not only did the depression result in an increase in the prison population, it simultaneously led to substantial declines in the living standard of the imprisoned: the daily ration for the provisions of a prisoner in a Berlin prison amounts to 30 to 32 pfennig today in comparison to 50 to 60 pfennig in 1932. It is inconceivable that so many authors believe that this dramatic deterioration of the prisoners' living conditions is not simply a regrettable consequence of present economic conditions and that they celebrate it as a much-improved penal instrument that ought to be permanently employed.

Equally unfathomable is the apparently sadistic drive motivating State Secretary Freisler's quest for more severe methods of imprisonment. In his most recent book he makes a number of suggestions along these lines that have to sadden anyone genuinely concerned with the reputation of German law.[29] He justifies every attempt to make criminal punishment more unpleasant by referring to the imperatives of general prevention, to the need to deter the general population from crime. The pain suffered by the individual, resulting from a system of treatment that consciously abandons any educational aspects and is likely only to strength asocial tendencies and the desire to commit further crimes, is supposed to deter the remainder of the population from committing criminal offences. The fact that German prisons are crowded to an unheard-of degree demonstrates that the aim of Freisler's proposals has yet to be achieved. In Prussia the number of prisoners was 56,928 in 1933, compared to 37,982 who were imprisoned in 1932—in short, a 50 percent increase. State Prosecutor Schäfer's remarks in a speech given in Königsberg suggest that the number of prisoners has doubled since 1930, and his calculations do not even include the 49,000 individuals presently detained in concentration camps.

Just as unconvincing are those arguments that try to justify the ever more extensive use of the death penalty. Freisler believes that the death penalty's usefulness has been demonstrated by the fact that terrorism directed against the National Socialist regime has subsided since its introduction. This is misleading: he knows quite well that antifascists have disavowed murder as a political instrument as a matter of principle. Neither at the time of their proclamation nor today—as Freisler's own comments concede—has there been an adequate justification for the antiterror decrees. It should be impossible to understand even from the viewpoint of Friesler why the death penalty should be used against someone like Rudolf Claus, who simply chose to remain an active member in the proletarian self-help organization Rote Hilfe.

PUBLIC AND ADMINISTRATIVE LAW IN THE THIRD REICH

> Adolf Hitler resolutely marches forward with the task of leading the entire folk into the national community. Correspondingly, the folk is no longer the sum of all subjects; this would contradict the *Führerprinzip*. Instead, the people consists of the followers of the Führer on the way to the realization of the national community.

Certain difficulties have arisen from this undeniably more metaphysical than real view of the position of the Führer because it is hard to make juristic

distinctions among his various announcements. In addition, the significance of the Führer's proclamations for the legal order often remains unspecified. Even today, the status of the so-called law that declared the actions of June 30, 1934, legitimate because they were committed during a national emergency is still unclear. It was necessary to refer to the metajuristic concept of the Führer in order to make the fusion of administrative execution, judicial decision making, and post facto justification in the form of an individual law—issued by the same authorities who made and then executed this judicial "judgment"—comprehensible.[30] Such difficulties are also evident in the debate about whether everyday political remarks made by the Führer can be distinguished from his legal statutes. In academic and bureaucratic circles, it is common to refuse to attribute a quasilegal binding character to each and every one of the Führer's statements because of "the confusion that would result in public life." Others would at least like to let remarks of the Führer supersede preexisting law. Evident in this dispute is a conflict between the conservative traditions of the state bureaucracy and the National Socialist Party's interest in political agitation. Parliament, where battles between distinct social and political interests were once played out, still meets, but only to receive the Führer's proclamations one to three times a year. (By the way, what do its 600 National Socialist members—who take home four or five times the income of the average "folk comrade"—really get paid for?) The Führer is all-powerful and sovereign; nonetheless, within the person of the Führer, different influences and tendencies intersect.

In the real world of the German Reich, the Führer is chiefly the leader of a civil war–based party that was able to seize control of the state apparatus by astutely exploiting the political crisis. The seizure of the state machinery is expressed in terms of public law by the installation of the leader of this party as the formally unlimited ruler of the German Reich. In addition, special privileges have been granted Hitler's "civil war army." With the help of the Law for the Restoration of the Civil Service,[31] leaders of this "army" were granted official posts in the state apparatus. The attempt was made to give the first 100,000 members of the party lower-level posts in the civil service that were vacant after marxist workers and employees had been chased away from their positions. An additional provision was allotted to "fighters for the National Socialist National Renewal" who suffered injuries in the battle against the banished marxists.[32] In order to offset excessive financial demands on government funds that might result from this initiative, the system of veteran's compensation was altered at the same time so that war-based injuries to members of oppositional political parties no longer guaranteed a right to compensation. Regulations of compensation for civil law claims (*Gesetz über den Ausgleich bürgerlich-rechtliche Ansprüche*) served to secure civil war booty in the form of houses, real estate, and newspaper businesses. The law confirms that "National Socialism does not even think of allowing the outcome of the events of January 30, 1933, to be taken away from it by means of a civil law dispute, or even by means of a judgment by default (*Versäumnisurteil*)."[33] In order to stifle any attempt to compete with the ruling party from the start, the organization of new parties has been illegalized. In order to suffocate any signs of opposition within the National Socialist Party itself, governmental legislation has established a system of internal party disciplinary courts. In addition, the strictest possible centralization of the entire organization of the party has been achieved. Only recently were the NSDAP's internal subdivisions and welfare organizations denied autonomy in the use of their financial resources. Their employment of these funds is now dependent upon the approval of the party's national treasurer.

But the legal presuppositions of the political hegemony of the NSDAP still fail to tell us anything about the social groups that exercise a predominant influence in governmental operations. Party Führer Hitler can only protect his party comrades' newly acquired sinecures and loot by joining ranks, as Führer of the political community as a whole, with Germany's dominant social groups. Alongside his rank as leader of the party, Hitler thereby becomes representative of the most powerful social interests. As long as they are willing to acknowledge the dominance of the party and of its leader, Hitler guarantees the unassailability of their economic resources. The army seems to be taking on an ever more significant role within this system of reciprocal guarantees and obligations. Juristically, this expresses itself in the fact that it is no longer possible for civilian authorities to intervene in the internal affairs of the army. Virtually as a reward for the army's positive attitude toward Hitler's ascent to governmental power, the old internal military courts were reestablished within the very first days of the Third Reich. As a way of averting party intervention in the army, the new military laws explicitly state that anyone who joins the army is required to suspend his membership in the NSDAP and in any related organizations for the duration of his stay in the military. If to all this the fact is added that in the Third Reich there no longer are elected parliamentarians in a position to scrutinize the military budget, it should be obvious why the outlines of a powerful, independent military apparatus—even more impressive than pre-1918 Imperial Germany's—are beginning to take shape.

In addition, Hitler is bound to support those social classes that promoted the rise to power of his party by many different forms of support; these groups still represent the most powerful social bloc in Germany. Hitler secures the inviolability of two guarantees of the interests of industrial and finance capital: the exclusive control over the means of production and the domination of wage labor. Admittedly, National Socialist writings maintain

that the concept of property constitutes nothing more than an administrative function in National Socialism.[34] It is correct that in contemporary Germany the acquisition and maintenance of economic power no longer rests simply on the exercise of a formal-legal title to property. To a great extent, economic status now depends on government economic regulation and social policy. But in itself the fact that intervention takes place in the sphere of property is not crucial; rather, what is decisive is *how* this intervention influences the social power and the living standard of different social classes. When existing price controls no longer allow a salesman to establish a certain price by referring to the prospective costs of production, then the state undoubtedly is taking control of his working capital. When a worker is prohibited from joining a union in order to improve wage conditions, the state is effectively limiting the worker's use of his means of production, his labor power, while providing economic advantages to the worker's economic opponent, the entrepreneur, by means of the very same set of actions (controlling wages). When inheritance laws make it impossible for the farmer to take a mortgage and thus keep him from gaining credit on his real estate, then the state is similarly limiting his right to use his property as he sees fit. But has the National Socialist state infringed upon the basic structure of German heavy industry? On the contrary, has not the National Socialist state provided new instruments of power to heavy industry by means of legally sanctioned compulsory cartels? Has National Socialism changed anything fundamental about the system of industrial and agricultural feudalism? Has not the pursuit of the axiom of "a strong economy in a strong state" generated benefits for the rich and massive sacrifices from the unpropertied? (One only needs to think of how the new inheritance laws worked to the benefit of the wealthy, or how the government has abandoned legal proceedings against all so-called national elements who refused to pay their taxes as a way of accelerating the demise of the Weimar Republic.)

The establishment of the totalitarian state has also brought about the death of genuine municipal and local self-government. Municipal self-rule was totally abolished by means of the German municipal code of January 30, 1935, and mayors and mayoral deputies were reduced to government functionaries. Guaranteeing local party organizations certain, albeit rather limited, possibilities for political participation did not change this situation. Municipal councils are purely decorative. The relevant legislation unintentionally concedes this by explicitly requiring the councils to express an opinion on matters of public interest if it varies from prevalent views. But if they were capable of giving authentic expression to popular aspirations and possessed real opportunities for influencing the administration, the municipal councils would not need to be legally obligated by such truisms. The elimination of any real possibility of influencing local affairs goes hand in hand with the curtailment of the municipality's jurisdiction. Making the mayorship an honorary, unpaid position in municipalities having less than 10,000 members at first glance may appear as the height of fiscal good sense. In practical terms, however, it serves to exclude members of the lower classes even within the dominant party from seeking the mayorship. This means that the post is handed off to wealthy interests cognizant of the fact that even an honorary mayorship ultimately can pay off quite nicely. Similarly characteristic is a regulation found in a Prussian law from July 17, 1933, which since has become part of the municipal code: the state forbids municipalities from engaging in any activity that might be seen as constituting competition with the private economy. Whereas fierce battles have erupted in other political systems—such as the United States and France—about the possibility of putting large utilities into public hands, National Socialism prefers to follow the example of fascist Italy and burden the population by leaving utilities in the hands of private capital.

To what extent possibilities are available for legal appeal against administrative acts in the Third Reich remains unclear. The widely accepted view that "there are neither individual rights nor rights of subgroups of the community against the Führer, since that would totally contradict the concrete legal nature of the Führer"[35] is quite apt since, in fact, no legal protection against the secret police is possible. Possibilities for legal appeal that might provide guarantees for the most important legal goods, freedom and life, are totally missing.[36]

There is another object that is not subject to review by civil and administrative courts owing to its dynamic character: the activities of lower administrative bodies—in particular, the actions of some factions of the National Socialist Party against the non-Aryan population. Their concerns are known to be regulated according to various legal acts of the Führer. Nonetheless, National Socialist legislation in the area of race has come nowhere close to realizing all the points sketched out in the party program.[37] A court thus was able to rule that in the future mixed marriage would not be prohibited because, in its view, courts lack the authority to attribute validity to National Socialist ideals beyond the scope of those areas to which National Socialist legislation has limited itself.[38] It is well known that not all of the lower courts have fully accepted this ruling. Quite recently, the registrar of marriages in Wetzlar refused to permit a mixed marriage and was subsequently supported in this decision by a ruling of the regional state court. Similarly, the permissible scope of Jewish small business has not been subjected to any special legal regulations. But that does not keep certain elements within the National Socialist movement from demolishing Jewish businesses and forcing their closing. It is yet to happen that public authorities in such cases

have ordered the reopening of the business in question or the payment of financial compensation to affected businessmen. On the contrary, administrative authorities work from the presupposition that disturbances to the peace do not stem from those who plunder and attack Jewish businesses but from the Jewish businessmen who dare to file complaints about acts of violence committed against them. Especially in the case of the "Jewish Question," the development of so much of the German legal system remains in a state of flux. Indeed, the dynamic nature of National Socialism conflicts with any attempt to establish a set of determinate legal guarantees. At least to the extent that the emotional rather than the social interests of the lower classes are at stake, the regime does by no means disdain attempts to base legal principles on the immediate imperatives of political agitation or distraction.

NATIONAL SOCIALIST LABOR LAW

As noted above, the basic traits of National Socialist labor law are determined by the fact that the Führer is trying to gain the absolutely crucial support of the industrialists. In order to achieve it, he guarantees their monopoly over the means of production and permits them to determine labor relations as they see fit. This, the National Socialist solution to the problem of labor organization is clearly distinct from that pursued in other countries. In England, France, and Belgium—all states having a highly developed, privately owned, capitalist industrial system—labor relations are determined by the conflict between two organized social groups: employees and employers. Work conditions and salary depend on the strength and the degree of organization found in these two groups. State intervention only occurs when and to the extent that the two groups prove unable to reach a collective agreement. But the National Socialist seizure of power put an end to the open struggle between capital and labor. The National Socialists replaced the marxist unions with the German Labor Front, whose tasks are more psychological than social in nature. The Labor Front has been outfitted largely with the special task of reeducating marxist "infected" workers with the "ideals" of National Socialism; rulings of higher courts refer to this task in order to make it unambiguously clear that the German Labor Front is not responsible for fulfilling the legal obligations of the marxist unions that it replaced.[39] Although the German Labor Front has taken full possession of all the properties of the marxist-oriented unions, the former employees of the dissolved organizations, who have lost any material claims that they had against the marxist unions, are now supposed to be consoled by the "ideal" nature of the mission of the Labor Front.

Whereas the Labor Front's activities are limited to the pursuit of a set of ideological goods, the Law for the Organization of National Labor procures

the widest possible authority for the so-called factory leader (*Betriebsführer*) in all social matters.[40] It must have been a mere lucky coincidence that led the ministerial bureaucracy to entrust the formulation of this law to a former corporate lawyer, Dr. Werner Mansfeld. Even during "marxist" times, Mansfeld had worked to make sure that entrepreneurs possessed unlimited authority within their factories. Intimately knowledgeable of the true needs of the factory leader, Mansfeld realized the basic ideas of economic Führerdom in the law; the system of collective agreements has been destroyed, and the center of all social norms has been shifted to the factory. There, the factory leader, armed with a sense of responsibility, regulates the relations of his "followers" (*Gefolgschaft*) (that is, his employees) in the best interests of the "factory community" (*Betriebsgemeinschaft*). At least the state continues to exercise a number of supervisory and participatory functions through the government-appointed trustee (*Treuhänder*). The much-maligned system of politically determined wages has not been fully abolished, and the trustee can participate in the determination of wages by the factory leader; hence, he can participate in accordance with economic and political necessities. But the trustee's right to intervene in the core activities of the factory leader remains limited. It would be a mistake to assume that the trustee has the power to expropriate an entrepreneur who acts in a socially irresponsible fashion. Nor does the trustee possess the authority to dissolve cartels that he deems socially counterproductive. Granting such authority to the trustee would conflict with the basic principles of a capitalist economy, which National Socialism acknowledges and protects like every other noncommunist state.

In the sphere of labor-capital relations, National Socialism thus has generated nothing but the unprecedented domination of the employees by their factory leader. Toward off growing discontent within the working class that has resulted from this situation, the National Socialists have introduced one of their boldest juristic innovations—the *social courts of honor* (*soziale Ehrensgerichte*). True, these courts fail to challenge the entrepreneur's monopoly over the means of production. But they are supposed to force him—at least as far as nonmaterial issues are concerned—to treat employees with the respect deserving of fellow "German ethnic comrades." In exchange, the worker is supposed to learn to treat the entrepreneur without bias and as deserving of his confidence despite differences in social status. In other words, to protect the existing social order more effectively, the psychological atmosphere within the factory should be improved. Like the German Labor Front, the social courts of honor do not serve the material interests of the working class. These are faithfully entrusted to the entrepreneur. Instead, the social courts of honor serve the "preservation of economic peace and undisturbed community work."[41]

The number of proceedings that have taken place so far—sixty-one in

1934, fifty-six of which were directed against the factory leader—does not measure up to the significance attributed the new social courts of honor in the legal literature and in political propaganda. Clearly, employees cannot gain much by undertaking legal proceedings against the factory leader in the social courts of honor. After all, the courts offer no basis whatsoever for material complaints—despite their profound significance to the workers. Even if the factory leader loses his position because of a blatant failure to fulfill collective responsibilities based on the idea of the factory community, his employees do not take possession of the factory. Consistent with the general aim of preserving capitalist property, the social courts of honor in such cases merely are allowed to institutionalize a division between the overall management of a factory and its immediate direction in the hands of a factory leader. The only controversial aspect here is whether the trustee should have the authority to name the new factory leader[42] or whether the owner should have the power to choose his own replacement as factory leader.[43] The formal alternation of the factory leader means virtually nothing for the employees. In order to avoid troubles with the authorities, even the factory leader often gladly hands over his post to a person who possesses good ties to the state bureaucracy; this practice is especially common among non-Aryan firms. As a series of decisions by the social labor courts demonstrates, the factory leader is freed of any real obligations as soon as he carefully selects a factory supervisor knowledgeable of the relevant legal regulations.[44] Thus, even the attempt to realize the mere psychological goals of the Law for the Organization of National Labor is failing. Given the fact that personal responsibility no longer plays a decisive economic role in developed capitalism, this is unsurprising.

It was widely believed that intensified community spirit within the factory, as well as outfitting the entrepreneur with additional responsibilities, would result in better guarantees of job security for the "working folk comrade" than had been provided by previous formal legal regulations with their marxist-oriented works councils. But even this soon proved deceptive. National Socialism itself was forced to acknowledge this in the wording of the Law Against Unfair Dismissals of January 30, 1934: to a greater degree than had been expected, entrepreneurs are failing to fulfill their responsibilities and are refusing to rescind unfair dismissals. Even though the continuation of employment would have been a reasonable demand in individual cases, they preferred paying compensation, thereby trying to buy themselves free from obligations appropriate to the true spirit of the factory community.[45] Consistent with capitalist modes of economic thinking, National Socialist legislators did not conclude from the entrepreneurs' inadequate community spirit that it would be appropriate to demand that those unfairly dismissed should be rehired on a compulsory basis. Instead, they

merely increased the maximum compensation amount to be paid from four to six months' wages. In addition, the entrepreneur possesses unlimited power to fire not only any of his employees but also any of the members of the Employee's Advisory Council (Vertrauensrat), whose members he chooses. More feudal than capitalist in its basic structure, the conceptual paraphernalia of German labor law makes it extremely difficult to act successfully against unfair firings. Expressions of political opposition naturally lead to immediate dismissals. In other words, any criticism of economic or social policy can be interpreted as a disturbance of community spirit and as constituting sufficient reason for immediate dismissal.

Neither its legal structure nor the manner in which the owner chooses its members allows the Employees' Advisory Council to become an effective organ for representing worker interests. This has culminated in a situation where the material position of the contemporary German worker is decidedly less advantageous than that of his predecessor in the Weimar Republic. Since the shift in social power has been so disadvantageous to the working class, it may very well endanger National Socialism's enthusiastic attempt to destroy "class spirit." In response to this danger, an attempt has recently been made in Leipzig by the State Labor Ministry, State Economic Ministry, and German Labor Front to try to improve the structure of the National Socialist labor policy. Mansfeld has described the resulting agreement from March 26, 1935, as the perfection of German social policy.[46] The agreement represents a partial and rather inconsistent step back toward a system of collective economic self-administration involving worker participation. In reality, the agreement shows that even today the Third Reich lacks a coherent set of social policies. Instead, it is inevitably following the party of the economically dominant; only in response to occasional crises does it even make a pretence of trying to fill its (unfulfillable and inevitably unfulfilled) promises to the weaker social party, the working class.

First, the Leipzig agreement aims to eliminate tensions among the two state bureaucracies, the German Labor Front, and entrepreneurs by trying to amalgamate them. Furthermore, it hopes to funnel growing worker dissatisfaction with the employer-dominated employees' advisory councils by establishing a system of sector-specific work councils based on a system of parity-based representation. Yet a fusion of the Labor Front with the state economic bureaucracies by no means signifies a shift in the relations of power between capital and labor. This fusion fails to give the Labor Front social functions that alone could transform it into a genuine representative of employee interests; more likely, it might lead to a situation where the ideological and educational functions of the Labor Front will be exercised by economic bureaucracies dominated by the entrepreneurial views. Committees based on a parity-based system of representation, where a consensus

between distinct social groups is supposed to be worked out, have been fearfully prevented from gaining genuine decision-making authority. In particular, they have been denied the possibility of intervention in the affairs of individual factories. It makes sense that even parity-based committees of this type could not succeed in heightening the "feeling of spiritual participation" among employees. Every feature of the Leipzig agreement proves nothing more than that, even in the third year of the "Renewal of the Nation," the reorganization of labor relations in National Socialism still faces serious difficulties. It proves something else as well: to ward off an open revolt against National Socialist labor organization by those groups most directly affected by it, particular features of its formal structure repeatedly need to be altered.

HEREDITARY ESTATE LAWS[47]

One of the most striking legal innovations of the Third Reich, the Hereditary Estate Act, aims to "preserve the source of German blood, the farming community, by securing the continued existence of old German inheritance customs." In three different respects, this law signifies a radical break with previous laws. First, it prevents non-Aryans—defined in the broadest possible sense of the term—from acquiring even average-sized agricultural properties. The second decisive legal change consists of making it illegal to mortgage a hereditary farm or to put it up for sale. Only in exceptional circumstances, and then only with the approval of a court, can this rule be disregarded. But this also means, as the legislature was well aware, that the hereditary farmer is prevented from gaining credit on his real estate. Instead, he is advised to seek personal credit.[48] Since failure to repay a personal loan legally cannot result in a foreclosure of the farm, the farmer has no practical way of gaining access to personal credit. The third substantial legal change concerns the right of inheritance. The law eliminates the possibility of dividing farm properties, and it stipulates that a single descendant, generally the eldest son, should inherit the entire farm. Other descendants have a legal claim only to basic living provisions of produce and other assets (which are usually nonexistent) and only as long as such provisions cannot be converted into cash. Since farmers who do not fall under the clauses of the Hereditary Estate Act can gain credit on their real estate and divide their property into lots, they and their heirs are eager to escape its blessings, which prevent them from gaining credit and inheritance. Distinguishing between those who fall under the new law and those who do not is extremely complicated and often paradoxical. If a farmer with little landed property is so diligent that he is able to cover all of his family's expenses with the proceeds from his farm, he still cannot attain the legal status of a hereditary farmer since it is impossible to ascertain whether a somewhat less hardworking heir would be able to support his family in a similar manner.[49] When, as is common in southern Germany, some type of business related to agricultural production is operated in conjunction with the farm, the agricultural unit in question becomes incorporated as a hereditary estate; that means that there are still possibilities for the farmer to gain credit on his real estate. In contrast, the hereditary farmer who simply engages in farming, and thus lacks the regular access to cash revenue possessed by his peer, is deprived of any chance of gaining such credit. The new regulations inevitably lead to a proletarianization of those offspring denied an inheritance, regardless of whether they receive financial compensation for leaving the farm. If they decide to stay, they are nothing more than servants—the only difference being that they cannot be dismissed from their positions. Understandably, many victims of this process are not content with their proletarian fate. Thus, they try to bring attention to aspects of the hereditary farmer's conduct that might justify a court decision to strip him of his special legal status. Although legal requests to disband the hereditary farmer's special status thus far primarily have come from creditors rather than members of his own family, this merely stems from the novelty of the law. In other words, it stems from the fact that the decision about who is to fall under the new law's provisions has yet to be made everywhere, as well as the fact that the overall number of relevant cases has remained relatively limited. We can already begin, however, to identify trends that suggest that the very aim of the law—the preservation of stable families—is likely to be undermined by it. The struggle to gain land and property, whether undertaken by a creditor who is trying to foreclose on a farm, an impatient son, or a brother threatened by the spectre of proletarianization, is now being waged with moral arguments rather than simple juristic means. Although the short period in which the Hereditary Estate Act has been in effect prevents us from reaching any final conclusions about its consequences, the social disadvantages resulting from it certainly seem to outweigh its advantages. It fails to resolve the question of small farms; the attempt to distinguish between hereditary farmers and other types of farmers creates artificial separations within otherwise homogeneous sections of the population; the credit problems of the average farmer are rendered irresolvable; all the farmer's offspring but one are driven into the ranks of the proletariat. Through this, and through new legal instruments that allow family members to discredit the hereditary farmer and then grant his special privileges to another sibling, familial harmony is destroyed.

CONCLUSION

Although changes in administrative, labor, and agricultural law might create the impression that they intend to provide economic relief for those

who have suffered from the economic crisis, such changes have in fact only resulted in a reshuffling of positions within the social structure: individual members of the economic and bureaucratic elite have profited at the expense of the public as a whole. It is evident that the measures undertaken by Hitler's regime against the economic crisis are a failure. That should be no surprise to those who understand that National Socialism's political roots are utterly reactionary and that the social mission of National Socialism is to represent the interests of a minuscule upper class.

Changes in the criminal law are functioning primarily to produce a system of total state repression unforeseen in the annals of modern civilization. Fewer years of imprisonment were passed in the eleven years of Bismarck's antisocialist laws than during one month of National Socialism. Fifty political convicts have been executed within two-and-a-half years of Hitler's regime; more than ten people are still sitting on death row. As these lines are being written, a new practice of the criminal "justice" system is getting tested: all political opponents are being systematically condemned to death. This is how the people's court justified the death sentence for the former communist parliamentarian Kaiser on August 4: with the comment that "he was active on behalf of communist ideas dangerous to the state and folk." This is how they similarly sentenced the leader of Rote Hilfe, Rudolf Claus, to death a few days earlier. The same thing can happen at any moment to any functionary in the antifascist movement, or leader of the union movement or Catholic Church. A new and unthinkable radicalization of judicial terror has occurred. The spectre of the death sentence haunts Germans of every social class. Judges and lawyers, who are increasingly hesitant to participate in the operation of this apparatus, no longer can close their eyes to the fact that a political system dependent on this type of criminal law ultimately cannot endure.

The task of future jurists will be to put an end to the National Socialist campaign of annihilation in all elements of the legal order. In the process, the groundwork for the legal system of a socialist Germany can be prepared.

(Translated by Anke Grosskopf and William E. Scheuerman)

NOTES

1. Editor's Note: Carl Schmitt long had argued that the rule of law constituted an essentially bourgeois ideal. In accordance with middle-class liberalism's basic hostility to the imperatives of a political universe characterized by the need for dramatic "decisions" incapable of being rationally justified, the rule of law functioned as an "antipolitical" instrument for restraining authoritative political action and forms of state power; its spirit corresponded to a typically middle-class preference for deliberation and "chatter." The emphasis of the rule of law-ideal on the virtues of regulating political action by means of cogent general legal statutes allegedly represented an attempt to subdue politics to a set of inappropriate "normativistic" criteria.

At a first glance, this position seems similar to marxist-inspired analyses of the rule of law like that developed by the Frankfurt School scholars; it certainly parallels important features of orthodox marxist views of the rule of law. But the following passages from Kirchheimer's 1935 essay already point to two significant differences. First, Neumann and Kirchheimer believe that "the transition from competitive to monopoly capitalism" tends to undermine the "bourgeois" character of the rule of law-ideal. In the simplest terms: the rule of law becomes economically dysfunctional in organized (or "monopoly") capitalism. Second, the rule of law always contained an "ethical minimum." That is, it serves a set of essential protective functions. The benefits of this "ethical minimum" chiefly accrued to privileged social strata, but others have also been able to benefit from it at least during some historical periods.

2. Editor's Note: In order to discredit liberal legal forms, Nazi jurists—including Carl Schmitt—typically traced their roots back to Roman and Jewish sources purportedly alien to the spirit of "Germanic" law.

3. Editor's Note: Kirchheimer is making a point here about Nazi legal practice during the regime's early years that more recent scholars have also made: as Stanley L. Paulson recently commented,

> [r]ather than waiting for the introduction of new statutory law, judges and other officials in Nazi Germany simply departed from the language of existing law whenever and wherever that was called for . . . [T]ime-honored guarantees of the rule of law or *Rechtsstaat* were eliminated in one fell swoop—not legislatively, but rather in the judicial practice of the new regime.

Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (1994): 313–359.

4. Fauser, "Das Gesetz im Führerstaat," *Archiv für öffentlichen Recht* 26 (1935): 149. The author refers to the Beuthen decision as an example of the ills of the pre-National Socialist legal order. In that decision "an instinctive political sense" of National Socialist ideology was clearly missing because "several German folk comrades were condemned to death on account of a Pole."

Editor's Note: In August of 1932, a Polish Communist was brutally murdered in Upper Silesia by a group of Nazis. Despite the fact that the Nazi leadership openly sympathized with the murderers, the regional court in Beuthen sentenced five Nazis to death. The ruling was followed by Nazi-organized riots in which Jewish businesses and the offices of republican newspapers were plundered.

5. Editor's Note: The 1935 Berlin International Criminologists' Congress focused its discussion on the following questions:

> Section I.
>
> 1. What powers must the judge in a criminal court possess in the execution of penalties?
> 2. What measures can be recommended to shorten the so-called "monster trials"?
> 3. Should the attenuation of penal legislation influence judgments which are already enforceable? What influence may a change in the legislation regarding the execution of penalties be allowed to have on the penalties which were definitely imposed before this change or the execution of which had already commenced?

Section II.

1. Are the methods applied in the execution of penalties with a view to educating and reforming criminals calculated to bring about the effects aimed at, and are these tendencies generally advisable?
2. What influence does industrial and agricultural unemployment have on the work of the prisoner in time of crisis, and by what means can the harmful consequences which it causes be avoided or reduced? In fixing the standard of life of the prisoner, must account be taken of the standard of life of the population in general?
3. How must the execution of penalties restrictive of liberty differ from the execution of measures of security involving deprivation of liberty?

Section III.

1. In what cases and according to what rules should sterilization be applied in the modern penal system, whether by castration or by vasectomy or salpingectomy?
2. Is it desirable to introduce into the penal legislation provisions authorizing the judge to prohibit persons condemned for offences connected with their profession from carrying on that profession?
3. Is it desirable to establish homes for discharged prisoners?

Section IV.

1. Should juvenile courts be given the power to decide on the measures to be taken with regard not only to erring children and youths but also to children and youths in moral danger?
2. How would it be possible, in the organization of the detention of minors pending trial, to reconcile the requirements of procedure with the interest of the moral protection of the minor against the dangers of detention?
3. What is the best way to organize moral and material assistance for children and youths when they leave schools or other institutions in which they have been placed by order of the court and by whom and in what manner should such assistance be granted?

Reprinted from *Actes du Congres Pénal at pénitentiare International de Berlin, Août 1935* (Bern, 1936), pp. 78–94.

6. See the very important remarks on this in Heinrich Henkel, *Strafrichter und Gesetz im neuen Staat* (Hamburg, 1934).

7. Rudolf Freisler, *Gedanken zur Strafrechterneuerung im nationalsozialistischen Strafrecht* (Berlin, 1933), p. 9.

8. Friedrich Schaffstein, *Politische Strafrechtswissenschaft* (Hamburg, 1934), p. 28.

9. Editor's Note: *Black's Law Dictionary* defines legal analogy in the following manner: "In cases on the same subject, lawyers have recourse to cases on a different subject-matter, but governed by the same general principle." *Black's Law Dictionary* (St. Paul, Minn., 1979).

10. Editor's Note: This refers to the idea that "there can be no punishment without law."

11. Editor's Note: The reference here is to Section I, Question 3:

Should the attenuation of penal legislation influence judgments which are already enforceable?

What influence may a change in the legislation regarding the execution of penalties be allowed to have on the penalties which were definitely imposed before this change or the execution of which had already commenced?

12. Editor's Note: Under a set of mysterious circumstances, van der Lubbe allegedly set the Reichstag on fire on February 27, 1933. His actual role in the fire was never clarified. The fire played a crucial role in securing Hitler's rise to power.

13. Ebert, *Deutsche Justiz* 96 (1934): 480–485; see also Rudolf Freisler's comments in *Zeitschrift der Akademie für deutsches Recht* 1 (1934): 82.

14. Editor's Note: The German expression here is "*Du kannst, denn du sollst.*" In other words, since something is legally decreed, it must be possible, even if there is no real possibility for a particular, concrete individual to do so.

15. Editor's Note: The question reads: "Are the methods applied in the execution of penalties with a view to educating and reforming criminals calculated to bring about the effects aimed at, and are these tendencies generally advisable?"

16. Editor's Note: In contemporary American criminal law, "attempt" is defined by *Black's Law Dictionary* as "an effort or endeavour to accomplish a crime, amounting to more than mere prevention or planning for it, which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design."

17. Freisler, in *Zeitschrift der Akademie für deutsches Recht* 1 (1934): 82.

18. See Oetker's comments in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, ed. Hans Frank (Munich, 1935), p. 1346.

19. Just to mention a further example: the French newspaper *Le Temps* published a report on May 27, 1935, about the case of Rudolf Claus, who was a functionary in the Rote Hilfe. After summarizing the reasons given by the Nazi people's court for the penalty, the article closes with the comment: "So what are the crimes that the condemned is accused of? Nothing very precise was made public about this."

Editor's Note: Rote Hilfe was a Communist Party charity organization.

20. Stanislaus Rappoport, who is a member of the Polish Supreme Court and a professor at the University of Warsaw: "Le Futur Code Pénal du Troisieme Reich," *Revue internationale de droit pénal* 39, no. 3 (1934).

21. Editor's Note: I have been unable to gather any further details about the case referred to here.

22. Rudolf Freisler in *Grundzüge eines allgemeinen deutschen Strafrechts. Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für deutsches Recht* (Berlin, 1935), p. 103.

23. Zimmerl in *Deutsche Juristenzeitung* 39 (1934): 442.

Editor's Note: Dimitrov was a famous Bulgarian Communist and analyst of fascism; Thälmann was leader of the German Communist Party.

24. Editor's Note: For an accessible discussion of the Nazi *Sondergerichte* see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991), pp. 129–137.

25. Editor's Note: This refers to the principle that legal bodies are not permitted to alter a court ruling in a manner that works to the detriment of the condemned.

26. Editor's Note: The accompanying explanation for the question at the Congress reads:

It has been found on various occasions that ordinary provisions governing criminal procedure and in particular the provisions regarding the furnishing of evidence . . . are only suitable for trials of more or less normal length while, in the case of very big trials,

> they lead to an excessive and unreasonable extension of the substance of the trial. The question therefore arises whether, in such cases, it could be left to the court to decide on the extent to which evidence should be furnished.

27. Editor's Note: The "people's court" was outfitted with the special task of persecuting political opponents. A contemporary German jurist describes it as "first and foremost an instrument of political terror . . . with the goal of exterminating political opponents." Günter Gribbohm, "Das Volksgerichtshof," in *Juristische Schulung* (1969), p. 109. See also Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, pp. 140–152.

28. See von der Goltz, *Deutsche Juristenzeitung* 39 (1934): 182.

29. Freisler, *Grundzüge eines allgemeinen deutschen Strafrechts*, p. 100.

30. Editor's Note: On June 30, 1934, SA Leader Röhm was murdered by the Nazi leadership. Kirchheimer very well may be referring here to the rather peculiar legal justification of the Nazi leadership's act that Carl Schmitt provided in an infamous 1934 article, "Der Führer schützt das Recht" ("The *Führer* Keeps Watch Over the Law"), reprinted in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1923–1939* (Hamburg, 1940).

31. Editor's Note: Issued on April 7, 1933, this decree made it illegal for Jews and "Marxists" (in other words: Social Democrats and Communists) to maintain positions within the civil service.

32. See *Reichsarbeitsblatt* from March 5, 1934.

33. These were the words used by the lawyer and District Führer Dr. Römer in the *Westfälische Zeitung*.

34. F. Wieacker in *Deutsche Juristenzeitung* 40 (1935): 1449.

35. Theodor Maunz, *Neue Grundlagen des Verwaltungsrechts* (Hamburg, 1934).

36. Editor's Note: The original here contains a number of typographical errors that render it very difficult to translate.

37. Editor's Note: The reader should keep in mind that the essay appears to have been authored in the summer or autumn of 1935. Obviously, this situation soon changed dramatically.

38. *Reichsgesetz* 134, p. 1.

39. *Juristische Wochenschrift* 64 (1935): s. 1338.

40. Editor's Note: The basis of Nazi labor law was the *Gesetz zur Ordnung der nationalen Arbeit* from January 20, 1934. It gave the proprietor the status of the workplace or factory "*Führer*" (leader); employees were now "*Gefolgschaft*" (followers), and both leaders and followers were given the duty of cooperating "in the best interests of the folk and state." The democratically elected Weimar labor councils (*Betriebsräte*) were replaced by a system of Employees' Advisory Councils (*Vertrauensräte*), which was given the responsibility of "deepening the spirit of trust within the factory." In order to become a member of this council, a worker's candidacy for it had to be approved by both the Factory Leader and the factory "cell" representative for the National Socialist Party. For a detailed account of Nazi labor law see Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York, Harper & Row, 1944), pp. 419–427. Also see Taylor Cole, "National Socialism and the German Labor Courts," *Journal of Politics* 3 (1941): 169–197; Nathan Albert Pelcovitz, "The Social Courts of Honor of Nazi Germany," *Political Science Quarterly* 53 (1938): 350–371.

41. Von der Goltz in *Juristische Wochenschrift* 64 (1935): 1281.

42. This is the view of Ernst Huber, who primarily seems to have its propagandistic benefits in mind, see *Deutsche Juristenzeitung* 39 (1935): 207.

43. This view, which is more consistent with the functioning of capitalism, is endorsed by analysts such as Werner Mansfeld and Pohl.

44. See the decisions reprinted in *Juristische Wochenschrift* 64 (1935): 1302.

45. *Reichsarbeitsblatt* (1934), 1, 274.

46. *Juristische Wochenschrift* 64 (1935): 1284.

47. Editor's Note: The *Erbhofrecht* analyzed here was made law on September 29, 1933. According to it,

> the peasant (only if racially a pure Aryan, of course) was tied to the land. Upon his death, it passes to one heir, undivided and unencumbered. The order of succession is fixed: the son, his offspring, the father, brothers or daughters and their offspring, sisters. To be a hereditary peasant one must be *bauernfähig*, that is, capable of managing the farm.

Neumann, *Behemoth*, p. 394.

48. See the discussion of this issue in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, ed. Hans Frank (Munich, 1935), p. 1064.

49. See the decision of the Hereditary Estate Court in Karlsruhe, printed in *Juristische Wochenschrift* 64 (1935): 2014.

SIX

Criminal Law in National Socialist Germany

Otto Kirchheimer

The first period after the downfall of the Weimar Republic was marked by the rise of authoritarian ideology. An authoritarian criminal theory, mingled with elements of the old classical school, dominated the academic field. In the criminal courts the transition was immediately reflected by the imposition of harsher punishments and by a weakening of the status of the defendant.

In this early period, the genuine national socialist contribution is to be found in the theory of the volitional character of penal law (*Willensstrafrecht*). This theory, the ideological offspring of Dr. Freisler, Undersecretary of Justice, completely shifted the emphasis from the objective characteristics of the criminal act to its subjective elements. It asserted that the state is justified in demanding greater self-control from the individual and also in considering criminal intent as the main object of the offensive action of the authorities. The content and even the style of these ideas were copied from Nietzsche, who characterized penal law as war measures used to rid oneself of the enemy.[1]

The most important practical consequence of this more or less deliberately vague theory was a disappearance of the distinctions usually separating criminal attempt and the consummated criminal act.[2] Neither doctrine, however, made much headway. When German theorists discovered that Germany is not an authoritarian state but a racial community, authoritarian criminal theory lost its theoretical foundation.[3] The doctrine of the volitional character of the penal law, although never officially discarded and still considered as a clue to national socialist law,[4] ran into a maze of contradictions and theoretical difficulties. At first it seemed to foreshadow the

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conversion of punishment of consummated acts into prohibitions against the commission of acts which would merely endanger the community. In effect, the new legislation of 1933, relating primarily to treason and the protection of the people and the government, has made punishable a large number of mere preparatory acts which, although not having done any actual damage, might, had they been consummated, have endangered the community.[5] The theory, although justifying the punishment of such preparatory undertakings in the case of high treason and related subjects, nevertheless fought with all available arguments against the unlimited extension of the penal sanctions.[6] The measures of security—one of the cornerstones of the national socialist penal legislation—introduced in 1933 are intended to protect society from future misdeeds and therefore aim also at wholly or partially irresponsible persons.[7] These measures, too, defy classification under a system of volitional penal law. Moreover, the doctrine would not apply to the whole field of negligence.

The so-called *Kieler Schule* (Phenomenological School) gained some theoretical following and its doctrine superseded, at least to a limited extent, the volitional penal law doctrine. With the beginning of the present war its influence could even be noticed in the formulation of governmental decrees and court decisions, which were seeking a concept to minimize the legal requirements for punishableness. In its theoretical foundation, this doctrine shares Carl Schmitt's attack on general conceptions, on normativism and positivism, and stresses, instead, the concrete order of life. Intuition and essence are introduced as the true method of discovering the criminal agent. His innate character can never be educed by mere logical deduction from the statutory requisites. "A person who takes away a movable object not belonging to him does not necessarily classify himself as a burglar. Only the very nature of his personality can make him such."[8] Vehement controversies rose around this doctrine. Its chief adversaries tried to prove that a penal code retaining rational and teleological elements was more in line with the aspirations and needs of National Socialism than was the *Kieler Schule*.[9]

For practical purposes it was sufficient to abandon the *nulla poena sine lege* rule[10] and to substitute the postulate of material justice (legitimacy) for mere formal deduction from the law (legality). These devices and, more effectively, the constant stream of new and sometimes retroactive statutes and decrees, coupled with the increasing subordination of the judiciary to the orders of the central authorities, worked to fashion the new fabric of national socialist penal law. The postulate, always recurrent in the national socialist literature of penal law, that mere formal wrongdoing must be superseded by the motive of material justice, leads to the demand that the eternal tension between morality and law, dominant in the liberal philosophy of law, must disappear.[11] The social order of the racial community postulates

the identity of law and morality. With this identification the given order is theoretically accepted as unquestionable and just. On the practical side, however, German literature no longer holds that acts formally forbidden by statute but performed in the higher interest of the country are not punishable per se. As in any other established order, there is still the contradiction between legal and legitimate. If there is an urgent need to suspend the validity of criminal sanctions—and many such cases are found in the Germany of today—the reference to a legitimacy beyond the law does not seem to be sufficient. In 1934, in the case of Röhm and his followers, a special law was promulgated, retroactively covering murder in these cases with a cloak of legality.[12] With regard to the recurrent criminal acts of overzealous Party followers, amnesty laws with *nolle prosequi*[13] clauses intervene, thus maintaining the fiction of a coherent legal order. The main importance of the attempted unification of the moral and legal order lies, therefore, in the symptomatic desire to broaden the scope of the penal law, and to extend its activities to new fields. We abstain from remarking on mere changes of phraseology which, in order to justify more severe punishment, try to find a foundation for secondary social rules in the new mores of the country. Under the pre-Hitler penal code, a person who abused a position of special trust was punished for breach of trust; the new prescription retained the old definition but added to its scope the violation of the duty to take care of other people's financial interests. Corruption was to be attacked through this comprehensive definition.[14] The mass of published decisions contains no hint of an intensified drive against corruption, but what quite naturally happened was that heavy pressure was brought to bear upon contract partners by initiating criminal prosecutions. The Reichsgericht was compelled to side against such attempts at enlarging the content of the penal law by explaining that mere violation of contractual relationships does not come under the modified prescription, and that the duty to protect other people's financial interests must be the essential content and not a circumstantial element of the contract in order to enjoy the protection of the modified Section 266.[15]

More far-reaching than this attempt to raise the standard of business ethics was the extension of the category of crimes committed by omission.[16] This extension was carried through by new legal rules as well as by judicial interpretation. Section 330c of the Penal Code makes it a legal duty for all people to render assistance in cases of accident or common danger, and the neglect to do so may be punished by imprisonment for two years. But still more important is the way in which judicial interpretation has extended the legal necessity of action. Every conceivable statute, whether in the realm of civil or of criminal law, may create such duties. An attorney who does not prevent his client from lying to the court when under oath may be punished

for participation in perjury, as Section 138 of the modified Code of Civil Procedure requires the parties to give complete and true accounts.[17] The wife of a hereditary farmer has the duty of extinguishing fires on the property because the hereditary farm law and the legislation in the field of agricultural production aim at raising production.[18] The Reichsgericht's interpretation creates special duties for people living in a family or in a domestic community. Here the Reichsgericht decides that the moral duty of Christian charity becomes a legal duty, the neglect of which results in punishment.[19] There have been many objections to this method of converting moral into legal duties whenever the court likes to inflict punishment.[20] The previously mentioned Kieler school has therefore tried to replace the moral-legal duty argument by increased emphasis on the nature of the criminal. Motives, general disposition, criminal antecedents, and personal character here largely replace objective characteristics, making the uncertain boundaries between legal and illegal still more indeterminate.[21]

The "sound feelings of the people" occupy a special position among the attempts to enlarge the scope of criminal law. In some instances—as in the previously mentioned Section 330c, and in the analogy prescription Section 2—they were explicitly inserted in the statutes. But in addition to that, they play an important part in the general reasoning of the courts. It may be doubtful, though, in particular instances, what the "sound feelings" of the people amount to. It is interesting to know that in such cases the individual judge is not supposed to act as an independent source of the "people's feelings." He is directed to find the authoritative expression of the "people's feelings" in two sources: first, in the pronouncements of the nation's leaders, and second, in the homogeneity of conceptions developed by the similarity of educational and professional standards among members of the judiciary. That is to say, the people's feelings are crystallized by the authentic interpretation first, of the executive, and second, of the judicial bureaucracy.[22] Most important of all, because of its wide field of application, is the mention of the "people's sound feelings" in the analogy prescription. The application of Section 2 is allowed only when two conditions coincide: first, that the fundamental idea underlying the statute can be applied to the case in question, and second, that "the people's sound feelings" require such application. If the fundamental idea of a statute is conceived as something fixed once and for all at the time of the statute's perfection, Section 2 serves only as a permissive clause for closing gaps unintentionally left open by the legislator. But it would not be permissible to extend this application to new facts which the legislator could not foresee.[23] In Germany, criminal law theory embraces all shades of opinion. Representatives of a very conservative application[24] are found side by side with advocates of an opinion which allows for changes in the fundamental idea,[25] and both

are outdone by a number of extremists who start by emphasizing the "people's sound feelings." Of course, in the phraseology of the statutes, "sound popular feeling" only takes second place after the mention of the fundamental idea of the statute. But for these extremists the analogy has little meaning as they acknowledge the legal prescriptions only as signposts for the judge, to guide him in his creative endeavor to form the conception of material wrong doing.[26] The numerous opinions delivered by the Reichsgericht on this question show a remarkable restraint in the use of Section 2 in contrast to the practice of the lower courts.[27] It would be futile to pin down the Reichsgericht to a well-defined doctrine, but it constantly refused to lend support to the more extremist views, and even recently it declared that no dispensation of the judge from obeying the statute follows from Section 2.[28] The following are among the most important decisions: the application of Section 2 in order to punish false accusations of unknown persons is denied, since the legislator intentionally refrains from punishing such accusations.[29] Merely immoral acts cannot be punished as incest because the legislator has deliberately demarcated the realm of punishable acts.[30] The cases in which the abuse of the dependency relationship is punishable are also explicitly limited and no extension into new fields may take place.[31] Neither did the interesting attempt to extend rape into the field of matrimonial relations find favor.[32] Manslaughter cannot be interpreted as murder simply because the accessory circumstances were especially atrocious.[33] A wide domain was more or less completely closed to the application of Section 2 when the Reichsgericht argued that the analogous application of prescriptions given by the national socialist legislator must be examined with the utmost care in order to make sure that the lawmaking authorities did not intend to erect a barrier against extension by analogy.[34] Of the less frequent cases where the Reichsgericht approved of the application of Section 2, we mention only two significant ones. The first case is concerned with the receiving of stolen goods. If a person, instead of receiving stolen goods, did receive the gains obtained by selling or exchanging them, he will nevertheless be punished. In this case, of course, the Reichsgericht admitted a change of the fundamental idea on which this prescription rests. The original prescription was directed against the hiding of stolen property, whereas in the new interpretation the idea of attacking participation in, and profiting through, crime prevails.[35] Embezzlement by employees of the party and related organizations is dealt with as embezzlement by public officials.[36] But it is interesting to know that so far the Reichsgericht utilizes only old tactics from the postwar revolutionary period (1918–1919) when it convicted revolutionary organs of "malfeasance in office," as if they were public officials. Throughout the decisions of the Reichsgericht there is an evident tendency to maintain rationality in the realm of criminal law. This

rationality requires that the statute is preserved as a main focus for the decisions of the individual cases. On the other hand it pays for its attempt to maintain a certain coherence in the legal system by complete submission when cherished ideas of the new regime are at stake. Thus, for instance, its decisions regarding race defilement fall in line with the interpretations of the most ardent adherents of the official dogma and try to extend the range of this legislation as far as possible.[37]

It is especially interesting to note the willingness of the Reichsgericht to extend legislation on race defilement to include foreigners who have contravened this German legislation on foreign soil.[38] It is just a preliminary stage of the realization of the ambitious plan to extend the limits of criminal jurisdiction over foreigners in foreign countries. This plan aims at extending the jurisdiction beyond the traditional limits of high treason, felony, and so on to embrace the punishment of all violations of German interests.[39] This principle remained a mere postulate, without much actual importance, as long as Germany's rule was restricted to her own territory. But at the point at which she began successfully to invade other countries, the retroactive extension of part of the German criminal legislation, as done by decree of May 20, 1940, to foreigners acting in foreign countries, served the double purpose of giving a cloak of legality to persecutions of foreign political enemies who fell in German hands and then frightening into submission the population of still unconquered territory by indicating the legal consequences involved in any move against Germany—a kind of legal counterpart to the *Blitzkrieg* movies shown to the upper classes in the countries about to be invaded.[40]

But it is questionable how far the influence of the Reichsgericht extends. The changes in appeal practice, no longer allowing many cases to come up to the Reichsgericht for review, limit the sphere of influence of the highest court. Where the influence of the Reichsgericht has diminished, the administration has stepped in with its much more effective weapons for coercing judges to fulfill its wishes not only as regards the general ideas but also as regards decisions in concrete cases. Whenever the government so desires, it can compel the judiciary to mete out sentences according to its wishes by means of retroactive statutes. This method was used in two types of cases. First, in the "cause célèbre" of van der Lubbe (Reichstag fire) the retroactivity served to obtain a desired sentence in an individual case. Second, retroactive statutes were later issued as, for instance, the statute against kidnapping and the statute against car holdups with the help of traps, as well as in the more recent war legislation. Here the retroactive death penalty was introduced in order to achieve an immediate deterrent effect. The executive influence on the administration of criminal justice has been further increased by the gradual abandonment, since 1937, of judicial

self-government. The assignment of tasks within the court is no longer carried out by the president of the court in connection with the presidents of the various sections and the highest ranking associate judge, as independent organs of the court, but by the president of the court alone as representative of, and on orders from, the ministry of justice. The assignment may be changed during the year not only for specific reasons, for example, illness, but also in the interests of the administration of justice.[41] This development, which tends to lower the judiciary to the status of a mere administrative agency, finds its logical conclusion in new regulations issued at the beginning of the war. These regulations grant the ministry of justice the right to change and unify jurisdictions and to abolish the immovability of judges, by ordering them to accept all assignments within the jurisdiction of the ministry of justice.[42] The dismissal and the compulsory retirement of judges, at first only planned as a transitional measure for the stabilization of the regime, have become a permanent device. The judges are subjected to Section 71 of the civil service statute, which provides for the compulsory retirement or dismissal of officials if they do not give sufficient guarantees of adherence to the National Socialist regime. The removal may, however, not be ordered by reason of the material contents of a judicial decision. But the boundaries are difficult to draw and a decision not punishable in itself may nevertheless reveal just that personal unreliability on which the removal may be based.[43] The changed status of the judge is quite naturally reflected in the official ideology which, instead of formal independence, emphasizes the judge's incorporation in the racial community.[44] The central administration also increasingly influences the decision of individual cases through the medium of the public prosecutor's office. Legally speaking the courts are at liberty to deviate from the punishment asked for by the public prosecutor, but in practice they are strongly discouraged from doing so.[45] The effect is evident. The rate of acquittals fell from 15.06 percent in 1932 to 10 percent in 1938. Duration and severity of sentences have increased,[46] even if the share of fines in all punishments has not varied very much. From 56.6 percent in 1932 it went down slightly to 54.5 percent in 1938, an interesting sign that even the penal law of the racial community cannot dispense with such capitalist institutions as fines. There is also, so to speak, a certain type of public opinion which exerts heavy pressure on the courts from below. This public pressure is allowed to express itself in the more extremist organs of the National Socialist Party, which sometimes disagree violently with the judiciary and publicly express their opinion in their newspapers.[47]

There is another feature to which little attention has been paid and which seems, however, very seriously to have influenced the administration of criminal justice in Germany: that is the disappearance of a unified system of criminal law behind innumerable special competences (departmentalization). The ever increasing number of administrative agencies with independent penal power of their own has enormously diminished the scope of action of the regular criminal courts.[48] This curtailment of the judiciary's activity is a phenomenon of deep social significance. Special administrative units like the S.S., the National Socialist Party, the labor service, and the army have their members partially or totally exempted from the competence of the ordinary criminal courts. Under the special disciplinary rules of such organizations, the legal demarcation between permissible and illicit behavior may be fundamentally the same as in the ordinary law courts. But the primary object of such organizations is the unconditional maintenance of a strictly hierarchic order, and this colors and varies the application of the penal law. The reestablishment of special military courts, abolished under the Weimar Constitution, was one of the first fruits that Hitler's victory brought to the army. Since then, the organization of the military courts has been carried out with great thoroughness. From a purely legal point of view the compulsory labor service has only a rather restricted disciplinary power over its members.[49] But in practice two-thirds of all punishable acts committed by members of this service are handled by the labor service organs themselves.[50] The same applies to more exclusive organizations like the S.S. The exercise of this disciplinary power makes it impossible for rival bureaucracies like the judiciary, and, to a certian extent, the public, to get too many glimpses of the conditions prevailing in such services, which are thus more or less hermetically sealed against outside influences. But at the same time the peculiar mixture of special disciplinary and regular penal power, which prevails even if nominally special penal courts are set up in the particular administrative branch, appreciably increases the administrative pressure on the members of the service.

The facts that the demarcation lines between special disciplinary and general penal power[51] are insignificant and that both these powers are combined in one bureaucracy result in a guarantee of the complete subservience of the individual and an immense advantage for the service. The separation of functions between the entrepreneur and the coercive machinery of the state is one of the main guarantees of liberty in a state of affairs where few people control their own means of production. This separation has often been threatened and rarely completely achieved. Now, however, it is completely eliminated under this combination of disciplinary and penal power in the same administrative service.

Whereas the exemptions of the members of the labor service or of soldiers are personal and more or less complete exemptions, German practice also knows a considerable number of exemptions that are only attached to specific functions, while in other respects the competence of the ordinary criminal courts is upheld. We do not need to go into the treatment of political offenders by the *Volksgerichtshof*, which is one of these special agencies

for a selected category of criminal cases. The importance of this agency, by the way, is diminished by the very fact that the Gestapo (Political Secret Police) are not obliged to abide by its decisions, but may keep in custody people acquitted by this court. The commercial part of the administrative penal law is only concerned with the professional activities of merchants, factory owners, their deputies, and the affairs of taxpayers in general. The term "exemption" is, strictly speaking, incorrect, as the German legal system provides for a dualist procedure. The administration is at liberty to carry the case to the courts or to impose fines of varying amounts on its own authority. The German theorists try hard to find a demarcation line between ordinary criminal law and commercial-administrative criminal law. They refer to the degree of immorality involved or call upon the difference between proven and presumed culpability for the different procedures.[52] In reality the completely discretionary power of the administrative agency as to whether it decides to initiate a criminal prosecution or prefers to deal with the offender by administrative methods defies theoretical classification. Criminal prosecution carries with it loss of social and economic position through imprisonment, publicity, and criminal records. The administrative procedure means a change in the basis of calculation, perhaps an alteration in the distribution of the social product between different participants in the process of production or distribution, perhaps only between entrepreneur and administration. This applies equally to tax evasion and to infringement of price, marketing, or production regulations. In many aspects such administrative procedure can be compared with the antitrust prosecution by the U.S. Attorney General whose last report expressly states: "The defendants are usually not members of what is ordinarily called the criminal classes."[53] But whereas the U.S. courts decide as sovereign bodies when to further and when to bar the industrial policies of the administration, the use of the administrative penal law in Germany represents an effective weapon of the administration's economic policy. It is applied, not to ascertain what the law of the land is in the question under dispute, but in order to coerce the merchant or industrialist to fall in line with the administrative regulations. In some cases private combinations, such as marketing organizations, were invested with disciplinary and penal power, and the official industrial associations (*Wirtschafts-Gruppen* and *Kammern*), which had similar powers, were mostly dominated by the most powerful affiliated corporations.[54] On the other hand, the choice of the administrative penal procedure in the field of taxation, marketing, or price fixing represents a noticeable advantage to the commercial and industrial classes in their typical clashes with the public order. Its consequences are of a financial nature and do not prejudice the social status of the persons involved. For a long time the administration has even acknowledged that these penalties form a part

of the ordinary business expenses to be deducted when establishing the net income of corporations for tax purposes.[55] Behind these advantages, which the administrative penal procedure grants to the business classes, there is always, of course, an evident danger that the administration may use the weapon of criminal prosecution against a recalcitrant or otherwise unpopular member of the business classes.

Administrative penal procedure does not necessarily imply that the offender fares badly in the individual case, as its foremost task is not one of punishing but of enforcing the obedience of the individual to the administrative policy with its rapidly changing needs. These administrative needs have also been responsible for a completely changed treatment of petty criminality (minor offenders in ordinary criminal cases). The increasing maze of regulations, economic hardships, and fundamental processes of economic dislocation, with their inevitable consequence of loosening moral standards, have created an urgent problem of what to do with the enormous army of minor offenders. The theory that had elevated the criminal as such to the rank of the archenemy who has to be exterminated hastened to show that the essential nature of those petty offenders raises a totally different problem.[56] The administration coped with the problem in its own way. It institutionalized an expedient that democratic governments use only very hesitantly. In 1933, 1934, 1936, 1938, and at the beginning of the war in 1939, amnesties were issued for: a) minor offenses of all types, punishable with prison terms of one to six months, b) minor offenses of political enemies, covering sentences up to six months, and c) almost all types of offenses and sentences of overzealous political adherents. The amnesty laws applied to judged as well as to pending cases.[57] The magnitude of these amnesties may be seen from the figures shown in the table on the following page, although they are very incomplete.

The German solution to the problem of petty criminality by generous and regularly recurring amnesties is open to grave doubts. When, by sheer good fortune or by adroit manipulation, it is possible, even if discovered, to avoid punishment, the enforcement of the penal law assumes the character of a gamble. A purely technical consideration must also be added because of its specific weight. Whether the offender is classed as a first offender or as a recidivist merely depends upon the chance of whether, at the time of the amnesty, the proceedings had already advanced as far as the judgment stage and whether his records have therefore been transferred to the criminal files, or whether he is lucky enough to get away with the *nolle prosequi* and therefore keeps his criminal record "virgin," as the French like to say.[58] Let us agree, for a moment, that the lawyer is a mere administrative classifier. Even a purely classificatory practice will suffer in the long run if the administrative technique is completely reversed during the year, while the

Numbers of convicted for crimes and misdemeanors[1]				*Amnestied*	*Nolle prosequi*	Strafbefehle[2] *asked for by prosecutor concerning trespasses and misdemeanors (in thousands)*
1928	588,492					831
1932	566,042			139,899	64,839	696
1933[4]	491,638	Amn. Dec. 30, 1932, results for Prussia only (55% of Reich)	up to 6 mos.[3] polit. up to 5 years	51,933		643
1934	383,885	Amn. Aug. 2, 1934, Prussia only (55% of Reich)	up to 3 mos.[3] polit. 6 mos.	193,350 44,174	120,244 50,334	565
1935	429,335			6,305		648
1936	383,315	Amn. Apr. 23, 1936, Reich as a whole	1 month[3] overzealous adh.	240,340 1,592	254,674 1,940	525
1937	438,493					530
1938	335,666	Amn. Apr. 30, 1938, Reich as a whole, old territory	1 month[3] pol. 6 mos. pol. 1 month	437,000 6,428 22,826	238,000 12,163[5]	406

[1]) All figures are taken from the official statistics given in *Deutsche Justiz.*
[2]) *Strafbefehle* = written order of the court issued without hearing on request of the prosecutor and imposing prison terms up to 3 months (6 months since September 1939) and fines.
[3]) Persons with more than 3 months antecedents not allowed to benefit from amnesty.
[4]) Figures for 1933 amnesty not available.
[5]) Austrians included.
Amnesties and *nolle prosequi* refer to fines too.

aims to be achieved remain unchanged. And the most subtle differentiation will hardly be able to show why a larceny committed on April 23 is something different from one committed on April 24.

The war, as we have already had the opportunity to mention, brought a mass of new legislation. This legislation was doubtlessly influenced by special considerations of war policy, but it also contains matured concepts of National Socialist criminal policy.

Insofar as substantive law is concerned, the principal aim is to guarantee the security of the country in wartime by an extremely harsh policy of punishment. The chief weapon is the unsparing use of capital punishment. As early as August 17, 1939, a decree made the death penalty mandatory for any attempt at treason.[59] At the beginning of the war, the scope of application of the death penalty was also extended to crimes committed during the carrying out of anti-aircraft defense measures and also generally to all those who profit from the state of war in order to commit crimes. Whereas in these cases the death penalty is optional along with hard labor, it is mandatory for crimes involving danger to the public.[60] A more recent decree applies the mandatory death penalty to anyone committing rape, highway or bank holdup, or other crimes of violence involving the use of firearms or swords or daggers or other equally dangerous implements. The same decree makes the punishment provided for consummated acts mandatory for anyone only attempting or participating in a crime.[61]

The decree of October 4, 1939, concerning dangerous juvenile delinquents, also merits special attention.[62] Up to the war there was some tendency to spare juveniles the harshness of National Socialist criminal policy. The new decree, however, apparently a consequence of increasing juvenile delinquency, marks a break with the previous policy. It exempts juveniles between sixteen and eighteen from the jurisdiction of the juvenile court when the culprit, in view of his mental and moral development, could justifiably be regarded as a person over eighteen, and when the offense exhibits a particularly degraded criminal character or if the protection of the community requires such a punishment.[63]

The new evaluation of these criminal offenses shifts the emphasis from the personal motives, the direction of the criminal's will, to the special external circumstances under which the offense was committed.[64] The deterrent purpose prevails above all other considerations. Where the statutory formulation still gives equal weight to the evaluation of the offender's personality and to the protective needs of the community, the official interpretation makes it abundantly clear that the latter aim has absolute predominance. In this relationship, the doctrines that lay special stress on the type of the criminal gain official recognition. The war parasite, the precociously dangerous criminal youth, and the brutal criminal, as they appear in the war decrees, are criminal types for which the pictorial impression (*Bildtechnik*) prevails over precise legal definition (*Merkmalstechnik*). In decisions deriving from these decrees, this method has led to the use of antecedents for establishing the guilt in the crime in question, and guilt becomes guilt not in relation to the particular offense, but in relation to the whole career and the earlier ways of life of the criminal.[65] This method of considering antecedents not only in order to decide the punishment but also to judge the guilt in the offense before the judge helps in practice to establish the predominance of a rather crude form of social protection as the main content of the criminal law.[66]

In the field of criminal procedure before the war, opinions arose, even in the National Socialist camp, resenting the fact that no mutual trust could be established between the defense attorney and the court. Nor had the problem of providing an adequate defense for the overwhelming majority of indigent defendants found a solution.[67] The deterioration in the position of the defense attorney was, after all, very largely an unavoidable result of the transition from the liberal to the National Socialist system. Instead of

improving the position of the defense attorney, the war increasingly shifted the main task from the judge to the public prosecutor, the member of the "militant" corps of the administration of justice. The war decrees have given the public prosecutor an almost completely free hand to choose before which judge he would like to bring a case. Competence in criminal matters is no longer regulated according to the nature of the offense, but depends on the sentence that the public prosecutor is prepared to ask for. Thus he has complete power to decide whether he intends to bring the defendant before the "one judge tribunal," which may prescribe hard labor up to two years and imprisonment up to five years and against the decisions of which there is no appeal, or before one of two kinds of "three men courts," which may prescribe any kind of sentence, including the death penalty. If he chooses to bring the defendant before the ordinary "three men court" (Strafkammer), an appeal to the Reichsgericht is possible. Incidentally, we should note here that the abolition of the principle of the inadmissibility of *reformatio in peius* now allows a conviction to be reversed to the detriment of a defendant, even if the decision has been appealed only by him. But if the prosecutor prefers to bring the case before the "special tribunal" (Sondergericht)—usually composed of the very same three judges who ordinarily sit as Strafkammer—no appeal is allowed.

The participation of laymen in criminal proceedings has been completely abolished as a measure of war economy, but even now it is still possible that the judges might not conform quickly enough to the policy of extreme deterrence initiated by the government. There were some instances where the "three men court," constituted as a "special tribunal," and issuing a decision that was legally unappealable, did not react quickly enough to the wishes of the government. To remedy the situation and to secure a jurisprudence in absolute conformity with the wishes of the political leadership, a special division was set up inside the Reichsgericht.[68] Before this division, the chief public prosecutor of the Reich (*Oberreichsanwalt*), as representative of, and on order from, the Führer, may directly bring—omitting the lower courts—certain cases which seem to him of special importance. Moreover, even cases which have been finally decided may be brought by him to a new trial before this division within a period of a year after the final decision of the lower court had been rendered. The decree provides for this new procedure in case there are grave objections to the accuracy or the justice of the judgment. But let us not misunderstand the position: when the chief public prosecutor demands a new trial, he at the same time stipulates the sentence which the division is expected to give.[69] Not without justification, the position of this special division has been compared to that of the princes in the seventeenth and eighteenth centuries, who had the sovereign right of confirming or modifying decisions of criminal courts, and, therefore, the possibility of increasing or decreasing the punishment. A slight difference, however, should not be overlooked. Frederick II of Prussia, whose memory the new German regime sometimes takes pleasure in invoking, exercised this jealously guarded right of "confirmation" in order to foster the humanization of the criminal law and not, as the present regime does, solely for the purpose of converting the criminal law into a system of deterrence and brutality.[70]

The situation of the German judiciary in dealing with criminal cases may be summed up as follows: like any other administrator of importance, the judge has the right and the duty to decide the particular case before him according to the existing laws of the land. Just as the administrator may receive, from his superior, a circular prescribing certain desired changes in administrative methods, so the judge may be presented with a retroactive decree ordering him immediately to change criminal practice. The difference between the administrator and the judge is the following: in particularly important cases the administrator usually receives orders from his superior, prescribing how to proceed and to decide. But a judge is legally bound only to decide according to the existing laws—subject, however, insofar as his person is concerned, to compulsory transfer or removal, and subject, insofar as the judgment is concerned, to the order of the Führer to the special division of the Reichsgericht to change the decision in the way indicated by the chief public prosecutor of the Reich. Of the many changes that the administration of criminal law has undergone in Germany since 1933, the most far-reaching one is its conversion into an administrative technique. New prescriptions are made and remade; the emphasis may shift from personality factors to the social situation; harsh punishment in one field and for one set of persons may be counterbalanced by wholesale exemptions for other violations and other groups of persons. And at the same time there is a continual process of leveling down the judiciary from the status of an independent organ of the state to that of an administrative bureaucracy. As early as the beginning of February 1933, the freedom of action of the judiciary became increasingly restricted through the replacement of the general law of parliament by the Führer's uncontrolled and incessant decree legislation, often applying to specific cases.[71] The wartime decrees, by making it possible to control individual criminal decisions, mark the last stage in the transformation of the judge from an independent agent of society into a technical organ of the administration.

One of the most serious consequences arose from the accompanying process of departmentalization. We have seen how the increased efficiency of state and industrial machinery was paid for not only by the loss of the benefits of abstract citizenship but also by the complete subordination of man in his productive relationships to the disciplinary and penal machinery built up by the special services and by private combinations invested with the garments of public authority. It is at this point that the inroads of the

National Socialist state machinery on the daily life of the average citizen appear to be most striking and that the exclusive predominance of strict power relationships will most likely create frictions.

The fight between normativism and the concrete conception of life did not affect developments in the field of criminal administration until a very late stage, when this conception could, by its very loftiness, be conveniently used to bridge theoretical difficulties in the recent campaign for ruthless extermination. The attempt of the legislator and of the judiciary to use the criminal law to raise the moral standards of the community, appears, when measured by the results achieved, as a premature excursion by fascism into a field reserved for a better form of society. In effect, it is difficult to see how the goal of improving public morality could be obtained by a state that not only operates at such a low level of satisfaction of needs but that also rests on a supervision and direction of all spheres of life by an oppressive political organization.

NOTES

1. Heinze, *Verbrechen und Strafe bei Nietzsche* (Berlin, 1939).

2. Rudolf Freisler in *Grundzüge eines Allgemeinen Deutschen Strafrechts. Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für deutsches Recht* (Berlin, 1934), pp. 13–14; see also the same author in the second edition of *Das kommende deutsche Strafrecht. Allgemeiner Teil* (Berlin, 1935), p. 26. The National Socialist ideology of penal law and the proposed changes in the penal code, as well as the changes already introduced, are dealt with in more detail, though without much regard for the actual administration of criminal justice, by Henri Donnedieu de Vabres in *La Crise Moderne Du Droit Penal, La Politique des Etats Autoritaires* (Paris, 1938).

3. See, for example, Georg Dahm, *Nationalsozialistisches und Faschistisches Strafrecht* (Berlin, 1935), beginning on p. 6, who speaks of the gulf separating the German people's community from the Italian ideology of state and nation. This is especially interesting because of the fact that the same author was one of the initiators of the authoritarian school two years before in Dahm and Friedrich Schaffstein, *Liberales oder Autoritäres Strafrecht* (Hamburg, 1933).

4. Graf Gleispach, "Willenstrafrecht," in *Handwörterbuch der Kriminologie* (Berlin, 1936), vol. 2, pp. 1967–1979.

5. See the decree of February 28, 1933, *Reichsgesetzblatt* (henceforth: *RGBL*), (1933), 1, 83, paragraph 90 a–d and paragraph 92 a–f of the Penal Code.

6. Oetker (in *Grundzüge eines Allgemeinen Deutschen Strafrechts*, p. 48), among others, used the argument that such a policy would tend to weaken the reliance of the members of the community on their own ability to avert possible dangers.

7. *Strafgesetzbuch*, paragraph 43 a–n. In Karl Larenz, ed., *Grundfragen der neuen Rechtswissenschaft* (1935).

8. Georg Dahm, *Verbrechen und Tatbestand* (1936), p. 46.

9. The whole controversy is surveyed by E. Wolf, "Der Methodenstrait in der Strafrechtswissenschaft und seine Überwindung," *Deutsche Rechtswissenschaft* 4 (1939), beginning on p. 168.

10. Editor's Note: This refers to the idea that "where there is no law there can be no transgression."

11. See the second edition of the *National-Sozialistische Leitsätze für das deutsche Strafrecht*, ed. H. Frank (Berlin, 1935); *Das kommende deutsche Strafrecht*, pp. 17, 45.

12. See *Reichsgesetz über Maßnahmen der Staatsnotwehr*, July 3, 1934, *RGBL* (1934), 1, p. 529.

13. Editor's Note: This refers to the plaintiff's choice not to proceed with his or her legal action, or with some part of it concerning certain defendants.

14. Dahm, in the special section of *Das kommende deutsche Strafrecht*, p. 339; Kohlrausch in the 34th edition of the *Strafgesetzbuch* (1938), paragraph 266, note 1.

15. Compare the *Reichsgericht* (henceforth: *RG.S*) decisions in criminal cases (*RG.S*, vol. 71, p. 90), and the decision of the same court quoted in the *Zeitschrift der Akademie für deutsches Recht* (henceforth: *ZA*) (1940): 15, with commentary by Nagler.

16. Editor's Note: For a discussion of this issue see Otto Kirchheimer, "Criminal Omissions," *Harvard Law Review* 54, no. 4 (February 1942): 615–642.

17. *RG.S*, vol. 70, p. 82.

18. *RG.S*, vol. 71, p. 193.

19. *RG.S*, vol. 69, p. 321; vol. 72, p. 373.

20. Helmuth Mayer, *Das Strafrecht des deutschen Volkes* (Stuttgart, 1936), p. 178.

21. On the whole problem there is an abundant though partially confused literature. See Drost, "Der Aufbau der Unterlassungsdelikte," *Gerichtssaal* 109 (1937): 1–63; Georg Dahm, "Bermerkungen zum Unterlassungsproblem," *Zeitschrift für die gesamte Strafwissenschaft* 59 (1939): 133–183.

22. Peters, "Das gesude Volksempfinden," *Deutsches Strafrecht* 3 (1937): 337–350.

23. The view that the underlying idea of the statute could itself undergo changes was warmly recommended to the 1937 Congress of the International Association of Penal Law in Paris by Professor Donnedieu de Vabres, although he would never have admitted that this extensive interpretation contemplated the abandonment of the *nulla poena sine lege* rule. See the report by Pierre Bouzat in *Revue Internationale de Droit Penal* (1937), beginning on p. 33.

24. Kohlrausch, *Strafgesetzbuch*, commentary on paragraph 2.

25. E. Mezger, "Der Grundgedanke des Strafgesetzes," *Deutsche Rechtswissenschaft* 4 (1939): 259–266.

26. Boldt, "Bericht über Stand und Aufgaben des Strafrechts," *Deutsche Rechtswissenschaft* 2 (1937), beginning on p. 47, who, however, is not very consistent; see his later and much more moderate programmatic formulation of principles in *Gerichtssaal* 112 (1938), beginning on p. 93.

27. See J. Hall, "Nulla poena sine lege," *Yale Law Journal* 40 (1937): 175.

28. *RG.S*, vol. 72, p. 93; The Reichsgericht in *ZA* (1940): 67.

29. *RG.S*, vol. 70, p. 367.

30. *RG.S*, vol. 71, p. 196; vol. 71, p. 306; The Reichsgericht in *ZA* (1940): 180.

31. *RG.S*, vol. 71, p. 94.

32. *RG.S*, vol. 71, p. 109.

33. The Reichsgericht in *Juristische Wochenschrift* (henceforth: *JW*) (1937): 1328.

34. *RG.S*, vol. 70, p. 218.

35. *RG.S*, vol. 72, p. 146.

36. *RG.S*, vol. 71, p. 390. The decisions on paragraph 2 are collected and systematized by Hans Bepler in *JW* (1938): 1553–1570, and in *JW* (1939): 257–266.

37. *RG.S*, vol. 72, p. 91, vol. 72, p. 149; vol. 72, p. 245.

38. The Reichsgericht in *Juristische Wochenschrift* (1940): 790. In this case one of the parties was a "non-Aryan" Czech, and the other was an "Aryan" German girl. The "crime" was committed in the sovereign republic of Czechoslovakia, before Munich, and the act was not punishable under Czech law.

39. Reimer in *Das kommende deutsche Strafrecht*, pp. 223–224; Maurach, "Treupflicht- und Schutzgedande," *Deutsches Strafrecht* 5 (1938): 1–15.

40. Incidentally, the retroactivity here, as in the Röhm case, also serves the German yearning for legal correctness. This longing for a wholly worthless legality is a strange sign in a legal order which, officially at least, rests on "material justice."

41. *RGBL* (1937), 1, p. 1286. E. Kern, "Die Selbstverwaltung der Gerichte," in *ZA* (1939): 47–50.

42. *RGBL* (1939): 1, p. 1658.

43. See Brandt, *Das deutsche Beamtengesetz* (1937), note 2 to paragraph 71.

44. Jaeger, *Der Richter* (1939), p. 69.

45. In a recent address given by Undersecretary of Justice Roland Freisler before the presidents of the special courts, he draws their attention to the fact that the public does not understand unimportant differences between the punishments asked for by the public prosecutor and the sentence given by the court. Freisler, "Die Arbeit der Sondergerichte in der Kriegszeit," *Deutsche Justiz* (1939): 1753.

46. George Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York, 1939), p. 186, table 23.

47. See the discussion between the Schwarze Korps and the Ministry of Justice, parts of which are reprinted, especially the arguments of the judicial bureaucracy, in *Deutsche Justiz* (1939): 58–59, 175–178.

48. Georg Dahm, "Wissenschaft und Praxis," *JW* (1939): 829.

49. Dienstrafordnung of January 8, 1935, *RGBL* (1935), 1, p. 5.

50. Bruasse, "Zur Frage einer Strafgerichtsbarkeit für den Reichsarbeitsdient," *ZA* (1938): 228.

51. See, for example, Hoder, "Erweiterte Disziplinarstrafgewalt im Krieg," *Zeitschrift für Wehrrecht* 4 (1940): 433–443.

52. Part of the field is now regulated by the decrees on punishments and procedures in regard to contravention against price regulations, *RGBL* (1939), 1, p. 999. As regards the literature, see Rauch, "Werdendes Wirtschaftsrecht," *Zeitschrift für die gesamte Strafrechtswissenschaft* 58 (1938): 75–98 and by the same, "Umgestaltung des Preisstrafrechts," *Zeitschrift für die gesamte Strafrechtswissenschaft* 59 (1939): 360–370. K. Siegert, "Zum allgemeinen Teil des Wirtschaftsrechts," *JW* (1938): 2516–2521.

53. *Annual Report of the Attorney General of the United States 1939*, p. 37.

54. See Drost, "Der Krieg und die Organisation der gewerblichen Wirtschaft," *ZA* (1940): 25–26.

55. The extent to which this administrative criminal procedure lacks any relationship with penal law may be seen in an example which at the same time shows the ascendancy of the administrative over judicial bodies. Up to the beginning of 1939 the revenue collectors, under the explicit rule of the highest judicial body in the field of taxation, the Reichsfinanzhof, maintained the practice of admitting the deduction of administrative penal fines from gross income when establishing the net corporation income. (See the decision of the Reichsfinanzhof of August 17, 1938, in *Reichssteuerblatt* [1939], p. 229.) It was reasoned that these fines represented a typical case of normal business risk. As these fines sometimes attain considerable amounts—in one case the amount was over one million marks—the finance ministry ordered the revenue collectors to stop the practice (order of January 4, 1939, p. 257). The Reichsfinanzhof, legally a completely independent judicial body, hastened to fall in line with the order given to the revenue collectors, thus completely reversing the decision that it gave nine months before (decision of March 8, 1939, in *Reichssteuerblatt* [1939], p. 507). It now argues that the administrative penal procedure also intends to punish guilt but with the difference that for reasons of mere convenience the guilt is often presumed and need not be proved. Its main argument for the abandonment of its earlier line are the changing aims and significance of the administrative penal procedure which leads to a change in the people's conceptions of such procedures. As it is very unlikely that the people have a definite conception of such intricate problems as the legal nature of administrative fines, we can safely assume that the order of the finance ministry is the real explanation of the miraculous change in the people's opinion.

56. Mayer, *Das Strafrecht des deutschen Volkes*, beginning on p. 84.

57. We have not taken into account the numerous special amnesty laws for the members of particular administrative services or for the inhabitants of special (mostly newly incorporated) regions.

Whereas the convictions for crimes and misdemeanors and the amnesties and *nolle prosequi* relate to numbers of persons, the *Strafbefehle* relate to numbers of cases. This difference is partly balanced by the fact that about 40 percent of the penal mandates are Bavarian cases (see *Deutsche Juristenzeitung* [1936]: 46). But in Bavaria the prevailing practice is to handle, through judicial *Strafbefehle*, all kinds of violations of police regulations (for example, traffic violations) elsewhere dealt with by the police and never appearing in any criminal record. It must also be noted that the "number of convicted" covers crimes and misdemeanors, the amnesties and *nolle prosequi* crimes of political adherents, less important misdemeanors, and probably also some major trespasses, whereas the *Strafbefehle* include only trespasses and minor misdemeanors. In spite of all this overlapping, which prevents accurate comparison, one result stands out very clearly: in the years 1932, 1935, and 1937, when the amnesties could have had no practical influence on the movement of criminality, the figures for convictions and for *Strafbefehle* are in general appreciably higher than in preceding or subsequent years, when the influence of the amnesty laws could be traced. We may notice, by the way, a secondary consequence of the amnesty policy with its numerous *nolle prosequi*, as well as of the transition from ordinary to administrative procedure: criminality figures based on convictions by ordinary criminal courts become meaningless. (Von Weber, "Die deutsche Kriminalstatistik, 1934," *Zeitschrift für die*

gesamte Strafrechtswissenschaft 58 [1938]: 598–624, admits the deceptive nature of the German criminality figures. As regards the 1939 amnesty, the administration has ordered that, insofar as *nolle prosequi* are concerned, no material for statistical use should be collected. See *Deutsche Justiz* [1939]: 1432. This order makes it impossible to follow the application of the 1939 amnesty.) We cannot, therefore, obtain a statistically accurate picture of the development of that part of criminality usually handled by the repressive agencies of the government.

58. This state of affairs has led to proposals to introduce a file of pending criminal procedures: Seidel, *Deutsches Strafrecht* 6 (1939): 23.

59. *RGBL* (1939), 1, beginning on p. 1455. We do not comment on the aggravations of punishment for military and related offences.

60. *RGBL* (1939), 1, beginning on p. 1679.

61. *RGBL* (1939), 1, p. 2378.

62. *RGBL* (1939), 1, p. 2000.

63. Although the number of unemployed youths between 14 and 18 fell almost to zero between 1933 and 1937, the rise in the number of criminal youths in many towns was much higher proportionally than would have been justified by the 34 percent increase in the age classes between these years. In Hamburg, for example, their number rose from 658 to 1068, in Erfurt from 111 to 230, in Halle from 150 to 230. The figures are taken from reports on crime among youth in *Zeitschrift für die gesamte Strafwissenschaft* 54 (1934): 667, and 59 (1939): 187. The most obvious rise is in the field of morality; the percentage of moral offenses in the whole of youth criminality rose from 4.6 percent to 10 percent between 1934 and 1937 in the townships.

64. "The picture of the personality of the offender cannot be separated from the state of war": Roland Freisler in "Gedanken zum rechten Strafmaß," *Deutsches Strafrecht* 6 (1939): 329–342.

65. See the decision of the Stuttgart Sondergericht, in *JW* (1940): 442.

66. *RG.S*, vol. 71, p. 179, anticipates this trend when it explains that a state of diminished responsibility by no means excludes the application of the death penalty.

67. K. Siegert, "Die Lage des Strafverfahrens," *Deutsche Rechtswissenschaft*, vol. 2 (1937), pp. 47–57.

68. Decree of September 16, 1939, *RGBL* (1939): 1841.

69. Tegtmeyer, "Der ausserordentliche Einspruch," *JW* (1939): 2060. The decision of the special division, quoted in *ZA* (1940): 48, shows that the judges understood the orders given to them when they changed a sentence of hard labor into a death sentence.

70. E. Schmidt, "Staat und Recht," in *Theorie und Praxis Friedrichs des Grossen* (1936), beginning on p. 30. A later decree of February 21, 1940 (*BGBL* [1940], 1, p. 405), generalized the option of the chief public prosecutor of the Reich to take exceptions to final decisions during a period of a year following the decision. The decree allows him to challenge criminal sentences before the ordinary divisions of the Reichsgericht if he finds fault in the application of the new law. Conservative lawyers were eager to interpret this as a new nullification procedure in substitution of the extraordinary exception before the special division (K. Klee, "Die Verordnung über die Zuständigkeit der Strafgerichte," *ZA* [1940]: 90), but it was immediately authoritatively confirmed that the extraordinary exception did not yield to the new rules (Roland Freisler, "Die neue Methode der Strafgerichtszuständigkeitsbestimmung," *Deutsche Justiz* [1940]: 281). It seems, therefore, that in order to obtain the desired results in questions of practical importance, a new trial before the special division will be asked for, whereas in questions of more legal than practical significance, the unification of the criminal practice will be obtained by means of the nullification procedure before the ordinary divisions of the Reichsgericht.

71. Franz L. Neumann, "The Change in the Function of Law in Modern Society," reprinted above.