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MARRIAGE AND FAMILY LAW  
IN  
NATIONAL SOCIALIST GERMANY

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I. Preliminary Considerations: German Law prior to National Socialism.

Historical development. Historically, Germany belongs to that great family of nations whose legal systems are classified as "Code" or "Civil-Law" countries. For those countries on the continent of Europe, this classification also implies that there is a close connection with the Roman Law as part of the legal tradition. Centuries after the fall of the Roman Empire in the West, the Roman Law was revived and revitalized in the great European universities. It was a basic part of the canon law of the Church, and thus had a claim for international or universal application. For a period of about 500 years, from about 1400 to 1900, western Europe saw a gradual process of amalgamation of this revitalized Roman Law with the ancient local customs in particular countries.<sup>1</sup> This process of amalgamation necessarily meant that there were many local variations to the universally studied Roman Law, or Civil Law, as it came to be called.

The next stage in the process was the movement toward a national code for each nation-state, a code which would introduce uniformity within the particular country and which would represent a break with the past. In Germany, this stage occurred from about 1870 to 1900, and culminated in the adoption of the various parts of the German Civil Code.<sup>2</sup> The thirty years of work put in on this Civil Code by the German legal scholars resulted in a blending of the great conceptualizations of the Roman Law in the fields of Contract and Tort with the traditional German (Langobard) legal customs in the fields of Real Estate and Movables, Persons, Family Law, and Inheritance Law.<sup>3</sup> German customary law was thus dominant

in important areas of the new Civil Code, even though the Code itself was inspired by the movement toward modernization and liberalization of society. This spirit showed itself even in those areas where the legal rules were in large part drawn from German customs; as put by E.H. Kaden:

Considered culturally, the provisions of the real estate laws, as the Civil Law Book has them, are based upon the liberal and equitable ideas of the French Revolution of 1789.<sup>4</sup>

The lengthy period of study and research which preceded the adoption of the Code shows itself in the fact that the German Code is characterized by a more complete and more precise classification system than the French Code, a classification system of legal concepts which results in "a continuously increasing degree of abstraction."<sup>5</sup> In other words, the Code moves from those concepts of more general application to those having a limited or specialized function. Thus, while there is a "General Part" in Book One containing a section on Persons and a section on Transactions in Law, and Book Two deals with Obligations and Book Three with Things (Ownership), the rules dealing particularly with Marriage and the rights of the parties thereto are found in Book Four, "Domestic (Family) Law."<sup>6</sup>

Many authors and scholars considered the German legal system subsequent to the adoption of the Civil Code of 1900 to be the finest on the continent. Justice under the Code was easily accessible, inexpensive (or free of cost), and swift. Civil procedure was even less formal and rigid than was the case in France, since there was less reliance on documentary evidence in the German procedure. There was an emphasis, both in specific Code

provisions and in judicial applications, on protecting the "little man" against unfair legal advantage. While the use of the trial by jury had been abolished in 1924, lay judges were extensively used for labor, commercial, and criminal cases, and even for public law cases.<sup>7</sup> Also, though the system was structured by the Civil Code, it did contain the necessary element of flexibility. The legal rules had to be interpreted and applied, and in doing this job the judiciary had an opportunity to provide for changing circumstances and changing social phenomena.<sup>8</sup> Failing such judicial interpretations, the legislative body could always pass a so-called "auxiliary statute" (e.g., the statutes of 1909 and 1922, which dealt with the liability of operators of automobiles and aircraft, respectively).<sup>9</sup>

Organization of Bench and Bar. Together with these strengths, the German legal system also contained several features which many observers (sometimes with the benefit of hindsight) considered weaknesses. A major systemic weakness was the fact that the German judiciary was isolated organizationally from the German legal profession as a whole. The German judges thus found themselves, both as civil functionaries and as "lawyers," in a position where they were cut off from what would have been a source of strong support when they came under fire from the Nazi regime.

Although not to be considered a "structural" defect, another problem which confronted the German legal system was the increasing "proletarianization" of the legal profession. As class barriers came down with the fall of the Kaiser, the professions became generally overcrowded. The number of law students jumped from 10,000 in 1912 to 18,000 in 1925 to 29,000 in 1928 — nearly a

three-fold increase in just 16 years.<sup>10</sup> In a 1929 article Godfried von Waldheim, President of the Association of German Referendare, expressed the German lawyers' fear of losing their status and earning power:

We are afraid that, more than ever and in spite of all favored social achievements, there exists a danger of proletarianising the legal profession.<sup>11</sup>

Other observers point out that the German legal profession did not have the time or the opportunity to develop a tradition of legal independence before it was subjected to attack by the National Socialists.<sup>12</sup>

Legal positivism in Germany. Another area which has come in for a large share of the criticism directed against the German legal system is the system's philosophic underpinnings, its explanation of the source and function of Law. The critics (again with the benefit of hindsight) point out that the acceptance of positivistic jurisprudence by most or all of the German legal profession left them no standards by which to deny that the acts passed by the Hitler regime were "Law" and thus deserving of enforcement and obedience.<sup>13</sup>

There are elements in German legal theory which differ from the generally accepted ideas in other Western countries. As stated by W. Friedmann,

It has been argued with much force that both the philosophical and the political and legal thought of modern Germany (that is roughly the last 150 years) reveals a deep cleavage with the thought and ideals of Western civilization.<sup>14</sup>

Friedmann goes on to cite the writings of Santayana, who characterized the history of modern Germany as a history of megalomania, using as examples Leibnitz, Kant, Fichte, Hegel,

Nietzsche, and Goethe. He also cites the French legal scholars Duguit and LeFur, who denounced German legal and political thought for its romanticism, mysticism, and intense nationalism, using as their examples Savigny, Gierke, et al.<sup>15</sup> Friedmann himself believes that these are oversimplified pictures, but he presents what he considers to be the five basic characteristics of German legal thought:

1. Savigny's conception of Law as the embodiment of the Volksgeist
2. the theoretical and practical abandonment of the individual in the national collective
3. the organic theory of corporate "personality," à la Gierke
4. the utilization of these first three concepts in the service of a ruthless system of dictatorial power politics, à la Nietzsche's "Will to Power"
5. a general background provided by the idealization of dynamic restlessness, à la Goethe's "searching" Faust<sup>16</sup>

Friedmann makes nationalism the source of Germany's sorrows:

It is not the German mind as such which is foreign to the progress of Western civilization but the disease with which a few generations of nationalists fascinated by the lure of power have infested it.<sup>17</sup>

Writing anonymously in 1943, another legal scholar explained the distinctive characteristic in German legal thought in a slightly different way, as the difference between the concept "Might is Right" and the concept "Might before Right."<sup>18</sup> The second concept merely says that Law is helpless without Power for enforcement, and that on occasion force may sometimes supersede Law. The first idea refers to the origin and foundation of Law:

Force, according to it, not only breaks law, it creates law too. In stressing this point and in neglecting other origins of law German legal thinking acquires its distinctive character.

According to prevailing German, and not only Nazi, opinion law derives its authority from the power held by the lawgiver.... Law is not supreme over government, it is the rule established by the government.<sup>19</sup>

This preoccupation with the "force" element in Law would lead, quite naturally, to certain consequences.

The indifference to the Law...produced a fundamental cynicism, both among lawyers and laymen, a deep contempt for any rule not backed by force, for all power the instruments of which could not be seen and touched. This contempt could not be limited to the rules of law. All rules of human behaviour came to be disregarded unless force stood behind them. It really was a "revolution of nihilism." It would be wrong to charge the whole of Germany and its history with this attitude, but it would be a worse mistake to charge only Nazism with it.<sup>20</sup>

Thus came the National Socialist period, with a conception of Law which did not have to deviate far from this positivistic view to accomplish its desired results.

## II. The National Socialist Theory of Law.

German Law versus Roman Law. Two interacting ideas form the basis of the National Socialist theory of Law: The idea that Law is the expression of the racial soul of a people ("Volksggeist") and the concept of the Fuhrer is the ultimate expression of that racial soul. In addition, there was a renewed emphasis on the collective rights of the racial community, as opposed to the individualism and emphasis on private rights which had developed under the Civil Code.<sup>21</sup> In turn, these basic ideas led to an intense verbal attack on the "foreign," "Roman" elements in German Law. After the alliance with Italy, the anti-Roman attacks were played down, and the Code was denigrated as being Jewish in inspiration.<sup>22</sup>

In 1932, a major Nazi legal theorist, Nicolai, demanded that:

...a law must be given to the German people which is German according to its content and is suited to the German nature. Everything foreign which has been imported in the course of two thousand years of legal history and has been perceived under the name of 'Roman Law' is to be rejected. To the German people is due a German law....<sup>23</sup>

Nicolai saw legal history as being racially determined, as being a struggle between two antithetical concepts--Recht, the spontaneous emanation from the Aryan or Nordic Volksgeist, and Gesetz, the law based on force and produced by inferior peoples who lack the blood-quality and therefore the legal spirit of the Aryan.<sup>24</sup>

Lacking this blood-spirit, the Jews and other inferior racial mixtures must rely on the State as the source of Law. Hence the worst features of the Roman Law, as adopted into the German legal system, stem from its positivism and its divorce from the spirit of the German people.

One of the basic tasks confronting National Socialism, therefore, is to rebuild a law of the spirit, or to provide the atmosphere in which this can be done. The Law cannot be merely the will of the State, but rather the legislator's function is to establish a living law, based on popular feeling. Statutes are necessary only to fill in the "details" not provided for in the popular legal consciousness, but needed for living in modern society. According to Dr. Gurtner, Reichsminister of Justice in 1934:

Law cannot be invented or devised; one cannot renew it in the sense that one can renew the facade of a building. For law has the force of its validity only outwardly 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.<sup>25</sup>

The National Socialist state, then, demands a Kampfrecht, a Law based on struggle, which expresses the conscience of the German nation. As Rosenberg puts it, "Law is what the Aryan man deems to be right; legal wrong is what he rejects."<sup>26</sup>

The Fuhrer principle. The basic standard by which parts of the pre-existing legal order must be judged suitable or unsuitable for retention is whether they conform to the will of the Fuhrer as the highest expression of the communal legal spirit. Summarized in briefest form, "The law is the political command of the 'Fuehrer.'"<sup>27</sup> Or as stated by another leading jurist of the Third Reich, Carl Schmitt: "Law is no longer an objective norm but a spontaneous emanation of the 'Fuehrer's' will."<sup>28</sup> The key words of the Nazi regime in Germany were "unity" and "integration"; these values had to be implemented by the legal order, as by all other institutions. Law then becomes merely "a special form of politics," and the jurist, a "politician, philosopher, soldier and leader in one person, a true artist and a connoisseur."<sup>29</sup>

Rebuilding German Law. As viewed by Joseph Goebbels, the jurists' main job in Nazi Germany was one of cloaking the regime in an aura of legitimacy. To use his speech of May 20, 1936:

At the beginning of every revolution stands the deed, and when the new situation has been created, it is the task of the lawgivers to provide it with a substructure of law.<sup>30</sup>

The elaboration of a completely new system of law, or the rebuilding of an old one in all its detailed branches, is quite obviously an extended process. The Nazis recognized the tremendous scope of the task they had set for themselves in the legal field, and the fact that a continuing struggle would be necessary. Speaking on November

21, 1933, the Vice-President of the Danzig Senate, Herr Greiser, proclaimed:

Although National-Socialism has to-day attained power, the legal position for which we National-Socialists are contending has not yet been created. Our struggle does not cease with the modification of Roman law: it can cease only when Teutonic law has taken the place of Roman law.... The issue of the present struggle is whether the objectivity of the judges is to remain the supreme legal consideration.... In the totalitarian National-Socialist State, the subjective law of the National-Socialist State must take the place of objective law, since the National-Socialist outlook is not based upon objective treatment but on subjective assent. The National-Socialist State must have National-Socialist law.<sup>31</sup>

But while there was a good deal of propagandizing and orating about rooting out the "Roman-Jewish" elements in German law, the National Socialist regime never engaged in wholesale repeal of previous law. Most obviously, there was no repeal of the basic Civil, Commercial, and Criminal Codes, which continued to serve the Nazi regime as they had Imperial Germany and the Weimar Republic.<sup>32</sup> Despite large numbers of decrees, orders, and enactments, the basic statutes remained largely unchanged, for the most part, throughout the Nazi period.<sup>33</sup> Writing in June, 1937, R. R. Kuhlewein believed that the Nazis had, as of then, made most of the statutory changes which their system required, although "...there still remain some acts requiring a thoroughly scientific preparation, for example, the Penal Code and the Family Law."<sup>34</sup>

(A statute containing a comprehensive treatment of the Law of Marriage and Divorce was passed the next year.)

Administration of Justice during the Nazi period. The administration of justice was subject to drastic and basic changes under the National Socialist regime. Where before it had been

primarily within the control of the German Laender, it was now completely centralized. Even though the substantive and procedural Codes were national in scope, judicial administration was decentralized in the pre-Nazi years. The courts, with the exception of the highest appellate court, were Laender courts rather than Reich courts. By a series of Nazi enactments culminating in the act of January 24, 1935, all jurisdiction over the court system and the administration of justice was transferred to the central government.<sup>35</sup>

One result flowing from this unification of the court structure was a greater degree of control over judicial selection and tenure. Since much of the pre-Nazi law remained on the statute books, it was particularly important to the regime to have "politically reliable" men on the Bench, applying the law.<sup>36</sup>

If statutes are only valid when the Leader does not contradict, then it follows logically that the Judiciary becomes a mere branch of the executive government. The Judge must decide in accordance with Party doctrine rather than with a conflicting statute; but, if in doubt, then he must leave the question for decision by the political authorities.<sup>37</sup>

A further insight into the important area of discretion which the Judge had in applying the law during the Hitler years may be gained from a 1942 statement attributed to Reich Minister of Justice Thierack:

Every judge is at liberty to call on me in case he thinks that a law compels him to render a judgment not compatible with real life. In such an emergency it will be my task to provide him with the law he needs.<sup>38</sup>

Much of the arbitrariness and injustice which characterized the Nazi period was due to such politically inspired application of the statutes, rather than to the formulations contained in the statutes themselves. Loewenstein says that the insertion of such personal

value judgments by the judges accounted for the instability of private law under the Third Reich.<sup>39</sup> According to another observer, Hitler symbolized an arbitrary rule of judge-made law (with the judges being carefully selected), as opposed to the older, more impersonal, and more uniform statutory law.<sup>40</sup> The importance of this judge-made element in Nazi law was also emphasized by Friedrich Roetter: "...Nazi law was but partly statute law. Its core was unwritten law based on the Nazi ideology."<sup>41</sup>

Strong pressures were brought to bear on the members of the German judiciary. Recalcitrant judges were removed, or were assigned to remote villages. Rewards of many sorts, both personal and professional, were given to those who cooperated. Despite these positive and negative pressures, the German judges did resist the Nazi emasculation of the courts, but they have been criticized for not resisting more forcefully. Perhaps the members of the legal profession at large did a better job in this regard, but then their professional advancement depended much less on the favor of the regime than did that of the judiciary.<sup>42</sup>

Legal training and legal scholarship. In addition to bringing pressure to bear on the legal profession as a whole and weeding out the "racially unfit" (Jewish lawyers) and "politically unreliable," the Nazi regime also closely controlled all aspects of legal training.<sup>43</sup> Prospective members of the Bar were carefully screened for racial or political "defects of character."<sup>44</sup> A new course structure, emphasizing the racial and national background and meaning of Law, was devised for the law schools. Law students were told: "Do not be satisfied with interpreting or memorizing

existing statutes! Be fighters to overcome them with a truly German law!"<sup>45</sup>

Legal scholarship, which has played such an important part in the formulation and exposition of the Civil Law, receded to a low-water mark, as the great university law faculties lost their autonomy. Loewenstein explained what this meant:

Because of the importance of law to the exercise of political power, no other academic department was found at the end of the Hitler regime in a more devastated condition. Under the impact of Nazi indoctrination, legal science, to which the law professors had made voluminous and valuable contributions under Weimar, practically ceased to exist. The number of "legal" treatises glorifying the "ennobled democracy" of the Third Reich is legion; their scientific merit is negligible.<sup>46</sup>

To take the place of the great university scholars, the Nazis founded the Academy of German Law in 1934. Its function was to aid in drafting new legislation; its membership consisted of some 300 party members or sympathizers.<sup>47</sup>

Extralegal and nonlegal means of control. The Nazi regime could not and did not rely solely on the legal system to control the populace, even after the legal system had been amended and renovated. The regime also relied very heavily on extra-legal and non-legal methods of imposing its will. Special courts were set up, and much of what would otherwise have been part of the normal workload of the regular courts was transferred to this Sondergericht structure. The Secret State Police (Gestapo) was not subject to the jurisdiction of the courts and was given tremendous arbitrary powers.<sup>48</sup> A complete hierarchy of Nazi Party courts was established, so that all Party members were exempted from the operation of normal judicial channels.<sup>49</sup> Many of the excesses which characterized the Nazi years therefore occurred outside the

legal system, in areas over which the regular courts had no control.

"Will of the Fuhrer" or "New legality"?. There are two ways to pervert a legal system under an authoritarian State. First, the absolutist government can deny that there is any Law at all apart from the will of the Leader--or the ruling elite. Law in such case simply becomes an expression of the Leader's wishes and a means for imposing his policies. But it is also possible to pay lip-service to the idea of legality and yet deny legality in practice by corrupting, evading and interfering with the operation of the legal system. The National Socialists used both methods with great effectiveness.<sup>50</sup>

### III. National Socialist Conceptions of Marriage, the Family, and the Status of Women.

Before examining the specific legislation passed in the field of Marriage and Divorce Law, it would be well to identify and examine the National Socialists' basic goals or values in this area.

Reactions against Industrial Mass Society. One of the basic parts of the National Socialist world-view was its negative reaction to the new industrial society and its criticism of what the new industrialism had done to the individual. Spiritual isolation in mass urban housing developments and in faceless, formless production lines had caused the German workers to lose their racial identity. Families were broken up, both spiritually and physically, by the new industrial order, and with the decline of the family went the decline of family-inculcated values--duty, honor, country.

Rebuilding the German family as a bulwark against "Industrialism" and "Bolshevism" thus became an important part of the Nazi doctrine.

"Blood and Soil". The basic Nazi solution for the evils of industrial society was to restore the ancient attachment of Germans to their hallowed German soil and to build up a solid, sturdy, and economically healthy peasantry, centered in the family, as a wall against the Bolshevik menace. As stated by Hitler himself, "There is no program in national affairs that does not begin with the root of national, popular and agricultural life--with the peasant."<sup>51</sup> In the words of an observer with a post-war perspective:

National Socialism came into power with a well-defined agrarian program. Its closely interrelated aims included de-urbanization, the preservation, increase and immobilization of the peasant class, and the attainment of self-sufficiency in the production of foodstuffs.<sup>52</sup>

The Preamble to the Hereditary Peasant Law of 1933 summarized official thinking on the revitalization of the German peasantry:

The Reich's government wishes to maintain peasantry as the life fountain of the German people by means of making the old inheritance custom permanent.

The farms are to be protected from encumbrance and division in inheritance so that they continually remain as the inheritance of the family, in the hands of free peasants.

A sound division of large agricultural estates shall be aimed at, since a large number of prosperous, small and middle-sized peasant farms, divided as equally as possible over the entire nation, constitute the best guarantee of soundness of the people and of the state.<sup>53</sup>

Not only were the large landed estates to be broken up, and the German peasantry to be promoted, but there was also a program for industrial workers. Factories were to be dispersed, and workers relocated in smaller communities. Many workers would be resettled

on farms, in many cases close enough to the dispersed industrial plants so that some members of the family might work in factories. Each person should own his own home; workers should not be forced to live in proletarian mass housing.

Nazi ruralism aimed at a new type of "rurban" community. The extensive literature on the subject contained strong criticism of modern city life. City people, no longer rooted in the soil, had lost their place in, and feeling for, the community. Children were regarded as a burden; intensive family life was considered a nuisance. In fact, cities with their large apartment buildings and impersonal relations tended to destroy the personalities of the people. This trend the Nazis insisted must be stopped.... Families should be able to combine the advantages of rural life with the necessities of urban industry.<sup>54</sup>

One clear thread running through the Nazi ideology, then, is the principle of Blut and Boden -- Blood and Soil.<sup>55</sup> There is a belief in a mystical relationship between Nation, Race, Soil, and Past Generations, a belief that the Nation could draw strength from the soil which held past generations of German dead, even a belief that deaths were necessary for strength.<sup>56</sup>

The fact that these idealistic "back-to-the-land" resettlement schemes could not be implemented due to the practical needs of a war economy does not reduce their significance as a part of the Nazi world-view.<sup>57</sup>

Population policies: Lebensraum. Another important part of official Nazi ideology was the belief that the spiritually renewed German nation would require additional "living-space." "Inferior" peoples (like the Slavs) would have to be moved, or physically eliminated, to make room for an increasing German population. This larger population would in turn form the base for an expanded military power, which would dominate Europe (and hence, the world). The State must therefore take whatever steps it can to ensure a high

birth rate and an ever-increasing population base. So basic is this Lebensraum concept to National Socialist thinking that it was characterized by Kruszewski, in 1941, as "...the greatest single underlying cause of the war and the keyword of the new empire for which Hitler and his followers are struggling."<sup>58</sup>

Removal of the Unfit and Perpetuation of the Best. The Nazi State was interested not just in a rising birth rate per se, but in making sure that German offspring would grow into healthy, happy, productive citizens, capable of contributing their share to the Third Reich. Therefore, in addition to taking positive steps to promote the procreation of children by strong healthy Germans, the State also had to establish controls against sexual relations where the likely result would be mentally or physically incompetent children.

An example of the State's positive steps to increase the birth rate of "the Best" can be seen in the following description of a lecture on eugenics at a school of the League of German Girls--Bund Deutscher Maedel, ages 14 to 21:

According to the teacher there was no such thing as a problem of morals in Hitler's Germany. The Fuehrer wanted every woman, every girl to bear children--soldiers. She herself was willing to have a child, even though she was not married. The State would rear and educate it.

"All of us women can now enjoy the rich emotional and spiritual experiences of having a baby by a healthy young man without the restricting ties of the old-fashioned institutions of marriage," were her words.

Hitler and his school authorities urge BDM girls to have babies....<sup>59</sup>

The agrarian resettlement program was also based on assistance to "only racially highly qualified carriers of best blood heritage" (rassich hochwertige Trager Besten Erbguts).<sup>60</sup>

On the other side of the coin, the Nazi State attempted to prevent reproduction by "incompetents" by means of a double-barreled policy--marriage restrictions and sterilization. No one was permitted to marry unless the parties could show, by a Health Office certificate, their "fitness to marry."<sup>61</sup> Persons suffering from certain mental and physical diseases classified as "hereditary" could be sterilized to prevent the procreation of diseased offspring, on the order of a Hereditary Health Court composed of a Municipal Judge and two physicians.<sup>62</sup> Deuel estimated that some 375,000 people were sterilized under this statute prior to the beginning of the War.<sup>63</sup>

Racial doctrines. As a natural consequence of its doctrines on Nation, Race, Blood, and Soil, the official Nazi ideology was opposed to marriage and/or sexual relations between the German Jewish population and other German nationals. Believing the Jews to be an "inferior" people, Nazi theorists held that all "race-mixing" must be officially discouraged by the State. In Mein Kampf, Hitler analyzed the "Jewish tactics" which must be combatted:

While he seems to overflow with "enlightenment," "progress," "freedom," "humanity," etc., he himself practices the severest segregation of his race. To be sure, he sometimes palms off his women on influential Christians, but as a matter of principle he always keeps his male line pure. He poisons the blood of others, but preserves his own. The Jew almost never marries a Christian woman; it is the Christian who marries a Jewess. The bastards, however, take after the Jewish side.

With satanic joy in his face, the black-haired Jewish youth lurks in wait for the unsuspecting girl whom he defiles with his blood, thus stealing her from her people. With every means he tries to destroy the racial foundations of the people he has set out to subjugate. Just as he himself systematically ruins women and girls, he does not shrink back from pulling down the blood barriers for others, even on a large scale.<sup>64</sup>

In order to meet this "menace," therefore, there must be strictly enforced prohibitions against such intercourse between Jews and other Germans. In addition, where an existing marriage was contracted between a Jew and a non-Jew, without the latter being aware of this racial problem, there should be provisions for dissolving such marriage.<sup>65</sup>

Status of Women in National Socialist Ideology. The status of women in the Nazi ideology is somewhat ambiguous. The generally accepted view was that Woman's place was in the home.

Women in the Third Reich are relegated to the traditional Kinder, Kuche, Kirche (children, kitchen, and church). According to the Reichreferentin of the Bund Deutscher Madel, Trude Mohr, two-thirds of the work of the Bund is to be devoted to bodily development. For the rest, German girls must mould their lives according to the new Weltanschung and fulfill their duties to family, race and State.<sup>66</sup>

Hitler denounced coeducation and condemned women's rights as a "product of decadent Jewish intellectualism." In his address to a Nazi Party convention at Nurnberg on September 8, 1934, he stated:

Liberalism has a large number of points for women's equality. The Nazi program for women has but one: this is the child. While man makes his supreme sacrifice on the field of battle, woman fights her supreme battle for her nation when she gives life to a child.<sup>67</sup>

There is some evidence that this view was not unanimously held, even by Nazi officialdom. In an unpublished manuscript dealing with the psychology of Nazi women, Dr. Wanda von Baeyer reported that:

...certain SS circles by no means agreed with this but felt that the German woman, as a Nordic "Valkyrie," belonged right in the midst of battle at the side of her man. This was, of course, the idea shared by the active SS women, of which many were assigned as guards and in administrative positions to concentration camps.<sup>68</sup>

Woman who were not active in this way, according to this view, would be responsible for providing spiritual strength and purification to

their menfolk; they would, in other words, act as a needed island of calm for men working in the stormy business of regenerating the Reich.<sup>69</sup>

Once again, there was a vast difference between idealized official slogans and programs and actual performance. For example, the SS Lebensborn ("fountain of life") organization in reality contributed to a weakening of the family and to a lessened respect for German womanhood; it really destroyed fertility, by spreading venereal disease, which was at an all-time high in the vicinities around SS garrisons.<sup>70</sup> In any case, a generally held official view in which women were little more than the means by which the Reich was provided with healthy soldiers was not likely to result in an enhanced social status for women.

#### IV. National Socialist Changes in Marriage and Divorce Law

Just as one would logically expect to find a wholly new employment relationship where a movement based on the proletariat had come to power, so also one would expect to find marked changes in marriage and family laws where a regime founded on the ideas of Race and Blood had been established. In this respect, the National Socialist regime does not disappoint the observer. In addition to passing a number of laws dealing with various aspects of the law pertaining to marriage, divorce, and family relations generally, the regime also granted different types of subsidies, exceptions, and exemptions to help promote its policies in this area. If there was any one unifying thread running through these various enactments, it was the new emphasis on the Community's interest in the marriage

relation and the State's right to regulate the relation in some detail.

Peasant Inheritance Law of 1933. One of the most striking examples of legislation based on specific National Socialist doctrines was the Hereditary Peasant Law of 1933. While it did not deal specifically with either marriage or divorce, it did have important implications for farm family relationships. The law basically reestablished the old German customary rule on inheritance: "The peasant has but one child." (I.e., for the purposes of inheritance, the rule was essentially "primogeniture.")

The law provided for the registration (which is not conclusive) of certain "landed property" not to exceed 125 hectares, which was used for "agricultural purposes" and which was in the sole possession of one "agriculturally competent" person with German citizenship (as redefined to include "blood" requirements).<sup>71</sup> Landed property so qualifying was in effect then owned by the family and its posterity, much like the old German custom. Such land could not be sold or mortgaged by the present holder thereof, nor could it be reached by his creditors. The present holder, as a kind of trustee, also had a duty to make productive use of the land. On the death of the present holder, such property passed under a very different inheritance provision to one person designated as the "chief heir." A surviving wife might qualify as the chief heir, or she might lose all ownership rights in the land, even if it had been jointly held and jointly administered property. However, if a surviving spouse was not so designated as the chief heir, then she had a claim for support for life against the earnings of the hereditary farm.<sup>72</sup>

The law thus subordinates the rights of the present owner to use, possess, enjoy, and alienate the hereditary land, to the rights of the family group and the State. In evaluating the effects of this law, Wunderlich said:

The law was hailed as a means of strengthening family ties, but it protected only one descendant, while his brothers and sisters were pushed into the ranks of the proletariat.<sup>73</sup>

Law against Abuses of Marriage (1933). An early indication of the Nazi State's assertion of its overriding interest in the marriage relation was made in the 1933 statute dealing with marriages "in name only" and with adoption abuses. Under its terms, a marriage could be declared void if the court found that the main purpose of the marriage was merely to give the husband's name to the wife without establishing a true matrimonial community between the spouses. Any children of such a marriage would be declared illegitimate. Only the public prosecutor, however, could initiate such proceedings. The act also imposed additional controls on adoptions.<sup>74</sup>

Law for the Protection of German Blood and German Honor (1935). Surely the most widely known and most highly criticized Nazi legislation was the series of acts usually referred to as the Nuremberg Laws. One of these acts deprived German Jews of their German citizenship; the Law for the Protection of German Blood and German Honor then imposed legal barriers to marriage and/or sexual intercourse between Jews and German nationals. Such marriages were declared void, even if entered into in a foreign country, if the parties intended to evade the German law in marrying abroad. Once again, only the public prosecutor could bring proceedings under this statute to annul such marriages. Persons entering into such illicit

relationships, whether marital or extra-marital, were subject to punishment under implementing regulations.<sup>75</sup>

Law for the Prevention of Hereditarily Diseased Offspring (1933) and Law for the Protection of the Hereditary Health of the German People (1935). Marriage and family relationships were also affected by two pieces of Nazi eugenics legislation. On its face, this legislation was aimed at lessening inherited mental or physical defects, certainly a worthwhile and unobjectionable motive.<sup>76</sup> The 1933 statute provided for the compulsory sterilization of persons with certain hereditary diseases, but made no specific reference to whether the person involved was married or unmarried; any effects it had on marital and family relations were therefore indirect.<sup>77</sup>

The 1935 statute dealt specifically with marriage and the qualifications to marry. It established restrictions against marriage where one party suffered from a contagious disease, a serious mental disorder rendering the marriage "undesirable in the interest of the folkish community," or any inheritable disease listed in the 1933 act (unless the party is sterile). The burden was placed on the parties to show that no such impediment exists, by procuring a certificate from the Public Health Office to that effect.

...it requires the applicant and his family to produce, in addition to personal statements on their health and that of their ancestors, a testimonial by a public health officer certifying to their individual and hereditary health, to the wife's physical ability to endure repeated child-bearing and to the probable desirability of her offspring.<sup>78</sup>

Here too, only the public prosecutor could institute the litigation to have the marriage be declared void. Marriages in violation of

this statute could be declared void if the health certificate was procured by known false statements, or if the parties entered into the marriage in a foreign country to avoid the statute. Violation of the statute (or attempted violation) was a criminal offense, to be punished by not less than three months' imprisonment.<sup>79</sup>

Law for Unifying Marriage and Divorce Law in the Province of Austria and Other Parts of the Reich (1938). The annexation of Austria as part of the Reich provided the occasion for the drawing together of the provisions of the several statutes affecting marriage already passed by the Nazis and the integration of some of these new concepts within the general framework of the law on marriage and divorce.<sup>80</sup>

The Fourth Book of the German Civil Code deals with Domestic (Family) Law; the First Division thereof, with Civil Marriage. In this First Division, the 1938 Nazi law repealed Titles Two--Celebration of Marriage, Three--Void and Voidable Marriages, Four--New Marriage in Case of Declaration of Death, and Seven--Dissolution of Marriage (Divorce).<sup>81</sup> Despite the seemingly substantial nature of these revisions the operative law of marriage was changed only slightly by this 1938 statute. It did incorporate the prohibition against marriages between Germans and non-Aryans and the 1933 avoidance provision for marriages in name only. It also contained a provision validating a marriage, which would be otherwise void because not celebrated before a Registrar, where the parties had lived together for five years as husband and wife.<sup>83</sup>

The really significant changes made by this law were those made in Divorce Law. The basic rationale underlying these changes can be seen in the Official Explanation:

For the National Socialist state, the deepest significance of marriage lies outside the individual interests of the spouses.... It follows, on the other hand, that the new rules of divorce law must disregard restrictions based on religious views opposed to the dissolution of marriage. On the other hand, however, it cannot be an object of this reform to bring about a general relaxation of divorce from the standpoint of an individualistic conception of marriage.... Therefore the only purpose must be to make it possible for a marriage to be dissolved in an honorable way when it has become valueless to the folkish community and to the parties themselves, who, fully realizing their moral duties, are no longer able to live together in true marital companionship.<sup>84</sup>

The question posed to the Nazi draftsmen, as to every legislator, was one of method: how to draft the statute so as to achieve the desired results. The Civil Code provisions on divorce had been dominated by the concept of "fault."<sup>85</sup> Even prior to the Nazi regime, there had been a strong current of opinion in favor of amending these provisions to prevent the airing of family grievances in court and the fabrication of "fault" grounds where none actually existed.<sup>86</sup> The Nazi jurists, then, had two alternatives: they could simply state the idea of dissolving "valueless" marriages in general terms, and leave to the courts the job of determining when a marriage became such; or they could set down specific bases on which a dissolution could take place.

The law as enacted was actually something of a combination of these two alternatives; there was a listing of specific grounds, but with enough flexibility to provide for "unlisted" situations where the marriage had in fact become "valueless to the folkish community." The grounds for divorce were listed as: (1) adultery; (2) incapacity to have children if the spouses are under 30 and have

been married less than 10 years; (3) persistent and unreasonable refusal to have children or the use of illegal means of abortion; (4) infectious or loathsome disease; (5) mental disease; and (6) three years' separation, where, "in consequence of a deep-seated and irreparable disruption of the marriage relation, the restoration of a life-partnership consistent with the essential nature of marriage is not to be expected."<sup>87</sup>

It was this last provision (Section 55) which provided the flexibility felt to be desirable, but which also gave rise to numerous articles and comments and a good deal of uncertainty.<sup>88</sup> Much of the difficulty in understanding Section 55 really arose from the unstated Nazi ideas which underlay the section; specifically, the idea that the procreation of children was more important than the maintenance of an existing marital arrangement. Thus, in theory, if the plaintiff in a divorce action instituted under the "disruption" provision of Section 55 was solely responsible (at fault) for the disruption (as in the case where the plaintiff-husband is guilty of adultery), the innocent defendant-spouse could object to the granting of the divorce. But, this rule was in turn subject to the further qualification that the objection of the innocent defendant-spouse could be overridden if the court found that the continuation of the marriage was undesirable from a "moral" point of view, i.e., from a Nazi point of view. Thus if a husband who had been guilty of adultery and had fathered an illegitimate child now wished a divorce from his childless wife in order to marry his mistress, he should be granted the divorce, by this analysis, since the new marriage would be more likely to produce needed offspring.<sup>89</sup> Contrariwise, in the case

of a sixty-year-old man seeking a divorce on these grounds, the divorce should not be granted (and was not), since it was likely that he would marry a mature woman past the childbearing age; thus the possible benefit to the folkish community from such a divorce would not be great enough to warrant granting it.<sup>90</sup>

Questions of alimony and support under this new legislation were primarily a matter of expediency.<sup>91</sup> Several purposes should be taken into account in determining such questions: (1) support payments should ease the dissolution of a "valueless" marriage; (2) a continuing support relation would serve to make the social impact of the divorce less drastic; (3) the State was interested in having as few people as possible on the public dole.<sup>92</sup> One change in the law was that there could be a claim for alimony, even where both spouses were at fault, against the spouse who was predominantly at fault (usually, against the husband).<sup>93</sup> Also new was a provision covering claims to alimony where the marriage was dissolved without the fault of either party. In such case, the party seeking the divorce had the duty to pay alimony to the defendant-spouse, and there was no express requirement that the defendant-spouse be without other means of support in order to claim the alimony.<sup>94</sup>

Custody of children after the divorce was left largely to the judge's discretion, according to the provisions of Section 81. This changed the pre-existing law, which set up certain presumptions as to which parent got which children (at least in cases where both parents were guilty).<sup>95</sup>

Other Policies Affecting Marriage and the Family. The Nazi State also encouraged marriage and the procreation of children by a number of special policies, subsidies, and exceptions. For example, the government made "marriage loans" to newlyweds, with twenty-five percent of the loan being cancelled for the birth of each child.<sup>96</sup> Tax rebates of 15 percent were given for each of a family's first four children, with an additional 30 percent for the next child.<sup>97</sup> The government also provided reduced school fees and medicinal charges for large families.<sup>98</sup> The Reich Labor Leader was empowered to conscript only unmarried unemployed women for general National Labor Service Duty, but any person between 15 and 70 years of age was liable to be conscripted for so-called "Emergency Service" (Notdienst). Even as to this latter requirement, however, there were exceptions for women in the sixth month of pregnancy and for mothers with children under 15 in their care.<sup>99</sup> There were thus a number of "promotional" policies which had an effect, direct or indirect, on marital and family relationships.

All in all, the National Socialist regime succeeded in inserting itself into the family life of the citizens to a rather remarkable degree.

#### V. The Aftermath: Quo Vadis?

The Potsdam Agreement and Control Council Law No. 1. Leaving aside for the moment the more basic questions of the validity of the occupation of Germany and the effect thereof on the existence of Germany as a state, the occupation raised some very real problems in legal administration. The Allied Powers had agreed that the German

legal system must be purged of Nazi concepts and ideology. The Potsdam Agreement (Part III, Section A, paragraph 4, page 12) required that:

All Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished. No such discrimination, whether legal, administrative or otherwise, shall be tolerated.<sup>100</sup>

Pursuant to this directive, the Allied Control Council for Germany passed Control Council Law No. 1, which repealed some 25 statutes in whole or in part and also contained a general prohibition against applying any law in an arbitrarily discriminatory manner.<sup>101</sup>

The real problems arose in trying to apply these general (and ambiguous) provisions to specific parts of the German legal system, since the Nazi and pre-Nazi law were interwoven to such an extent in many areas. Understaffed legal advisory departments handled the job on a day-to-day basis, as best they could.<sup>102</sup> Several observers pointed out the dangers of abolishing all Nazi law without being able to replace it with some sort of a working structure.<sup>103</sup>

The German Civil Code was not repealed in its entirety, but remained on the books in both West Germany and East Germany.<sup>104</sup> In general, the Allied policy was to attempt to restore German Law and the German judicial system to the situation that existed prior to the Nazi regime.<sup>105</sup> Again, the problem in implementing this objective was that not all Nazi Law could be located by a simple examination of the statute books. In commenting on the post-War resurgence of Natural-Law thinking in West Germany and its effectiveness as a tool in removing such objectionable Nazi remnants, H.O. Pappe noted that:

Altogether, administrative and judicial abuses of law

appear to have accounted for more of the knotty legal problems of the post-Hitler era than did the legislative enactments of the regime. Moreover, not all decisions arrived at on the basis of objectionable statutes were objectionable per se, while many decisions based upon pre-Nazi statutes were. Neither a purely legislative nor a purely judicial review of the Nazi legal legacy could offer a comprehensive solution.<sup>106</sup>

After the formation of the Federal Republic of Germany, its Constitutional Court adopted a sociological compromise solution to this problem:

...a solution which permits the courts to weed out the unwholesome, while preserving such legal relationships as, though based on Nazi enactments, require preservation in the interest of legal continuity and order.<sup>107</sup>

Control Council Law No. 16. In the field of marriage and divorce law, the Allied Council took specific steps to remove the Nazi amendments to the Civil Code. Law No. 16 was promulgated February 20, 1946, and further amended by Law No. 52, effective April 21, 1947.<sup>108</sup> Law No. 16, as amended, specifically repealed the Nazi Marriage Law of 1938 and any other Nazi legislation inconsistent with the provisions of Law No. 16. These Council Laws also recognized the legal validity of common-law marriages where the parties had been living together as husband and wife, but had been unable to marry legally due to persecution or disability under the Nazi regime.<sup>109</sup>

All four Allies agreed on the need for some provision in the divorce laws to deal with the large number of broken marriages which had resulted from the War and attendant dislocations. Along with the usual grounds for divorce -- adultery, genuine cruelty, mental derangement and mental disease -- a new basis was included in Article 48:

If husband and wife have not kept a common household for three years, and if owing to a deep-seated incurable disruption of marital relations a restoration of the common life in the conjugal sense cannot be expected either spouse may petition for a divorce.

If the spouse seeking divorce has wholly or predominantly caused the disruption the other spouse can oppose the divorce. Such opposition must however be disregarded if the maintenance of the marriage does not appear morally justified on a true assessment of the significance of marriage and of the mutual conduct of both parties.<sup>110</sup>

Article 61 provided that if the husband (or rarely, the wife) petitions for divorce under Article 48 he is obligated to pay alimony, unless the defendant caused the disruption.<sup>111</sup>

Equal Rights Law of 1957. The 1949 Bonn Constitution, in Article 3, paragraph 2, stated that men and women were to be given equal rights before the law. Article 117 went on to state that any law in conflict with this legal equality of the sexes would remain in force until amended, but in no case would such law be effective beyond March 31, 1953.<sup>112</sup> Since no legal-equity legislation had been passed by the specified date, the courts were forced to consider the extent to which certain statutes were no longer in force because of conflict with the constitutional provisions. The lower courts had some difficulty in making such determinations, especially in the field of marital property rights.<sup>113</sup>

It was not until 1957 that a statute was passed in conformity with the constitutional mandate; this statute took effect on July 1, 1958. In order to give the spouses legal equality in the area of Civil Law and Civil Procedure, the statute had a two-fold aim: (1) to give the wife equal rights to administer the marital property during the joint lives of the spouses; (2) to give the wife a share in marital property gains during the marriage, by providing for a

form of dollar equalization.<sup>114</sup> The statute amended both the Civil Code and the Code of Civil Procedure to incorporate these changes. While the spouses are given some possible alternatives with respect to the marital property, the law provides for the regime of "community of gains" as the basic statutory arrangement.<sup>115</sup> With the passage of this statute, it would seem that Nazi legal ideas had been substantially eliminated from the marital relationship.

#### VI. Summary, Evaluation, and Conclusions

In one sense the Nazi law of Marriage and the Family was an exception to the general legal policies followed by the regime. There was much more to Nazi legality in this area than simply a change in the way the law was administered; there were substantial and basic statutory changes. These statutory changes fell into two general categories: first, those basic reforms which were not peculiarly National Socialist in origin but which had been proposed prior to the Nazi seizure of power; second, those changes in Marriage and Family Law which were required or suggested by National Socialist doctrine. In both cases, the general tenor of the changes was to emphasize the public interest in the private marriage relationship.

As indicated by Magdalena Schoch, the 1938 Nazi Marriage Law contained much that had been proposed as reform legislation in pre-Nazi days.<sup>116</sup> Particularly in the area of divorce, many persons had felt that changes were long overdue, that the law was in need of modernization in this area. Even the official explanation

of the Law itself seemed to adopt the view that this was not solely a Nazi statute.

While for decades the general desire for a reshaping of divorce law had been urgently voiced, yet there was equally general lack of unanimity as to the ends that reform should seek. This frustrated all efforts at reform. The new world-view in which National Socialism has united the German people and which has made possible the solution of so many problems that the past failed to solve presses powerfully for a new and final solution of the question of divorce.<sup>117</sup>

Schoch's evaluation of this 1938 statute also contains some interesting conclusions.

Unlike some of the other legislation of the Third Reich, the new divorce law is not a monument to Nazi radicalism ... the statute did not carry the idea that marriage is a public institution for the preservation and increase of the master race to its ultimate logical conclusions. On the contrary, it preserved enough features of the "private law" of marriage to make it appear as a compromise rather than a new departure. It is not without irony that we find the National Socialists put into effect reforms, urgently demanded by the new "world-view," which had been championed by public opinion in the "liberalistic" and "individualistic" era of the Weimar Republic.

Many of the solutions reached in the new German divorce law could easily be rationalized from an entirely different social-political viewpoint. More than that, they might equally well be advocated on moral grounds or on grounds of individual happiness and human dignity....we may say on an objective analysis that the Law has its merits. Stripped of the Nazi-ideological verbiage with which it is surrounded, it is by and large a fairly progressive statute, holding the balance between systems which sanction divorce by mutual agreement or unilateral divorce and systems based on the traditional notion of fault. It would, therefore, not be surprising if the Law, or at least large parts of it, survived the National Socialist regime in Germany.<sup>118</sup>

At least this basic statute, then, had a certain validity in many of its essential provisions, despite the fact that it owed its existence to the National Socialists.

Much of the peculiarly Nazi legislation on marriage and the family cannot be justified on a rational, legal basis. The law forbidding marriages between Germans and non-Aryans, for example, could only be valid to someone who accepted the Nazi theories of race and race-mixing. The eugenics legislation included some highly questionable categories of hereditary diseases for which the afflicted person could be sterilized against his will; also, medical science is something less than unanimous in believing that this is the correct approach to the problem. It must be said in defense of these eugenics laws, however, that pre-marital health examinations are certainly not unusual in the modern world; indeed, it might be said further that more comprehensive health examinations prior to marriage would be highly desirable, both from a personal and from a social point of view. Recent years have also seen an increasing, and surely not unreasonable concern with this problem of birth defects. Again, the real key to the Nazi perversion of law is not the statute itself, but the method of administering the statute.

The 1933 law on peasant farms represented a novel National Socialist attempt to return to a kind of pre-industrial German feudalism. In the words of R.A. Brady, looking at this and other Nazi policies:

The Nazis, claim, in fact, to have abolished capitalism entirely and to have established in its place a pre-Romanic system in which property rights held in fee simple are transmuted into the fixed family inheritance and where the content and quality of inheritance rights are (ultimately) fixed by the state to correspond with a hierarchically arranged system of social or class gradations--in turn founded upon occupational differentiations as determined by biosocial inheritance factors. This idea they refer to as the Standestaat -- literally, a "state of estates," or of classes or social-economic castes.<sup>119</sup>

The fact that the Nazi agrarian policies had to be abandoned shows that they were out of touch with modern economic realities to some degree, but the Nazis were certainly not alone in their adverse reaction to the soullessness of modern industrial society, nor in their wish to have smaller, decentralized communities.

While the Nazi policies encouraging the procreation of children were clearly connected with the official views on Race and Nation, even such policies as these are not solely indigenous to Nazi Germany. So-called "baby bonuses" and tax exemptions for children, and other subsidizations for large families, are not unknown in other countries of the Western World.

The Nazi totalitarianism was highly successful in asserting its control over all phases of life in Germany, down to and including that most intimate of relationships, the one between husband and wife.<sup>120</sup> By Loewenstein's definition,

... totalitarianism is the successful attempt to bring most if not all private relationships under the guidance, direction and supervision of the state and of the single party identified with the state. The totalitarian technique consists in narrowing the range of autonomous private relations to the point where most of them are conducted under state control. From the juridical viewpoint totalitarianism is the suppression of private by public law.<sup>121</sup>

It is precisely at this point that the National Socialist legacy provides its main message for jurists in today's Free World countries. As much as anything, the cause of the Nazis' perversion of the machinery of justice was their attempt to make the law, and the public interest, extend to life, every relationship, every facet of every transaction. It is this substitution of some mythical public interest for any and all private interests which accounts, in large part, for the arbitrariness and unpredictability of the law

during the Nazi years. The following analysis of Nazi Law by Ernest Barker would be difficult to surpass:

A legal system cannot be based on the idea of totality; nor can it attempt to cover and regulate every aspect of life. Any legal system must deal with a definite and specific area--the definite and specific area of external relations and conduct, which can be brought (and which alone can be brought) under certain and fixed legal rules capable of certain and fixed legal enforcement. This is a limited area, as all experience proves. It is an area which excludes the play of social taste, the movement of the inward conscience, the general march of the mind, and the general building of culture. These are all things which escape legal rule and legal compulsion, for the simple reason that they possess the quality of quick-silver. The Weltanschauung which is vowed to totality will seek to escape the limitation of area inherent in the nature of law; but in the very act of seeking to reform and 'totalize' law it will deform what it touches, and it will abolish all the precision and certainty of law.<sup>122</sup>

It is this very urge to legal "totality" which must be resisted at all costs, under whatever disguise it presents itself.

## FOOTNOTES

1. Deak and Rheinsein, "The Development of French and German Law," 24 Georgetown Law Journal (1936), 551.
2. Schlesinger, Comparative Law (1959), 174-78.  
Prussian Law had been codified in 1791. Rheinsein, "Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany," 5 Wisconsin Law Review (1938). The influence of the Napoleonic Code was especially strong in the Rhineland and southern Germany. North German lawyers, coming into contact with this superior law, and recognizing it as such, were thus motivated to push for similar legal reform for their own parts of the country. Weiden, "Impact of the Occupation on German Law," Wisconsin Law Review (1947), 332.
3. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 779.
4. Kaden, "Peasant Inheritance Law in Germany - on the basis of the Reich's Hereditary Peasant Law of 1933," 20 Iowa Law Review (1935), 350.
5. Rheinsein, "Approach to German Law," 34 Indiana Law Journal (1959), 546.
6. Schlesinger, Comparative Law (1959), 546.
7. Rheinsein, "Approach to German Law," 34 Indiana Law Journal (1959), 546.
8. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 779.
9. Schlesinger, Comparative Law (1959), 262.
10. von Waldheim, "The Student of Law in Germany: A New Aspect of His Training and Social Position," 7 New York University Law Review (1929), 484.
11. Ibid.
12. Marsh, "Status of the German Legal Profession," 30 Journal of the Society of Comparative Legislation (1948), 92.
13. Rommen, "Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany," 4 National Law Forum (1959), 1.

14. Friedmann, "Western And German Legal Thought: Community or Cleavage?" 58 Law Quarterly Review (1942), 257.
15. Ibid.
16. Ibid.
17. Ibid.
18. Anonymous. (This writer is identified as C. Parry by Rudolph Schlesinger, Comparative Law (1959), 519.
19. Ibid.
20. Ibid.
21. Dickman, "An Outline of Nazi Civil Law," 15 Mississippi Law Journal (1943), 127. Preuss, "Position of Aliens in National Socialist Penal Law Reform," 26 American Journal of International Law (1935), 206.
22. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936) 779. Dickman, as above; Lowenstein, as above.
23. Preuss, "Germanic Law versus Roman Law in National Socialist Legal Theory," 16 Journal of the Society of Comparative Legislation (1934), 269.
24. Ibid.
25. Ibid.
26. Preuss, "Position of Aliens in National Socialist Penal Law Reform," 26 American Journal of International Law (1935), 206.
27. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 787.
28. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 811.
29. "Law in Nazi Germany," 11 Fortnightly Law Journal (1941), 7.
30. Ibid., p. 7. This does not seem to square too well with the basic theoretical explanation of law discussed above.
31. Preuss, "Germanic Law versus Roman Law in National Socialist Legal Theory," 16 Journal of the Society of Comparative Legislation (1934), 269.

32. Cohn, "German Legal Science Today," 2 International and Comparative Law Quarterly (1953), 169.
33. Shartel and Wolff, "German Lawyers-Training and Functions," 42 Michigan Law Review (1943), 521. See Also: Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 779.
34. Kuhlewein, "Recent German Legislation," 11 Tulane Law Review (1937), 601.
35. Wells, "The Liquidation of the German Lander," 30 American Political Science Review (1936), 350. See also Lepawasky, "The Nazis Reform the Reich," 30 American Political Science Review (1936), 324.
36. Dickman, "An Outline of Nazi Civil Law," 15 Mississippi Law Journal (1943), 127. See also; Bennett, "Notes on The German Legal and Penal System," 37 Journal of Criminal Law Criminology and Polic Science (1947), 368.
37. "Law in Nazi Germany," 11 Fortnightly Law Journal (1941), 7.
38. "Crimnal Justice in Germany," 42 Michigan Law Review (1944), 1067.
39. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1936), 779.
40. Morse, "Communal Spirit in German Law," 10 Georgia Bar Journal (1948), 327. This arbitrariness reached its high point in the law of September 16, 1939, by which the Fuhrer was given the right to set aside any decision of any German court, thus effectively abolishing the principle of res judicata. Timasheff, "Legal Regimentation of Culture in National Socialist Germany," 11 Fordham Law Review (1942), 1.
41. Roetter, "The Impact of Nazi Law," 1945 Wisconsin Law Review (1945), 516.
42. Loewenstein, "Reconstruction of the Adminiatration of Justice in American-occupied Germany," 61 Harvard Law Review (1948), 419.
43. Some 132 law teachers were ousted from their positions. "Law in Nazi Germany," 11 Fortnightly Law Journal (1941), 7.
44. H. Weniger, the Secretary-General of the Chamber of Attorneys of the Reich, attempted to justify this extreme "selectivity" in terms of the oversupply of Attorneys and the resultant damage to the economic health of the German legal profession. Weniger, "Profession of the Bar in Germany," 34 Illinois Law Review (1935), 85.

45. Rheinstein, "Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany," 1938 Wisconsin Law Review (1938), 5.
46. Loewenstein, "Reconstruction of the Administration of Justice in American-occupied Germany," 61 Harvard Law Review (1948), 419.
47. Dickman, "An Outline of Nazi Civil Law," 15 Mississippi Law Journal (1943), 127.
48. There were cases where persons were arrested by the regular police and prosecuted by the regular courts and jailed, to prevent their falling into the hands of the dreaded Gestapo.
49. Mason, "Judicial System of the Nazi Party," 38 American Political Science Review (1944), 96.
50. Marsh, "Some Aspects of the German Legal System under National Socialism," 62 Law Quarterly Review (1946), 366.
51. Kaden, "Peasant Inheritance Law in Germany - on the basis of the Reich's Hereditary Peasant Law of 1933," 20 Iowa Law Review (1935), 350.
52. Wunderlich, "The National Socialist Agrarian Program," 13 Social Research (1946), 33.
53. Kaden, "Peasant Inheritance Law in Germany -on the basis of of the Reich's Hereditary Peasant Law of 1933," 20 Iowa Law Review (1935), 350.
54. Schweitzer, "Depression and War - Nazi Phase," 62 Political Science Quarterly (1947), 321.
55. Campbell, "Fascism and Legality," 62 Law Quarterly Review (1946), 141.
56. Alexander, "Destructive and Self Destructive Trends in Civilized Society - A Study of \_\_\_\_\_," 39 Journal of Criminal Law Criminology and Police Science (1949), 553.
57. Wunderlich says simply, "Point by point, the program had to be abandoned." Wunderlich, "The National Socialist Agrarian Program," 13 Social Research (1946), 33.
58. Kruszewski, "Germany's Lebensraum," 34 American Political Science Review (1940), 964. See also; Krebs, "Moeller van den Bruck; Inventor of the Third Reich," 35 American Political Science Review (1941), 1085.

59. Ziemer, "Education for Death," (1941), 128-29. Such statements obviously contradict the other expressed Nazi purpose of strengthening the family. There are also inherent contradictions between the ideal of strong family ties and the requirements of a totalitarian state. Under pre-Nazi criminal law, for example, the rendering of aid and comfort to criminal after the crime had been committed (begünstigung) was not an offense if the person doing so was an ascendant, descendant, collateral, or spouse of the criminal. Morse, "Communal Spirit in German Law," 10 Georgia Bar Journal (1948), 327. Such an exception could clearly not be allowed by a regime which encouraged intra-family snooping and denunciations of parents by children. See e.g., Koessler, "Nazi Justice and the Democratic Approach," 36 American Bar Association Journal (1950), 634.
60. Wunderlich, "The National Socialist Agrarian Program," 13 Social Research (1946), 40.
61. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, 1948-49. See the next chapter infra for a further discussion of this legislation.
62. Ibid., pp. 1946-47. See Chapter IV, infra. The concept of compulsory sterilization of mental defectives can hardly be called a "novel National Socialist legal principle." Such statutes were in force in Denmark, Switzerland, two Canadian provinces, and as many as 27 American states. "Report of the Committee of the American Neurological Association for the Investigation of Eugenical Sterilization," by Dr. Abraham Myerson, et al., 1938, cited in Simpson and Stone, Book Two, pp. 1130, 1133-36.

In his majority opinion for the United States Supreme Court, upholding the validity of the Virginia sterilization statute, Justice Holmes stated:

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds.... In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.... Three generations of imbeciles are enough. Buck v. Bell, 274 U.S. 200 (1927).

63. Deuel, "People Under Hitler," (1942) 221-22. Sterilizations ended, by and large, with the onset of the War. Compare statistics and analysis in Schuman, The Nazi Dictatorship, (1936), 382.
64. Hitler, Mein Kampf, (1943), 315-16, 325.
65. See the discussion in the next section, *infra*, for a more detailed coverage of the infamous "Nuremberg Laws," which attempted to achieve this end.
66. Schuman, The Nazi Dictatorships, (1936), 383.
67. Ibid.
68. Alexander, "Molding of Personality under Dictatorship," 40 Journal of Criminal Law Criminology and Police Science (1949), 3.
69. Ibid.
70. Alexander, "Destructive and Self Destructive Trends in Civilized Society," 39 Journal of Criminal Law Criminology and Police Science (1949), 350.
71. Kaden, "Peasant Inheritance Law in Germany - on the basis of the Reich's Hereditary Peasant Law of 1933," 20 Iowa Law Review (1935), 350.
72. Ibid.
73. Wunderlich, "The National Socialist Conception of Landed Property," 12 Social Research (1945), 71.
74. Kuhlwein, "German Legislation since 1933," 10 Tulane Law Review (1936), 425.
75. Ibid. See also Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, 1819-26 (1949). See also Garner, "Recent German Nationality Legislation," 30 American Journal of International Law (1936), 96. According to Garner's interpretation, the rule only prohibited sex relations between a German male and a Jewish female.
76. Loewenstein, "Law in the Third Reich," 45 Yale Law Journal (1939), 779.
77. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, (1949), 1946, 1947.

78. Jasny, "Some Aspects of the German Agricultural Settlement," 52 Political Science Quarterly (1937), 208.
79. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, (1949), 1948, 1949.
80. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, 1806-11 (1949).
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82. Schlesinger, Comparative Law (1959), 258-59.
83. Kuhlewein, "German Legislation from 1937 to 1939," 14 Tulane Law Review (1940), 593.
84. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, (1949), 1809.
85. Ibid., pp. 1812-13.
86. Schöch, "Divorce Law and Practice under Nationalist Socialism," 28 Iowa Law Review (1943), 225.
87. Simpson and Stone, "Cases and Readings on Law and Society." Book Three: Law, Totalitarianism and Democracy, (1949), 1810. See also: Kuhlewein, "German Legislation from 1937 to 1939," 14 Tulane Law Review (1940), 593.
88. Kuhlwein. See, e.g., the articles quoted in Simpson and Stone, 1812-19.
89. Kuhlewein; Simpson and Stone, 1806-19.
90. Simpson and Stone, 1812-13.
91. Mankiewicz, "German Law of Alimony before and under National Socialism," 6 Law & Contemporary Problems (1939), 301.
92. Ibid., pp. 309-310.
93. Ibid., p. 313.

94. Ibid., p. 314.
95. Kuhlewein. This is not the only area where the judge was given a great amount of discretion by the 1938 law; as one source characterized it, "everything depends on the judge." Mankiewicz, op cit.
96. Jasny, "Some Aspects of the German Agricultural Settlement," 52 Political Science Quarterly (1937), 208.
97. Schuman, "The Nazi Dictatorship," 38 (1936).
98. Ibid.
99. Cooper, "Labor Mobilization Legislation in Great Britain, U.S.S.R. and Germany," 11 George Washington Law Review (1943), 213. Wise, "The German Law of Requisition," 33 Georgetown Law Journal (1944), 33.
100. Plischke, "Denazification Law and Procedure," 41 American Journal of International Law (1947), 807.
101. Ibid.
102. See, e.g. Harvey, "Sources of Law in Germany," 11 Modern Law Review (1948), 196.
103. See, e.g., Roetter, "The Impact of Nazi Law," 1945 Wisconsin Law Review (1945), 516.
104. Cohn, "German Legal Science Today," 2 International and Comparative Law Quarterly (1953), 169. Schlesinger, Comparative Law (1959), 255.
105. Loewenstein, "Reconstruction of the Administration of Justice in American-occupied Germany," 61 Harvard Law Review (1948), 419. Pappé, "On the Validity of Judicial Decisions in the Nazi Era," 23 Modern Law Review (1960), 260.
106. For further comment on the resurgence of Natural Law in West German legal thought, see also; Bodenheimer, "Significant Developments in German Legal Philosophy since 1945," 3 American Journal of Comparative Law (1954), 379.
107. Pappé, "On the Validity of Judicial Decisions in the Nazi Era," 23 Modern Law Review (1960), 260.
108. Fahy, "Legal Problems of German Occupation," 47 Michigan Law Review (1948), 11.

109. Loewenstein, "Law and Legislative Process in Occupied Germany," 57 Yale Law Journal (1948), 724.
110. Weiden, "Impact of the Occupation on German Law," 1947 Wisconsin Law Review (1947), 332.
111. Ibid.
112. Leyser, "Equality of the Spouses under the New German Law," 7 American Journal of Comparative Law (1958), 276.
113. Nagel, "Judicial Review in Germany," 3 American Journal of Comparative Law (1958), 276.
114. Leyser, op. cit.
115. Ibid.
116. Schoch, "Divorce Law and Practice under Nationalist Socialism," 28 Iowa Law Review (1943), 225.
117. Simpson and Stone, "Cases and Readings on Law and Society." Book 3: Law, Totalitarianism and Democracy, (1949), 1808.
118. Schoch, "Divorce Law and Practice under Nationalist Socialism," 28 Iowa Law Review (1943), 254-55.
119. Brady, "Modernized Cameralism in the Third Reich: the Case of the National Industry Group," 50 Journal of Political Economy (1942), 65-97.
120. Koessler. See also, "Situation of the Lawyer in Germany," 27 American Bar Association Journal (1941), 294-95.
121. Loewenstein, "Law and Legislative Process in Occupied Germany," 57 Yale Law Journal (1948), 724-60, 994-1022.
122. Barker, Reflections on Government, (1942), 394-95.