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PUNISHMENT BY ANALOGY IN NATIONAL SOCIALIST PENAL LAW

LAWRENCE PREUSS¹

By an act of June 28, 1935, which has been hailed as "a milestone on the road to a National Socialist penal law,"² the Government of the Reich has provided that:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.³

Thus the principle *nullum crimen, nulla poena sine lege*, which stood at the very head of the Penal Code of 1871⁴ and was included among the fundamental rights of Germans guaranteed by the Weimar Constitution,⁵ has been abolished. The new law permits the judge to impose a penalty for acts which, although not expressly made criminal by the written law, are analogous to acts which are declared to be punishable, provided that they are condemned by the popular sense of right and by the fundamental legal conception upon which the statutory prohibition is based. Originally intended as a protection to the individual against judicial arbitrariness, the principle *nulla poena sine lege* had, it is claimed, become "the Magna Charta of the criminal." With the law of June 28, Dr. Hans Frank declares, "a development is closed which, on the one hand, forced the judge to formal-juristic decisions unrelated to real life, and, on the other, gave to the criminal

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²*Reichsjustizkommissar* Dr. Hans Frank, "Revolution im Strafrecht," *Völkischer Beobachter*, July 5, 1935.

³"Gesetz zur Änderung des Strafgesetzbuchs," *Reichsgesetzblatt*, I, 839, Art. 1: "Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt oder die nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient. Findet auf die Tat kein bestimmtes Strafgesetz unmittelbar Anwendung, so wird die Tat nach dem Gesetz bestraft, dessen Grundgedanke auf sie am besten zutrifft."

Corresponding changes are inserted as §§170a and 267a of the *Strafprozessordnung*. "Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes. Vom. 28. Juni 1935," *RGBl.*, I, 844.

⁴*Reichsstrafgesetzbuch*, §2, par. 1: "An act may be visited with a penalty only if the penalty was determined by law before the act was committed."

⁵Article 116.

the opportunity to slip through the meshes of the law by crafty manoeuvres, and to avoid just punishment."⁶

The demand for the abolition of the principle *nulla poena sine lege* has assumed a central importance in all schemes for National Socialist penal law reform. The *Denkschrift* issued by the Prussian Ministry of Justice in November, 1933, proposed that the future code of the Third Reich should provide that acts not expressly made criminal be punishable if they are "morally reprehensible according to the sound perception of the people," and can be subsumed under an analogous offense defined in the written law.⁷ A similar provision was advocated by the Official Penal Law Commission of the Reich Ministry of Justice in July, 1934,⁸ and by the Reich Bureau of Law of the N. S. D. A. P. in May, 1935.⁹ "In National Socialist penal law," the latter stated, "there can be no formal right or wrong, but only the idea of substantive justice. . . . Every grave violation of the duties of members of the *Volk* must find its expiation in the penal law." The National Socialist *Weltanschauung* requires that the "fetishistic fanaticism" with which liberal German jurists have regarded the "normative dogma" *nulla poena sine lege*¹⁰ be replaced by a perception of the "higher and more powerful legal truth—*nullum crimen sine poena*."¹¹ This fundamental change has been brought about by the acts of June 28, 1935, and will undoubtedly be incorporated in the new penal code which is now in preparation. In order to free the courts from the "cult of precedent" and to enable them to employ their new discretion for the realization of National Socialist principles, it is further provided that the Supreme Court of the Reich "may depart from a decision which has been made before the present law (of June 28, 1935) enters into effect. . . . As the highest German tribunal, the *Reichsgericht* is called upon to give con-

⁶Cited, note 2, above. See also the statement of Dr. Franz Gürtner, Reich Minister of Justice, *Völkischer Beobachter*, July 6, 1935, and his address before the Eleventh Penal Law and Penitentiary Congress at Berlin, August, 1935, on "Der Gedanke der Gerechtigkeit in der deutschen Strafrechtserneuerung," *Sonderbeilage der Zeitschrift der Akademie für Deutsches Recht* (Oktober, 1935), 1-7. Also, the "Amtliche Begründungen" (official motivation) to the legislation of June 28, in "Die Strafrechtsnovellen v. 28 Juni, 1935," *Amtliche Sonderveröffentlichungen der Deutschen Justiz* (Berlin, 1935), 27-30, 51-52.

⁷*Nationalsozialistisches Strafrecht: Denkschrift des Preussischen Justizministers* (Berlin, 1933), 127.

⁸*Das kommende deutsche Strafrecht, Allgemeiner Teil: Bericht über die Arbeit der amtlichen Strafrechtskommission* (Berlin, 1934), 132.

⁹"Nationalsozialistische Leitsätze für ein neues deutsches Strafrecht," *Völkischer Beobachter*, May 7, 1935.

¹⁰Carl Schmitt, in 4 *Deutsches Recht* (1934), 223.

¹¹*Id.*, "Der Weg des deutschen Juristen," 39 *Deutsche Juristen-Zeitung* (1934), 694.

sideration, in interpreting the law, to the transformation of the perception of life and the law which has come about through the renovation of the state."¹²

The insistence of National Socialist jurists upon the elimination of the principle *nulla poena sine lege* is the expression of a strong reaction against the liberal notion, justified by considerations of individual freedom and legal security,¹³ "that the legislator must guarantee to the individual a sphere, free from state interference, within which he may act at discretion, and that such a free-zone is secure only if legislative restrictions are enacted which are applicable to all. This argument ignores the change in point of view which has re-

¹²"Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes. Vom. 28. Juni 1935," Art. 2, *RGBl*, I, 844.

There has been a marked tendency in National Socialist legislation to give a wide scope to judicial discretion. See, for example, the Prussian "Bäuerliches Erbhofrecht." §63 (3), of May 15, 1933, which provides that: "If a question not specially regulated by this law has to be decided, the judge, keeping in mind the purpose of the law and acting within the limits of the obligatory law of the Reich, is to decide as though he himself had to regulate the case as a fair and conscientious legislator." *Preussische Gesetzsammlung* (1933), 165.

The *Denkschrift* of the Prussian Ministry of Justice recommended the following provision, which would abolish the principle of the non-retroactivity of the criminal law: "New penal law provisions, which were not yet in force at the time of the commission of the act, are to be applied to the prejudice of the actor if the act was already at that time deserving of punishment according to common conviction and was morally reprehensible, or already deserved the determined penalty." *Op. cit.*, 127. This recommendation was rejected by the Official Penal Law Commission of the Reich Ministry of Justice on the ground that the task of determining the point of time at which such a conviction may have arisen would impose an undue burden upon the courts. In cases of grave necessity, the report stated, the Government could enact retroactive statutes, such as the so-called "lex van der Lubbe." *Op. cit.*, 136. Van der Lubbe, the principal defendant in the Reichstag fire case, was convicted and executed under a retroactive statute ("Gesetz über Verhängung und Vollzug der Todesstrafe. Vom 29. März 1933," *RGBl*, I, 151) which imposed the death penalty for an offense which, when it was committed, was punishable by imprisonment for ten years to life (see §307, *Reichsstrafgesetzbuch*, and §5, "Verordnung zum Schutze von Volk und Staat. Vom 28. Februar 1933," *RGBl*, I, 83). The law of June 28, 1935 (cited, note 3, par. 1, above), provides that the following shall be inserted in the *Reichsstrafgesetzbuch* as §2a, par. 1: "The punishability of an act and its penalty are determined according to the law which prevails at the time of the act."

¹³On the historical origin of the principle *nulla poena sine lege*, see Adolf Schottlaender, "Die geschichtliche Entwicklung des Satzes *nulla poena sine lege*," *Strafrechtliche Abhandlungen*, Heft 132 (Breslau-Neukirch, 1911), *passim*; Barbara Ackerman, "Das Analogieverbot im geltenden und zukünftigen Strafrecht," *ibid.*, Heft 348 (Breslau-Neukirch, 1934), 1-18; Klee, "Strafe ohne geschriebenes Gesetz," 39 *Deutsche Juristen-Zeitung* (1934), 639-643; and Mazke, "Was bedeutet die Überwindung der liberalistischen Weltanschauung für die heutige Stellung des Richters zum Strafgesetz?" 63 *Juristische Wochenschrift* (1934), 1612 ff.

Despite its Latin dress, the principle was unknown to the Roman law. It originated in the rationalistic and humanitarian thought of the *Aufklärungszeit*, and found its way into German legislation through the influence of French revolutionary philosophy and the works of the criminalist Anselm von Feuerbach.

sulted from the National Socialist Revolution. The individual is no longer the central point of state-interest, but the community. The new state is totalitarian, and therefore cannot tolerate that an individual should abuse his powers and capacities to the injury of the whole people. Consideration for legal security ought not go so far as to permit acts which are contrary to the obvious intent of the statute, although not included in its letter."¹⁴ The liberal and positivist conception of formal justice, which placed the individual in the foreground, must be replaced by the National Socialist idea of material justice, which demands that all acts contrary to the interests of the people and state be punished, even though they cannot be subsumed under an express statutory provision.¹⁵ The law must be interpreted broadly in the light of present legal and political values, and, whenever an act injurious to the *Volk* is not laid under a penal sanction, must be extended by analogy. "For the authoritative aim of the statute is not the will of the historical legislator, but the living, continuously developed will of the present day. . . . We cannot assume that the Leadership would permit laws to continue to exist if they must be interpreted in the liberal spirit of 1870 or 1879. The fact that such laws are allowed to exist today is, on the contrary, proof that they have been inwardly transformed and that it is possible to import into them the new spirit. The leadership-principle requires that the will of the present legislator be obeyed. It follows, therefore, that the application of the law goes beyond the letter of the statute (*Gesetz*), and must include analogy from the statute."¹⁶

It is undeniable that there is a measure of justification in National Socialist strictures upon the juridical formalism which has marked past decisions of the German courts, and particularly of the *Reichsgericht*, in criminal cases. The extreme reaction against the principle

¹⁴Karl Schäfer, in *Das kommende deutsche Strafrecht*, 131.

¹⁵See Manfred Fauser, "Das Gesetz im Führerstaat," 26 *Archiv des öffentlichen Recht* (1935), 131 ff.; Heinrich Lange, "Vom Gesetzesstaat zum Rechtsstaat," *Recht und Staat in Geschichte und Gegenwart*, Nr. 114 (Tübingen, 1934), 9 ff.; Edmund Mezger, "Die materielle Rechtswidrigkeit im kommenden Strafrecht," 55 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1935), 1 ff.; and Herschel, "Staatlicher Befehl und richterliches Ermessen im neuen Reich," 38 *Deutsche Juristen-Zeitung* (1933), 1008 ff.

¹⁶Karl Siegert, "Auslegung und Analogie im heutigen Strafrecht," 64 *Juristische Wochenschrift* (1935), 891. Also, Carl Schmitt, "Kodifikation oder Novelle?" 40 *Deutsche Juristen-Zeitung* (1935), 919 ff.

"Law (*Gesetz*)," Schmitt states, "is for us no longer an abstract norm, resting upon a past will; law is the plan and will of the Leader. As a plan, the law is directed toward the present and future and supersedes . . . the false and incorrect divorce of past and present which was decisive for the theory and practice of the former conception of law. . . ." "Die Rechtswissenschaft im Führerstaat," 2 *Zeitschrift der Akademie für Deutsches Recht* (1935), 439.

nulla poena sine lege is in large part attributable to the excessively narrow construction which the courts have placed upon the letter of the law in the interests of legal security. Resort to analogy has been rigorously excluded whenever it might affect the defendant adversely, and interpretations have been adopted which are manifestly at variance with the purpose of the law. In an oft-cited decision of May 1, 1899, the *Reichsgericht* held that the unauthorized tapping of an electric power line did not constitute theft within the meaning of §242 of the Penal Code, since electricity is a "force" (*Kraft*), and not a "thing" (*Sache*).¹⁷ This gap in the law was filled by a statute of April 9, 1900, which expressly made punishable the theft of electricity by means of a "conductor" (*Leiter*) attached to a power line.¹⁸ Nevertheless, in a decision of December 8, 1933, the *Reichsgericht* held that the operation of an automatic telephone by means of altered coins did not constitute an offense under this law, since it was accomplished by technical means not contemplated therein.¹⁹ The laws of June 28, 1935, are designed to prevent the recurrence of such decisions and to bring the jurisprudence of the courts into harmony with the "German legal conscience."

Under the legislation the courts will be able to resort to *Gesetzesanalogie*, that is to say, they may apply the legal idea upon which a determined statute is based to analogous cases, provided that the act in question is condemned by the "sound perception of the people." Whether they may resort to *Rechtsanalogie*, that is, to "the application of a principle underlying the entire legislative system to an unregulated case which corresponds to this fundamental principle," is controverted among National Socialist jurists.²⁰ The direct application of *Recht*, independently of the text of a statute, would, some assert, lead to a violation of the leadership-principle.²¹ The "living law of

¹⁷32 *Entscheidungen in Strafsachen*, 165.

¹⁸*RGBl.*, I, 228.

¹⁹68 *Entscheidungen in Strafsachen*, 65. By the "Gesetz zur Änderung des Strafgesetzbuchs" of June 28, 1935, Art. 8, a provision on the "misuse of automats," designed to correct this decision, is inserted in the *Reichsstrafgesetzbuch* as §265a.

For other cases, with critical comment, see Ackermann, *op. cit.*, 26 ff.; Siegert, *op. cit.*, 891 ff.; and Mazke, *op. cit.*, 1614 ff.

²⁰"Gesetzesanalogie ist die Anwendung eines bestimmten gesetzlichen Tatbestandes auf eine ähnliche, gesetzlich nicht geregelten Fall.

Rechtsanalogie ist die Anwendung eines der gesamten Gesetzgebung zugrundeliegenden Prinzips auf einen gesetzlich nicht geregelten Fall, der diesem Grundprinzip entspricht." Ackermann, *op. cit.*, 5. See also, Ebermayer, Lobe and Rosenbergl, *Reichs-Strafgesetzbuch* (8. Aufl., Berlin and Leipzig), 114.

²¹See Siegert, *op. cit.*, 892; and Ackermann, *op. cit.*, 41-50.

The exclusion of *Rechtsanalogie* would, for example, prevent the extension

the people," as an expression of the National Socialist *Weltanschauung*, is indeed "*Recht*," but it must be formulated and concretized as statute before it can become a binding rule for the judge. There is need for a "clear line," to be established by the Leader whenever he deems that the legal conscience of the *Volk* requires that certain acts be punishable. Legal opinion, however, is not unanimously agreed that *Rechtsanalogie* is excluded, and it may be expected that the lower courts, at least, will draw upon the general principles of the National Socialist *Rechtsanschauung* in the decision of criminal cases. The numerous convictions for "racial defilement," even before the adoption of the "Law for the Protection of German Blood and German Honor," September, 15, 1935, can be explained only upon the assumption that such a practice had already been established.²²

to the S.-A. (Storm Troops) of penal provisions specifically applicable to the S.-S. (Protective Guard). *Ibid.* 43.

Dr. Roland Freisler, on the other hand, maintains that "Law created by analogy, upon the basis of the National Socialist conception of the people, does not violate the principle of the authoritarian state, for the authoritarian state wills to be nothing other than the function, the vital expression of the conception of the people." *Denkschrift* (cited, note 6 above), 11.

²²The "Gesetz zum Schutze des deutschen Blutes und deutschen Ehre. Vom 15. September 1935," *RGBl.*, I, 1146) prohibits, under severe penalties, marriage and extramarital intercourse between "Jews and nationals of German or related blood."

See the decision of the *Landesgericht* of Königsberg, August 26, 1935, in which "mixed marriages" were held to be forbidden, prior to the enactment of a specific statutory prohibition, on the following grounds: "The jurisprudence of the courts is the servant of the *Volk* no less than every other state activity. It sees its duty and fulfillment in active collaboration in the creation of foundations for the new racial and political structure of the Reich. Only from this point of view is a true jurisprudence possible. An absolute law, divorced from the notion of the national community . . . is unthinkable. The National Socialist State is built upon the idea of national-racial unity. Maintenance of the purity of the race is the first requirement for the victory of the new conception of the state. A marriage which does violence to this idea cannot be approved by the legal order of the national-racial state (*völkischer Staat*). Even in the absence of a legislative regulation, it is not comprised in the provisions of the Civil Code," which can relate only "to such marriages as correspond by their nature to the ideology of our national legal order, and are fundamentally approved by it." Not only is the letter of the law important, the Court stated, but also, "the legal consciousness rooted in the *Volk* is of no lesser importance, even if it has not yet gained form through drafting and proclamation." 40 *Deutsche Juristen-Zeitung* (1935), 1289.

In a case decided on July 12, 1934, however, the *Reichsgericht* had refused to annul a marriage between an "Aryan" and a "non-Aryan" on the ground that the courts are not authorized, in advance of express legislation, to apply to an unregulated case the general principles underlying the legislation on race. "The courts are not called upon," the opinion states, "to extend National Socialist views beyond the bounds which the legislation of the National Socialist state itself has drawn. It is of decisive importance, in this connection, that the legislation of the National Socialist Government upon the race question has not, by a long way, realized all the requirements of the National Socialist program." Since the laws which impose certain disabilities upon "non-Aryans" are silent upon the subject of "mixed marriages," it is to be assumed that there was no

Punishment without a written law is not only a requirement of the National Socialist program for penal law reform; it has its deeper roots in the National Socialist *Rechtsanschauung*, which conceives of law as an "expression of the racial soul."²³ In the "*völkischer Staat*,"²⁴ "the final and most profound source of law is the conviction of the people and the organically developing popular legal conscience";²⁵ the basis of legal obligation lies in the "harmony between moral valuation, the sense of duty and the perception of law."²⁶ The state cannot create law arbitrarily, but can only formulate it and give to it a coercive sanction. State legislation (*Gesetz*) is law only because it is the expression of *Recht*, the living law of the Germanic racial community or *Volksgemeinschaft*.²⁷ Substantively illegal action, therefore, is action against the National Socialist *Weltanschauung*, which is conceived as the purest expression of the Germanic spirit.²⁸

Recht is transformed into *Gesetz* by the command of the Leader, in whom, by definition, the will of people and state are united.²⁹ The

intention to prohibit such marriages. 145 *Entscheidungen in Zivilsachen*, 1, 6.

For other cases see the Annex to the "Letter of Resignation of James G. McDonald, High Commissioner for Refugees (Jewish and Other) Coming from Germany, addressed to the Secretary General of the League of Nations," pp. 120-121. Reprinted in *The Christian Century*, Part 2 (January 15, 1936).

²³Fauser, *op. cit.*, 132. In an oft-quoted statement of Alfred Rosenberg, "Law is what an Aryan deems to be right; legal wrong is what he rejects." 4 *Deutsches Recht* (1934), 233.

On the National Socialist conception of racial law, see Helmut Nicolai, "Die rassengesetzliche Rechtslehre," *Nationalsozialistische Bibliothek*, Heft 39 (Munich, 1932), *passim*; Erik Wolf, "Das Rechtsideal des Nationalsozialistischen Staates," 28 *Archiv für Rechts- und Sozialphilosophie* (1935), 348-363; and L. Preuss, "Germanic Law versus Roman Law in National Socialist Legal Theory," 16 *Journal of Comparative Legislation and International Law* (1934), 269-280.

²⁴On the conception of the "*völkischer Staat*," see Julius Binder, "Der deutsche Volksstaat," *Recht und Staat in Geschichte und Gegenwart*, Nr. 110 (Tübingen, 1934), *passim*; Reinhard Höhn, "Staat und Rechtsgemeinschaft," 95 *Zeitschrift für die gesamte Staatswissenschaft* (1935), 656-690; and Carl Dermedde, "Völkischer, totaler und autoritärer Staat," 63 *Juristische Wochenschrift* (1934), 955-959.

²⁵Friedrich Schaffstein, "Nationalsozialistisches Strafrecht," 53 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1935), 607.

²⁶"Nationalsozialistische Leitsätze für ein neues deutsches Strafrecht," *Völkischer Beobachter*, May 7, 1935. Also, Heinrich Lange, "Justizreform und deutscher Richter," *Deutscher Juristentag* (Berlin, 1933), 186.

²⁷"Law," *Reichsjustizminister* Dr. Gürtner states, "cannot be invented or devised; one cannot renew it in the sense that one can renew the façade of a building, for law has the force of its validity only externally in the authority of the legislator—that is, only in so far as the state by intervening can enforce its validity. The vital root of law, however, reaches down into the secret depths of the popular conscience and thence supplies it with its inner validity and affirmation." "Zur Erneuerung des deutschen Rechts," *Deutsche Justiz*, November 9, 1933, p. 622. Also, Herman Göring, "Rechtssicherheit als Grundlage der Volksgemeinschaft," *Völkischer Beobachter*, November 14, 1934.

²⁸Edmund Mezger, "Die materielle Rechtswidrigkeit im kommenden Strafrecht," *Zeitschrift für die gesamte Strafrechtswissenschaft* (1935), 9.

²⁹Ernst Rudolf Huber, "Die deutsche Staatswissenschaft," 95 *Zeitschrift*

unlimited legislative competence of the Leader is justified on the ground that "he, more than any other servant of the people, is also the servant of the law," and that he is "rooted more deeply than any other in the *Volk* of yesterday, today and tomorrow."³⁰ There is, in other words, an assumed identity of content between the real will of the *Volk*, as expressed in the Germanic *Volksrecht*, and the will of the Leader. It is denied by National Socialist jurists that this conception is inconsistent with judicial independence³¹ or with the existence of legal limitations upon the state.³² "The National Socialist state," Professor Koellreutter asserts, "is a law-state (*Rechtsstaat*), because in it the idea of law is most closely bound up with the idea of the state. Both derive from the same source, that is, the *Volks-gemeinschaft*. . . . The significance and nature of the *Rechtsstaat* result from this harmony of state and law and the orientation of these vital forces toward the people."³³

A practical application of the above theory of law may be found in the statement made by the Leader in justification of the measures taken by him to suppress the "Röhm revolt" on June 30-July 2, 1934. "In that hour," he declared, "I was responsible for the destiny of the German nation, and was thereby, the supreme judge (*Oberster Gerichtsherr*) of the German people."³⁴ By a law of July 3, 1934, these measures were declared to be legal.³⁵ Although the victims of the "purge" had been denied even the summary justice afforded by the National Socialist tribunals, commentators have defended the measures of the Government as being legal from their inception. The law of July 3 was not an act of ratification, it is said, for this would imply the initial illegality of these measures; it was declaratory in form

für die gesamte Staatswissenschaft (1934), 41 ff.; Karl Larenz, "Deutsche Rechtserneuerung und Rechtsphilosophie," *Recht und Staat in Geschichte und Gegenwart*, Nr. 109 (Tübingen, 1934), 34 ff.; Otto Koellreutter, "Der Aufbau des deutschen Führerstaates," *Die Verwaltungsakademie*, Bd. I, Gr. 2, Beitrag 19, p. 5 ff., and *Grundriss der allgemeinen Staatslehre* (Tübingen, 1933), 165 ff.

³⁰Heinrich Lange, "Vom Gesetzesstaat zum Rechtsstaat," *Recht und Staat in Geschichte und Gegenwart*, Nr. 114 (Tübingen, 1934), 38.

³¹See Siegert, *op. cit.*, 893; and Lothar Schöne, "Richter und Rechtspflege im neuen Staat," 25 *Archiv des öffentlichen Rechts* (1934), 129 ff.

Legislative safeguards, the *Denkschrift* of the Prussian Ministry of Justice states, are "not needed against a judiciary rooted in the *Volksleben*, such as the old-Germanic period knew and as it shall again come to life in the Third Reich." Cited, note 6, above.

³²Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?" 95 *Zeitschrift für die gesamte Staatswissenschaft* (1935), 189-201.

³³"Die nationalsozialistische Rechtsstaat," *Die Verwaltungsakademie*, Bd. I, Gr. 2, Beitrag 15 (Berlin, 1935), 2 ff.

³⁴Quoted, 39 *Deutsche Juristen-Zeitung* (1934), 946.

³⁵"Gesetz über Massnahmen der Notwehr," *RGBl.*, I, 529.

and effect, a "proclamation of faith."³⁶ It "did not and could not create new law, but simply established that the acts for the suppression of the revolt—and this without a law of the *Reich*—are legal."³⁷ The "purge," far from being illegal, constituted "genuine jurisdiction," the direct application of the highest law without the intermediary of the courts.³⁸ "Nothing shows more clearly the political significance of the positive legal order," Professor Koellreutter asserts, "than this legal positivization of the law of state-necessity. The law of state-necessity is always positivized when the maintenance of the national order of life of a people is in question. . . . It can be guaranteed only by giving the security of the national order of life precedence over the security of individuals and individual legal claims."³⁹ Since the Weimar Constitution is deemed to be valid only in so far as it conforms to the will of the Leader,⁴⁰ it could interpose no legal obstacles to the action taken by the Government in the June crisis.⁴¹ In the National Socialist conception, the constitution is merely a means for the protection of the National Socialist order. To observe the rigid norm in a time

³⁶Heinrich Lange, "Vom Gesetzesstaat zum Rechtsstaat," *Recht und Staat in Geschichte und Gegenwart*, Nr. 114, 39.

³⁷Roland Freisler, in *Jahrbuch des deutschen Rechts*, Neue Folge, Bd. I (Berlin, 1934), 495. In the emergency of June 30, Dr. Freisler states, the measures of *Notwehr* undertaken by the Leader constituted the only way in which the law of the people could be carried out with sufficient rapidity, "and, therefore, there is no one in Germany who did not feel in his deepest heart that the law living within us says: 'guilty of death!'"

³⁸Carl Schmitt, "Der Führer schützt das Recht," 39 *Deutsche Juristen-Zeitung* (1934), 497.

³⁹"Die nationalsozialistische Rechtsstaat," *Die Verwaltungsakademie*, Bd. 1, Gr. 2, Beitrag 15 (Berlin, 1935), 6.

⁴⁰Helmut Nicolai, "Der Neuaufbau des Reiches nach dem Reichsreformgesetz vom 30. January 1934," *Das Recht der nationalen Revolution*, Heft 9 (Berlin, 1934), 39 ff.

⁴¹In an advisory opinion given on December 4, 1935, the Permanent Court of International Justice held that certain decrees of the Danzig Senate, which incorporated the German legislation on punishment by analogy into the law of Danzig, were incompatible with its Constitution. *Publications of the Permanent Court of International Justice*, Series A./B.—No. 65. The legislation in question was in violation of the fundamental rights guaranteed to the individual by the Constitution, and was contrary to the nature of a "State governed by the rule of law" (*Rechtsstaat*). *Ibid.*, p. 17. "Sound popular feeling," the Court stated, "is a very elusive standard . . ." and "covers the whole extra-legal field of what is right and what is wrong according to one's ethical code or religious sentiments. . . . The rule that a law is required in order to restrict the liberties provided for in the Constitution therefore involves the consequences that the law itself must define the condition in which such restrictions of liberties are imposed. . . . These decrees transfer to the judge an important function which, owing to its intrinsic character, the Constitution intended to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State." *Ibid.*, 16, 19. The Court, therefore, was "of opinion that the two decrees of August 29th, 1935, are not consistent with the Constitution of the Free City of Danzig, and that they violate certain provisions and certain principles thereof." *Ibid.*, 20.

of national emergency would be "to act against the sense of the norm, which is to protect the people and state."⁴² The unlimited conception of *Staatsnotwehr* upon which these comments are based is indicative of the practical importance which the National Socialist theory of a Germanic *Volksrecht* may be expected to assume in German legal life. In the events of June 30-July 2, 1934, Dr. Roland Freisler sees the clear recognition of the customary law and a sign of the liberation of the judge from the fetters of statute.⁴³ This view may be extreme, but it is probably symptomatic of the spirit in which the German judiciary will exercise its new freedom. The racial theory of law, a perversion of the historical theory, can be no more sound than the racial dogma on which it is based.⁴⁴ Its practical influence is not thereby diminished, however, for it provides a specious justification for the introduction of National Socialist principles into the application of the law by the criminal courts. In a country in which judicial independence, as understood in western states, has utterly disappeared, the right of the courts to punish without a written law destroys the last defense of the individual against the totalitarian National Socialist state.⁴⁵

⁴²Ernst Rudolf Huber, "Das Staatsoberhaupt des Deutschen Reiches," 95 *Zeitschrift für die gesamte Staatswissenschaft* (1935), 225.

⁴³*Jahrbuch des deutschen Rechts*, Neue Folge, Bd. I, 495.

⁴⁴See L. Preuss, "La théorie raciale et la doctrine politique du national-socialisme," 41 *Revue générale de droit international public* (1934), 661 ff.; also in 15 *Southwestern Social Science Quarterly* (1934), 103 ff.

⁴⁵In the German legislation of June 28, 1935, Professor C. H. McIlwain sees a clear issue drawn "between law and will." Referring to Dr. Frank's assurance that no one is to be regarded from the outset as guilty and that the rights of the defense will be unimpaired, he remarks that "Doubtless no rights will be impaired, for from now on no rights exist." "Government by Law," 14 *Foreign Affairs* (1936), 185 ff.

See also, James G. McDonald's letter of resignation, Annex, Chapter III, "Application of Racial Law by the Courts." Cited, note 22, above.