

Nazi Jurisprudence

An essential role in the decline of law during the Third Reich was played by law professors at German universities. They provided a philosophical cloak for the Nazis' arbitrary acts and crimes, which would otherwise have been clearly recognizable as unlawful. There was virtually no outrage perpetrated by the Nazis which was not praised during the regime as "supremely just" and defended after the war by the same scholars, with equally dubious arguments, as "justifiable" or even "advisable" from a legal point of view.

Since after the war the leading legal thinkers either kept their professorships or were soon reinstated—that is, continued to direct the course of legal studies—and since the current generation of law professors has been recruited almost exclusively from the ranks of their most acquiescent students, there has been only scanty research on the contribution of jurists to Nazi terror. It is almost impossible to overestimate this contribution, however, for it was in the writings of these scholars that the judges of the Third Reich found guidelines for their verdicts and lethal interpretations. This occurred more and more as the increasingly vague wording of laws ceased to provide a precise foundation on which decisions could be based.

Even prior to 1933, conservative law professors had openly sympathized with the National Socialist movement. In 1930, for example, the Nazi members of the Reichstag proposed an outrageous amendment to the Law for the Protection of the Republic which would have classed advocacy of conscientious objection and disarmament, along with any claim that Germany had been responsible for the world war, as "military treason" and would have provided the death penalty for all of them. This proposal, which would also have established "vilification of war heroes, living or dead," "betrayal of the race," and "disparagement of national symbols" as capital crimes,¹ was received enthusiastically by several noted legal

scholars. Georg Dahm applauded the "courageous renunciation of all definitions" as to what constituted such crimes,² and Johannes Nagler felt that at last an effective means had been found to combat "defeatism of all kinds." In his eyes the amendment did not go far enough, however: he proposed adding severe penalties for negligent treason as well, and "perhaps even negligence in the aiding and abetting of treason."³

On April 7, 1933, all professors of law who were Jews and those few who were not conservatives were driven from their universities in humiliating circumstances. With one stroke, 120 of the 378 scholars who had been teaching at German law schools in 1932 were dismissed—that is to say, almost a third of the total number, the great majority of them for racial reasons.⁴ Their positions were now vacant for promising untenured faculty colleagues with a "nationalistic orientation." Count Gleispach, an Austrian expert on criminal law who was highly regarded in Germany, had already been given an honorary professorship in Berlin after disciplinary sanctions were imposed on him in Vienna in 1931 for National Socialist agitation. Now in 1933, in Prussia alone, Hermann Bente, Georg Dahm, Ernst Forsthoff, Heinrich Henkel, Heinrich Herrfarth, Fritz von Hippel, Ernst Rudolf Huber, Max Kaser, Karl Larenz, Siegfried Reicke, Paul Ritterbusch, Karl Siegert, Gustav Adölf Walz, Hans Julius Wolff, and Hans Würdiger were also appointed to professorships.⁶ Most of them were young, barely over thirty, and continued to teach until the late 1960s. (By 1939, fully two thirds of the faculty at German law schools had been appointed in or after 1933.) A few scattered liberals who had not been dismissed following "restoration of the permanent civil service" resigned from their universities and withdrew into "inner emigration." One of the rare documents of moral courage and integrity in that era is the letter of Gerhard Anschütz, professor of public law at Heidelberg, requesting early retirement. Anschütz wrote to the minister of education in the state of Baden that he was unable to muster the intellectual "solidarity with new German constitutional law as it is now taking shape," which would be necessary to train law students "in accord with the intent and spirit of the current government."⁷

By contrast, the Association of German Institutions of Higher Education, which spoke for the universities, greeted the "rise of the new German Reich" as a "fulfillment of their longings and confirmation of their undying and heartfelt hopes."⁸ Once the law faculties of the country had light-heartedly parted company with their Jewish and (Social-)democratic colleagues, they boldly set about throwing overboard achievements fought for and won in Europe during centuries of struggle: the requirements that legal learning be disinterested, objective, and autonomous. Scholars were

more than willing to return to the role of handmaiden which had characterized the profession in the Middle Ages and to accept a system of values imposed on them from the outside. National Socialism had long since recognized, in the words of Bernhard Rust (minister for universities, schools, and popular education), that “scholarship [is] completely impossible without a foundation of values.”⁹ Carl Schmitt applied this doctrine to the specific case of legal scholarship: “The whole of German law today . . . must be governed solely and exclusively by the spirit of National Socialism . . . Every interpretation must be an interpretation according to National Socialism.”¹⁰

The anti-Enlightenment spirit of the new regime found favor among law school faculties, whose members were largely antirepublican, anti-democratic, and authoritarian in attitude. Not only the newest appointees, who owed their promising careers to the personnel policy of the Nazis, but also established professors were astoundingly productive during the early years of the Third Reich in helping to shape a “National Socialist legal system.” They saw it as their task to bring about a “coordination” of the legal profession’s thinking parallel to the “coordination” of legal institutions which had already occurred. In this effort, some of the older full professors strove to outdo their young colleagues in demonstrations of nationalistic fervor. Wilhelm Sauer, for example, who had been appointed to his professorship in 1919, published in the respected journal *Archiv für Rechtsphilosophie* (Archive for Legal Philosophy) in 1933 an exhortation “to extol the Führer as a figure of light and a hero who is leading the German soul out of the depths into the light, showing it the safe path to Valhalla, to God the Father in the true German homeland, setting an example of this Gothic life to his own brothers, offering them help to help themselves, so that all Germans may become brothers before God the Father.”¹¹

In this flood of publications, lectures, manifestos, and proposed amendments to existing laws, both the fiery avowals of loyalty to the Führer, to a nationalistic order, and to racial homogeneity, and the development of “completely new” legal methods, ways of thinking, and interpretations managed to disguise only with difficulty the fact that all these usually meant turning back the clock and eradicating every trace of civilization and historical progress from German law. Citing Goebbels’ famous remark that the task of National Socialism was “to erase the year 1789 from German history,” legal scholars began to indulge in polemics against human rights, guarantees of individual rights vis-à-vis the state, limitations of state powers, and restraints on the state’s right to impose punishments. In this area, as Friedrich Schaffstein, one of the up-and-coming talents of

Nazi jurisprudence, remarked in his inaugural lecture as a professor in January 1934, there was a lot of work to be done: “Almost all the principles, concepts, and distinctions of our law up to now are stamped with the spirit of the Enlightenment, and they therefore require reshaping on the basis of a new kind of thought and experience.”¹²

Most of the hallmark achievements of constitutional government—the subjection of state authority to law, equality of all citizens before the law, and certain inviolable individual rights—had already been done away with during the “National Socialist revolution.” Nonetheless, for a broad spectrum of the population the concept of the “constitutional state” long retained its positive connotations, and traditionally this was understood to mean a government which was subject to law—that is, liberal constitutionalism. In the early years of the Third Reich, a discussion thus arose in which legal thinkers attempted to clarify what the correct stand was on the issue of the constitutional state. Ernst Forsthoff, who had referred to the constitutional state as the “prototype of a society without honor and dignity,”¹³ attacked Otto Koellreutter’s use of the term as an “error in terminology”¹⁴ that encouraged liberal associations. And Carl Schmitt issued a warning that if the term was used at all, such usage should be aimed only at illustrating how its meaning had changed and should occur only in combinations such as “the German constitutional state,” “the National Socialist constitutional state,” or better yet, “the German constitutional state of Adolf Hitler,”¹⁵ for “we do not determine what National Socialism is according to a preexisting concept of the constitutional state, but rather the reverse; the constitutional state [is determined] according to National Socialism.”¹⁶ Political theorists vied with one another in coining new combinations such as “the national constitutional state”¹⁷ or “real constitutional state,”¹⁸ a contest in which Roland Freisler demonstrated the most active imagination. He compared the “National Socialist constitutional state” with “the concentrated might of the people, as only concentrated firepower could stop a tank attacking the front lines.”¹⁹ Metaphors such as these made it clear that there would be no carryover of earlier civil libertarian ideas about freedom, and that the formal constitutional state, the “mere state under the law,”²⁰ would be replaced by a “more profound idea of legality”²¹—namely, “that the state and the law acquire an identical meaning for the *Volk*.”²² During the whole controversy, however, the participants were fundamentally agreed on the main point: “At issue was not the thing itself, but only its name.”²³

German jurists were particularly united in their rejection of the constitutional democracy of the “formalist era.” It embodied for them a “degenerate form of bourgeois constitutionalism,”²⁴ and its fundamental no-

tions—democracy, liberalism, equality before the law, and tolerance of differing political opinions—were “opposed and repellent to our own German world view.”²⁵

The most important specific application of the principle of constitutionalism to the administration of justice is judges’ independence and their obligation to the law alone. But since the Nazi dictators, despite their hectic legislative activity, were unable to alter all laws overnight, their problem was to commit the judiciary to a new and flexible attitude, depending on whether a particular statute stemmed from the old republic or was a new one of the Führer’s. The Law for Restoration of the Professional Civil Service had already done away with judges’ security of tenure, since it allowed the government to dismiss from office all judges who were politically undesirable, or not “Aryan,” or who would not undertake “to support the national state at all times and without reservation.” Furthermore, judges could also be removed from office without such reasons being given, even “if the conditions required for this by existing laws are not met.”²⁶

The dismissals which followed the passing of the law reinstating the permanent civil service represented a decisive step in purging the courts of undesirables. But the law had a further, virtually incalculable effect on the “coordination” of the legal profession owing to the way it also intimidated those judges who were not directly affected by it. German law professors now informed them that “in the interest of consistent government, certain limits must be imposed” on the autonomy of the courts.²⁷ There should be no mistaking the fact “that the rule that a judge’s sole obligation is to the law now means something different from what it used to,”²⁸ for “we seek an obligation which is more reliable, more vital, and deeper than the misleading obligation to the letter of thousands of paragraphs, which can be twisted.”²⁹

In the future, decisions should be handed down only by “one who lives in his people, feels with his people, and seeks justice where it is born, in the healthy common sense of the people.”³⁰ A judge’s “true nature and racial identity” ought to “make him part of the community which creates the law and make him an existential member of it”;³¹ it should also make him a person who acts “on his convictions in a harmony of feeling and will with all his legal comrades.”³² The judge’s labors should “not [be] constricted by arbitrary decisions or by a formalistic and abstract principle of stability of the law; rather [they should] find clear lines and, . . . wherever necessary, their limits through the legal views of the people that have found expression in the law and that are embodied by the Führer.”³³ The ideal of the rational, dispassionate judge propagated since the Enlighten-

ment was suspect in the eyes of jurists of this ilk. “Abstract and normative thinking” appeared to them as an “expression of helplessness, rootlessness, and debility.”³⁴ The new judge should decide his cases “not on the basis of an analytical investigation of their elements, but only as wholes, concretely, after grasping their essence.”³⁵ The “rationalistic dissection” of the facts of a case and “the distortion of its essential nature”³⁶ that resulted from an unprejudiced approach—these were ideas they rejected completely. After all, the new form of law was “not to be arrived at by logical reasoning alone, . . . but instead was to be felt and experienced by a member of the *Volk* by virtue of his close ties to it.”³⁷ A judge should therefore approach a case with “healthy prejudice” and “make value judgments which correspond to the National Socialist legal order and the will of the political leadership.”³⁸ This kind of jurisprudence stood above the “typically exaggerated liberal fear of miscarriages of justice”;³⁹ an “emotional, value-laden, and overall approach”⁴⁰ and an “overall view of the nature of the law”⁴¹ would guarantee that judges reached correct decisions. It was probably Justus Hedemann who best expressed the emotionality of the new direction in legal thinking in his remarks entitled “Truth in the Law”: “And [let there be] no guardian of German law who is not gripped, at least in great moments, by that seriousness of purpose, who pales at any labor, and who does not hear from beyond the course of his labors, now near, now far, the waters gushing from the fount of truth.”⁴²

Such irrational phrases about the “rootedness” of the jurist “in the substance, the spirit of the *Volk*,”⁴³ and about his “proper place in a national order based on racial unity, to which the jurist and his intellectual labors belong as well,”⁴⁴ had a concrete background which was revealed in Erik Wolf’s warning to judges: “In the everyday practice of law, genuine National Socialism is certainly best represented where the idea of the Führer is silently but loyally followed.”⁴⁵ Judges were “liberated” from their obligation to the law only to be constrained by an incomparably more restrictive “obligation to the main principles of the Führer’s government,”⁴⁶ a step which in the last analysis had the effect of making “the judge a direct servant of the state,”⁴⁷ or, as Freisler put it in one of his inimitable metaphors, “The law is the bated breath of life, . . . but the guardian of the law must be the soldier at the front of the life of the nation.”⁴⁸

National Socialist polemics were directed not only against every effort to make the criminal code more humane, but also and equally against its constitutional foundations, particularly the principle *nulla poena sine lex* (“no penalty without law”). This fundamental principle sums up several limitations of the state’s power to impose punishments: nothing may be prohibited retroactively (only an act which was punishable at the time it

was committed may be punished); nothing may be prohibited by analogy (only what the wording of the law specifically declares to be punishable is punishable); nothing may be left unclear (the statute must be worded precisely and must make it possible to recognize what is a punishable offense and what is not); and finally the right to impose punishments must be granted exclusively to an independent judiciary, since any system of justice can be undermined if sanctions are permitted to exist outside it. Every single component of this fundamental legal principle was quickly abolished during the Third Reich. Retroactive punishment became possible with passage of the Law on the Imposition and Implementation of the Death Penalty, the so-called Van der Lubbe Law, and more than twenty other statutes and ordinances of the Nazi era also contained provisions for retroactive penalties.⁴⁹ A possibility for sanctions outside the criminal courts was created by the institution of “preventive detention,” over which the police had sole control. And finally the prohibition against declaring an act criminal by analogy was eliminated in June 1935 by the rewording of paragraph 2 of the Criminal Code: “That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the fundamental principle of a criminal statute or healthy popular opinion.”⁵⁰

Ernst Niekisch hits the nail on the head when he calls the legal analogy an “insidious arrangement” created for the sole purpose “of sending every unyielding opponent to the penitentiary, even though no law whatsoever exists against which he has offended.”⁵¹ Nevertheless, the significance of this piece of legislation is often overestimated today. Of course—as Roland Freisler pointed out approvingly—it enabled “the judge to punish every lawbreaker, even if his particular crime was not specifically mentioned by law, something which until then had been difficult and only partially possible through broad interpretation of the limits of sentencing.”⁵² However, in practice the new paragraph 2 played only a small role in the courts. This was due primarily to the efforts of jurists who had long since developed a theory of criminal law and a number of procedural tools which made rewriting of the criminal code in fact unnecessary.

There was, of course, no area of the law which National Socialist ideas failed to permeate eventually; even such apparently apolitical fields as landlord and tenant law, commercial law, and trade and industrial law were “fertilized” with Nazi legal thinking. The consequences of this new jurisprudence emerge most clearly, however, in criminal law, an area which allows the state the firmest grip on its citizens and where, for this reason, the notion of the stability of law has traditionally been most sharply de-

finied. Whereas since the time of the Enlightenment efforts had been directed toward making the dividing line between lawful and unlawful acts as clear as possible, professors of criminal law in the Third Reich openly acknowledged it as their chief task to blur this line to the point of invisibility. The primary aim of criminal law was “to protect the community of the *Volk* from criminals,” and this protective function supplanted what had been the foremost principle of the constitutional state: “Today everyone will recognize that the maxim ‘No crime without punishment’ takes priority over the maxim ‘No punishment without law’ as the higher and stronger legal truth” (Carl Schmitt).⁵³

Just as from an authoritarian point of view criminal law was not designed “to protect the rights of the individual against the state . . . , but rather to protect the state from the individual,”⁵⁴ National Socialist criminal law was “less concerned with the clarity of statutory provisions than with material justice.”⁵⁵ Stability of law and protection of individual rights were thrust aside in favor of this mystical “material justice,” which could supposedly be grasped only through “an overall view of its essential nature.” For this reason, laws ought to be formulated purposely in vague and fuzzy wording: “General provisos, admission of analogy, recognition of healthy popular opinion as a source of law, and admission of direct and immediate recognition of what is just . . . are criteria of National Socialist criminal law.”⁵⁶ The concomitant loss of stability of law was quite intentional, for, as Carl Schmitt noted, “In the decisive case of political crime, the use of norms and procedures merely means that the Führer’s hands are tied, to the advantage of the disobedient.”⁵⁷ There was even some discussion of whether a criminal code could not be dispensed with entirely: “The recognition that it is impossible for individual legal norms to cover all possible cases suggests that it would be preferable to do without a list of specific offenses and to provide the judge with guidelines in the form of a few general principles, according to which he must determine the criminal nature of an offense.”⁵⁸ The fact that it would then become impossible for an individual “to comprehend the law and to calculate its consequences” was expressly welcomed by the professor of criminal law Heinrich Henkel as a desirable aim, since uncertainty about the possible repercussions of an act would increase the pressure to conform. Therefore, the saying ought no longer to run, “What is not forbidden is allowed, but rather: What is not allowed is forbidden.”⁶⁰

As a result, this new kind of criminal jurisprudence was no longer concerned with determining whether an action was prohibited by law or not, since according to Reich minister of justice Gürtner, “National Socialism

replaces this concept of formal illegality with the concept of material illegality . . . Hence, the law renounces its claim to be the sole source for determining what is legal and illegal.”⁶¹

What did it in fact amount to, this notion of “material illegality” that was cited repeatedly and supposed to be understandable only in terms of a “world view determined in the last analysis by experience and faith?”⁶² Criminal law professor Wilhelm Sauer had already worked this out in 1921: “Behavior is unlawful when its general tendency in the judgment of jurisprudence does more harm than good to the state and its members.”⁶³ From this conservative, statist position it was only a small step to Edmund Mezger’s succinct definition: “Materially unlawful activity is activity counter to the German National Socialist world view.”⁶⁴

A widely known maxim in those days, which every law student had to learn by heart, taught that the chief aim of criminal law, the “protection of German society,” would be achieved “by eliminating individuals who are degenerate or otherwise lost to society and by allowing petty offenders who can still perform useful social functions to atone.”⁶⁵ This maxim revealed the two areas on which National Socialist criminal jurisprudence concentrated its efforts: developing a disciplinary code for the German citizen “derelict of his duty,” and finding means to destroy the enemy, the deviant “other,” a group to which “degenerate” criminals were also assigned. And it was by no means true, as one might suppose, that only the most extreme Nazis among the criminal law experts emphasized the more aggressively punitive area of “tactical law” for the “protection of society,” while the older school of conservatives tended to turn to the “disciplinary” side. On the contrary, an Official Criminal Law Commission composed chiefly of conservatives and chaired by Reich minister of justice Gürtner placed the idea of “protection” at the center of their ideas about a future Criminal Code, whereas it was the Reich Law Bureau of the Nazi party which stressed the “duty of allegiance to the *Volk*.”⁶⁶

“Protective” law aimed to “purge society of inferior individuals”⁶⁷ and stressed that “the particular obligation of criminal law is to the negative, defensive side of protection. Its ultimate function is to exterminate.”⁶⁸ The notion of “protection” was not directed solely—or even primarily—at “degenerate criminals,” but above all at opponents of the system, since the view of criminal law as a “law of war” led to the conclusion that “obviously the goal of this law is not merely to resist the opponent, but to annihilate him.”⁶⁹ The privileged treatment of political offenders—previously guaranteed by the criminal code and from which Hitler had profited himself during his trial for high treason—was now not just abolished, but in fact turned into its opposite: as Roland Freisler explained, “There is no place

in National Socialism for the recognition of political offenses. This would be tantamount to classifying the offender as a decent and respectable adversary, and this is not possible under National Socialism.” Political opponents were branded as particularly reprehensible criminals: “For the enemy of the state and the community of the *Volk* there is only one course in prosecution and sentencing: unflinching severity and, if necessary, total annihilation.”⁷⁰ In Gürtner’s words, there “could be no doubt” that the German people had never shown “any sympathy” for the recognition of political offenses, “for the traitor has always been regarded everywhere as the most heinous of criminals.”⁷¹

In order to be able to decide whether “unflinching severity” or “total annihilation” was called for, legal scholars developed a system of criminal punishment which closely resembled existing disciplinary procedures for the civil service and the armed forces and which was based on an increased loyalty owed to the state and its leaders. A long tradition (which continues to the present day) decrees that such disciplinary procedures are less concerned with exacting expiation from a civil servant for a particular misdeed than with establishing whether his “overall behavior” permits his remaining “in the circle of his colleagues.” In precisely this manner the criminal law of the Third Reich was now to attempt to judge whether a “member of the *Volk* could still be tolerated by society” or whether, depending on the prognosis for his future behavior, he should be removed from society, either temporarily or permanently. And like disciplinary law, which was feudal in origin and still hardly touched by the spirit of the Enlightenment, the criminal law of the Nazi era was characterized by categories of “wrongdoing” based on vague and feudalistic moral values such as “honor,” “loyalty,” and “duty.” The legal scholars of the Law Bureau of the Nazi party developed the following guidelines for criminal offenses:

National Socialist criminal law must be based on the duty of loyalty to the *Volk*: loyalty is the highest duty of the *Volk* and therefore a moral duty in National Socialist and German thinking. In German thinking there is a harmony between moral values, a sense of duty, and a sense of justice . . . According to these principles a violation of the duty of loyalty necessarily leads to the loss of honor. It is the task of the National Socialist state to require just expiation from the disloyal, who by their disloyalty have renounced their membership in the community. Just punishment serves to strengthen, protect, and safeguard the community, but also serves to educate and improve the criminal who is not yet lost to society.⁷²

Nazi theorists of criminal law had begun early to equate crime with “disloyalty,” “violation of duty,” and “treason.” In addition to the particular gravity assigned to it, a criminal offense represented a breach of duty to-

ward the community; George Dahm took the view that even simple theft constituted an act of disloyalty toward the Führer and the *Volk*.⁷³ Of course, a breach of loyalty could be committed only by someone who owed loyalty—that is to say, a member of the community. Thus, Friedrich Schaffstein called for a “consolidation of the *Volk*” as a prerequisite for this new criminal law to be redefined along the lines of disciplinary law. A criminal should be made “the subject of study in criminal law solely in terms of his necessary ties as a member of society, not as an individual, but as a member of the *Volk*.”⁷⁴ The contribution of jurisprudence to this consolidation would consist in pointing out the right path to members of the *Volk*. Hans Welzel, who always stressed the “constructive ethical force of criminal law,” saw its foremost task to be impressing “enduring values” firmly upon the German consciousness: “Loyalty toward the *Volk*, the Reich, and its leaders, obedience to the authority of the state, readiness to defend one’s country, truthfulness in oaths, sexual decorum, respect for the life, health, and freedom of others, honesty with regard to others’ property, probity in financial dealings, and so on.”⁷⁵ German professors of criminal law generally liked to regard themselves as educators of the populace. Wilhelm Sauer declared that “a healthy criminal law [must] have the highest ethical values pulsing through it, to keep popular sentiment healthy, particularly in a moral sense, and to contribute to the improvement and advancement of the *Volk*.”⁷⁶ It was Hans Welzel’s hope that criminal law “would raise the ethical attitudes of all members of the community.”⁷⁷

It followed that punishment was seen above all as a loss of honor, and that a sentence imposed on a convicted criminal represented “a moral judgment on his attitudes as a member of the *Volk*.”⁷⁸ Scholars came out early in favor of penalties which would have the effect of a pillory or exposure to public shame; one example was the “declaration of dishonor,” which went far beyond the loss of a citizen’s privileges and included a ban on becoming a farmer, manager of a business, shop steward, legal guardian of a minor or incompetent, lay magistrate, or soldier. Georg Dahm even went so far as to demand a form of penalty which would in effect declare the convicted criminal outside the protection of the law: “He may no longer participate in legal transactions, and it appears inevitable that his legal status as a member of a family is forfeited as well.”⁷⁹ However, even the stigmatizing effect of “normal” criminal penalties ought to be increased, it was thought, since “every real punishment is a loss of honor.”⁸⁰ The purpose would be “to give visible expression to the dishonor and disesteem” in which such an individual is held by the community.⁸¹ A penitentiary sentence would mean not only the loss of freedom

under more severe conditions, but also “the severest form of dishonor.” Only when the criminal had expiated his guilt would he be permitted to stand “once more in rank and file with all the other members of the *Volk*.”⁸³

“Absolution” of this kind was possible only in limited measure, however—a point on which Nazis and old-style conservatives agreed. For criminal law professor Friedrich Oetker (who like many of his colleagues is still regarded in the postwar literature as a “liberal” of that period), it was clear that “whoever forgets his place in the ranks, whoever commits an assault on the community of the *Volk* or refuses to obey its laws [is] . . . an enemy of the people.”⁸⁴ And in the eyes of the committed National Socialist Count Gleispach, an “attack on the foundations of national life” represented the gravest kind of disloyalty: “The German who transgresses against the community itself in this manner . . . commits treason.”⁸⁵

The consequences of the verdicts “enemy of the people” or “traitor” were obvious, for “certain of the most serious crimes preclude the reintegration of the criminal into society by their very nature, even if in a given instance the education and resocialization of the culprit as they used to be understood appear possible.”⁸⁶

As a result, the purpose of a trial now became not so much to determine whether the accused had broken a law, but rather “whether the wrongdoer still belongs to the community”;⁸⁷ the criminal trial was supposed to be “an evaluation and segregation of types.”⁸⁸ A decisive characteristic of National Socialist theory was that emphasis was placed less on the act committed than on the “criminal personality.” Legal scholars developed categories of “characteristic criminal types” for use in the rewriting of laws and decrees; these “types,” which were determined by “simple and popular distinctions,” came to play an ever greater role, from the law against dangerous habitual criminals, the decree concerning protection against juvenile criminals, and the decree on violent crimes and “antisocial parasites” to the new version of the murder laws, which stated: “Murder is punishable by death.” All of these laws, which prescribed the death penalty as a possible or as a mandatory sentence, proceeded on the assumption that murderers are born, not made.

A half-hearted attempt to maintain the traditional principle of guilt—that is, the principle according to which a person is punished not for what he is, but for what he has in fact done—was made by Edmund Mezger in the form of his doctrine of “culpability in the conduct of one’s life.”⁸⁹ This concept was designed to force the “law of criminal types” into the old mold of the principle of guilt, since it maintained that “antisocial outsiders, who are a burden to the community and who merit punishment not

so much on the basis of single actions as for their antisocial . . . existence," should supposedly not be punished because they are antisocial but because they had become so through "culpable conduct of their lives." However, the dominant view of that time was long past the stage of being willing to accept this kind of hair-splitting. Geog Dahm objected that "even judges experienced in dealing with life and people trained in criminology" would not be able "to determine the roles played by personal guilt and fate in a person's life." Should a judge, he asked rhetorically, "seriously consider whether a defendant with twenty or thirty previous convictions is responsible for having become what he is, and whether his heredity or personal guilt is the actual cause of the crime? It is precisely in such a case that the death penalty fulfills the intention of the law, if the lawbreaker had no other possibility than to become a criminal."⁹⁰

Since at that time two basic types of criminal punishment—the penalty intended to protect society if a defendant was found unfit to stand trial, and "retribution" if he was guilty—led to the same result in both instances, namely the death penalty, it would have been superfluous in any case to inquire into the motives and causes of an action. The courts certainly tended to take this view. For example, the Supreme Military Court (*Reichskriegsgericht*), which has been praised in recent years for its supposedly model constitutional stance, determined on January 24, 1940, that "the particular circumstances of the army and the requirements of wartime make it necessary to treat defendants of diminished responsibility no differently from those who are fully responsible in the sense of the law."⁹¹

The essential features of Nazi theory in criminal law were developed above all at the law school of the University of Kiel, where personnel policy had led to the assembling of an incomparable Nazi faculty, including Georg Dahm, Ernst Rudolf Huber, Karl Larenz, Karl Michaelis, Friedrich Schaffstein, and Wolfgang Siebert. They provided the judicial system with the intellectual basis for its murderous interpretations. The pithiest summary of these principles is probably the program contained in Schaffstein's *Politische Strafrechtswissenschaft* (Political Theory of Criminal Law). This work also demonstrates that the antirepublican spirit of many court decisions in the Weimar era created a foundation enabling Nazi leaders to twist criminal law at will and make it an instrument for cementing their power.

One doctrine in particular made is possible for judges even in the Weimar Republic to disguise breaches of the law contained in their own decisions as "interpretation." This was the "teleological method" of interpretation developed by professor of criminal law Erich Schwinge, a method of "teleological concepts" which encouraged judges to identify a particular

ideological meaning and intent underlying a given law and then to use this "intent" to undermine the wording of the law as such.

One crass example of this method has already been mentioned in the verdict of the court against Hitler after his attempted coup in Munich. Although the law clearly required his deportation as a foreign national, "the meaning and intent of the requirement" prevented its application in the case of "a man whose mentality is as German as Hitler's." This kind of "interpretation" served effectively to counteract the intentions of the democratic legislative branch of the Weimar government; during the Third Reich, "the will of lawmakers" could be carried out to a far greater extent than could actually be expressed in the wording of the laws themselves. Although the Supreme Court never admitted officially the degree to which it was practiced, such a method of interpretation led, as Schaffstein rightly concluded, to an "abandonment of the liberal notion of the separation of powers and to a neglect of the principles of stability of law and predictability in favor of other new legal values."⁹³

The recognition of "defense of the state" as a justification for breaking the law made it possible for the courts to let the most serious crimes up to and including political assassinations go unpunished. The emphasis on motives, general tendencies, previous convictions, and character of a defendant—rather than the objective and verifiable circumstances of a particular act—made the criminal justice system flexible and often permitted the courts to circumvent the provisions laid down by law in favor of penalties they deemed "appropriate."

The numerous "scientific" approaches to criminal law developed by right-wing scholars in the 1920s and 1930s, such as the doctrine of "criminal types" and inflated pseudo-scholarly concepts such as "material crime," "creative interpretation," "teleological method," and "grasp of essences," were even more sinister than the formal step finally taken by the Nazi government of recognizing the principle of analogy in judging a defendant. The approaches suggested by Nazi legal theorists led to the same result in a less obvious manner, providing the courts with the means to subvert justice and commit judicial murder.