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Book Review

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BOOK REVIEW

HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH. By Ingo Müller. Cambridge, Mass. Harvard University Press. 1991. Pp. xviii, 349.

Reviewed by Graham Hughes*

Decades of conflict with Soviet Russia compelled the West to come up with soothing explanations of the German Nazi past. If Germany was our gallant ally, standing fast in NATO against the menace of Communism, it somehow must be cleansed of any stain of original sin. This has been accomplished by portraying the Nazi years as a monstrous aberration—a characterization naturally fostered and promoted by the Germans themselves. Germany had struggled in the years of the Weimar Republic toward a democratic system and a just society. Under this view of things, a handful of evil maniacs, who incomprehensibly had succeeded in seizing the machinery of state, dragged Germany for twelve years into a dark tunnel of *Nacht und Nebel.*[1] Mercifully liberated by

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1. *Nacht und Nebel* (night and fog) suggests something illegal and secretive in the German phrase *bei Nacht und Nebel* (by night and fog) and was the popular name given to a decree of Hitler to the effect that "crimes committed by non-German civilians against the Reich or the forces of occupation and posing a threat to their security and effectiveness" were to be punished as a rule by death. If the death sentence was not likely to be imposed, the Nazis deported the prisoners to Germany with all information on their whereabouts withheld. The official correspondence referred to these as "NN prisoners," with NN standing officially for *non nominatur* (not named) and unofficially for *Nacht und Nebel.* INGO MÜLLER, HILTER'S JUSTICE: THE COURTS OF THE THIRD REICH, 170-71 (1991).

the democracies from this interregnum in 1945, Germany resumed its impeccable progress towards ballot box politics, economic prosperity, and the just society.

This tale conveniently ignores uncomfortable facts. It fails to remind us that Hitler first achieved political prominence through the ballot box, and that there can be little doubt that between 1933 and at least 1943, he would have won landslide victories in democratic elections. Even more conveniently, it ignores that many of the politicians, soldiers, officials, lawyers, and doctors, who conscientiously served the occupying powers in the 1950s and contributed to the rebuilding of Germany in the 1960s, had been equally conscientious in the service of the Nazi regime. Also, it ignores that a significant number of them had been party members or strident in their overt enthusiasm for the Nazi regime.

Ingo Müller's compelling treatment of the course of German law and the conduct of German judges during the Hitler years discusses these most disturbing facts.[2] There have been few previous studies of the German judiciary during this period.[3] For the most part, as with Hubert Schorn's work,[4] they have sought to portray German judges as struggling gallantly to restrain the excesses of the regime and preserve at least some twinklings of the rule of law amid the encircling gloom.[5] Müller presents an entirely contrary and chilling picture, an almost unrelieved indictment of the German judiciary as being much worse than supine in the face of Nazi tyranny, indeed as being enthusiastic leaders in the vanguard of irrationality, cruelty, and oppression.

In Müller's exposition, we cannot understand the nature of modern German courts and judges without travelling back at least to the Bismarck era. In the first half of the nineteenth century, many German judges were in the forefront of the Enlightenment movement for liberal political reform. As late as 1862, the liberal Prussian Chamber of Deputies contained a large number of judges, to whom Bismarck referred as

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2. Müller's book appeared first in German as I. MÜLLER, FURCHTBARE JURISTEN (1987).

3. Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 662 (1990).

4. HUBERT SCHORN, DER RICHTER IM DRITTEN REICH (1959).

5. Müller comments:

> Since after the war the leading legal thinkers either kept their professorships or were soon reinstated—that is, continued to direct the course of legal studies—and since the current generation of law professors has been recruited almost exclusively from the ranks of their most acquiescent students, there has been only scanty research on the contribution of jurists to Nazi terror.

MÜLLER at 68.

"district judges and other revolutionaries."[6] Bismarck clearly could no longer tolerate liberal judges, and after 1878, when he became Chancellor, he began a series of measures that gave the judiciary an ultra-conservative cast that, according to Müller, it has never lost. By instituting a long period of apprenticeship with little or no pay and requiring that candidates for judgeships in Prussia give proof of a substantial private income, the bench belonged to the wealthy. Further, since judges could be dismissed at any time during their training and apprenticeship, only those with pleasingly conformist, conservative views survived the initiation. This generally filled judicial vacancies at a high level with senior public prosecutors, who were civil servants schooled in years of discipline and compliance with authority in the developing Prussian system.[7]

Civil servants received great prominence and privilege in Prussian society, and, since judges were technically not civil servants, they ranked rather low in the official hierarchy. Perversely, this made it possible for Jews, whom Prussia excluded from the civil service and the army, to become judges. The judicial response was an earnest effort to improve their status through fanatic proof of loyalty to the regime. The judiciary became blatantly hostile to any reformist or mildly liberal movement in politics and identified itself ferociously with the Kaiser and the Empire. As one judge observed, "What the army is at our borders, our decisions must be within them."[8]

The German judiciary challengingly unfurled its conservative colors during the social unrest and rebellious upheavals that occurred during the years of the Weimar Republic. According to one source, during the first two years of the Weimar Republic, the German courts imposed two death sentences, and a total of 177 years of imprisonment on leftists implicated in thirteen political murders. Right-wingers, on the other hand, received no death sentences, one life term, and a total of thirty-one years of imprisonment for 314 murders.[9] Müller suggests an even more unbalanced picture. He contrasts the judicial treatment of participants in the left-wing Munich coup in 1919 with the treatment afforded leaders of the ultra right-wing Kapp *putsch* of 1920. In the aftermath of the Munich coup, the Bavarian People's Courts, staffed with professional civilian judges, imposed one death sentence and a total of 6,080 years of

6. *Id.* at 6.

7. *Id.* at 6-7.

8. *Id.* at 9 (citations omitted).

9. RICHARD GRÜNBERGER, THE TWELVE YEAR REICH 117 (1971) (sometimes cited under its title on publication in England as A SOCIAL HISTORY OF THE THIRD REICH) (citations omitted).

imprisonment, of which 4,400 applied to leaders of the revolt. By contrast, in the prosecutions following the right-wing Kapp *putsch* in 1920, which caused the national government to flee Berlin and resulted in the deaths of hundreds of people, the courts convicted and sentenced only one leader to detention in a fortress (*Festungshaft*), the mildest form of confinement provided by the law.[10]

From the first, the courts treated Nazis with respect and delicacy. When Hitler was charged with high treason, after his abortive *putsch* attempt in Munich in 1924, the judgment acknowledged that he had been "guided . . . by a purely patriotic spirit and the noblest of selfless intentions" and sentenced him to the minimum term of fortress detention. Since he was Austrian, the statute clearly mandated his deportation, but the court evaded this conclusion by stating that "in the case of a man whose thoughts and feelings are as German as Hitler's, the court is of the opinion that the intent and purpose of the law have no application."[11]

During these Weimar years, several prosecutions occurred under a statute that prohibited the vilification of the constitutionally established form of government for singing a nationalist song containing the line, "We don't need any Jew Republic. Shame, Jew Republic!" In an opinion issued on June 22, 1923, a panel of the German Supreme Court (*Reichsgericht*) reversed convictions in these cases, stating:

> [The expression "Jew Republic"] can denote the new legal and social order in Germany which was brought about in significant measure by German and foreign Jews. It can also denote the disproportionate power and disproportionate influence which, in the opinion of many citizens, a small number of Jews, relative to the total population, actually wields. The sense in which the accused used the expression "Jew republic" is not precisely established.[12]

Based on many examples of this kind, Müller argues that the performance of the courts during the Weimar years amply demonstrates that there was no need for the Nazis to bend the courts to their will. The judges were already out in front leading the parade, eager to give total support to a regime whose ideology so closely resembled their own.

Hitler's appointment to the office of Chancellor in January 1933 occurred directly before the Reichstag fire that served as the pretext for promulgating the "Decree for the Protection of the People and the State"

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10. *Id.* at 11-12.
11. *Id.* at 16
12. *Id.* at 18 (citations omitted).

and decrees prohibiting "disloyalty to the German people." These decrees annulled most of the basic rights granted by the Weimar constitution, empowered the government to close newspapers, and granted sweeping arrest powers with respect to anyone suspected of "disloyalty." The courts cooperated with no show of reluctance. Taking one of many examples, a woman was sentenced to imprisonment for aiding and abetting the preparation of high treason because she had placed a wreath on the grave of left-wing revolutionaries. In another case, the Supreme Court concluded that it was public knowledge that the aims of the Social Democratic party were treasonable.[13] The courts relied repeatedly on the argument that any act after March 5, 1933 that could be aimed at the re-establishment of the Communist party was potentially high treason because the party had been proscribed on that date.

Meanwhile, the Nazis purged last vestiges of liberalism and the presence of "undesirables" from the bench and bar. The Nazis removed all Jewish judges and prosecutors from office in 1933, as were all Social Democrats and others considered politically unreliable. Under an amendment to the Civil Service Act, judges could be compulsorily retired if any doubt existed that they "always acted in the interest of the national socialist state."[14] The German Federation of Judges made no protest, but only commented that it left everything in Hitler's hands "with complete confidence."[15] The Nazis gradually forced out of the profession the high percentage of German lawyers who were Jewish—about twenty-two percent nationally, perhaps sixty percent in Berlin, and eighty percent in Vienna—by a series of measures beginning in 1933. During the first national convention of jurists in Leipzig in October 1933, 10,000 lawyers swore, as they gave the Nazi salute, that they would "strive as German jurists to follow the course of our Führer to the end of our days."[16]

Legal theorists in the university law schools—after Jewish and social democrat professors had been swiftly purged[17]—rushed to put themselves at the service of the Nazi state. The brilliant professor of constitutional law at the University of Berlin, Carl Schmitt, applauded the burning of

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13. *Id.* at 53.

14. FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 454 (1942)

15. MÜLLER at 37.

16. *Id.* at 38.

17. Shortly after Hitler's accession to power, the legislature enacted a law "for the renewal of the bureaucracy." "Under this statute about 16 percent of the university faculty members were replaced, including some 22 percent of the law faculties." Vagts, *supra* note 3, at 676.

books and the expulsion of intellectuals. Later, he developed a theory of international law (*Grossraum*), which justified the subjection of Europe to Nazi rule.[18] German law professors sought to both repudiate the liberal notion that a trial represented a conflict and substitute a "new order in which the participants have a unanimity of aim."[19] This unanimity ultimately came to be expressed in trials when the defense counsel made speeches against the defendant, and culminated in the counsel for the defendants at the trial of those who attempted to assassinate Hitler in 1944 expressing horror at their clients' acts and demanding the death penalty.[20]

German jurists collaborated enthusiastically in dismantling all the hallowed safeguards of liberty and justice embodied in the theory of criminal law and procedure. The police soon introduced preventive detention and mounted a concerted attack on the implications of the traditional maxim *nulla poena sine lege*, or no punishment except by law. " 'No crime without punishment' takes priority over the maxim 'No punishment without law' as the higher and stronger legal truth," observed Carl Schmitt.[21] A 1935 statute introduced the notorious provision that any act is punishable that is contrary to "healthy popular opinion." Schmitt positively advocated the lack of precision and appeal to vague feelings of what was right and proper because the use of norms and procedures "merely means that the Führer's hands are tied to the advantage of the disobedient."[22] There were even suggestions from law professors that the criminal code might be dispensed with entirely. Uncertainty about what was criminal would then increase the pressure to conform one's conduct, and we might arrive at the happy position where "the saying ought no longer to run, 'What is not forbidden is allowed' but rather, 'What is not

18. MÜLLER at 44. For a study of Schmitt's life and work, see J. BENDERSKY, CARL SCHMITT, THEORIST FOR THE REICH (1983). Schmitt's tireless work for the Nazi regime was too conspicuous for him to be restored to his university chair after the war, but his colleagues feted him with the publication of *Festschriften* for his seventieth and eightieth birthdays in 1958 and 1968. The latter was entitled *Epirrhosis* (Greek for "enthusiastic agreement"). MÜLLER at 45. His theory of *Grossraum* appeared in C. SCHMITT, VOLKERRECHLTICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM RECHTSBEGRIFF IM VOLKERRECHT (1939). Drawing on historical appeals to the Holy Roman Empire, arguments derived from geopolitics and population pressure theory, and analogies to the Monroe Doctrine, Schmitt argued for the propriety of Germany hegemony in Europe. Vagts, *supra* note 3, at 684, 689.

19. MÜLLER at 64.

20. *Id.*

21. *Id.* at 75 (citations omitted).

22. *Id.* (citations omitted).

allowed is forbidden'."[23]

Müller's study should shatter the canard that the German judiciary's lack of resistance to Nazi laws sprang from a positivist legal education that led them to find validity in anything that issued from a sovereign source bearing the appropriate formal stamps of authority. Indeed, the whole ethos of Nazi legal theory, constructed largely by German law professors, appears antithetical to positivism in its appeals to analogy, to popular consciousness, and to an intuitive grasp of the just solution in terms of National Socialist ideology. Rather than stick to the letter of the law, Nazis exhorted judges to ignore the letter to penetrate to the true purpose and aims of the enactment or principle.[24]

For example, before the Nazis prohibited marriages between Jews and non-Jewish Germans, courts nevertheless were holding that officials might refuse to perform these marriages because it was contrary to the German understanding of what was right. One court castigated an appeal to the actual state of the law as evidencing a "typically Jewish and liberalistic moral and legal mentality."[25] In another example, the Decree on Violent Criminals gave jurisdiction over crimes involving violence to Special Courts that had been set up in 1933, staffed by professional judges with a very informal procedure designed to bring about very speedy dispositions, from which there was no appeal. The decree prescribed the death penalty for the use of weapons during certain felonies. A panel of the Supreme Court gave this death provision extremely wide application when it decided in 1939 that the use of the defendant's own physical strength amounted to the use of a weapon in a robbery case in

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23. *Id.* (citations omitted).

24. This parallels the famous jurisprudential debate between H.L.A. Hart and Lon Fuller that touched on the question of what made the German judges act as they did during the Nazi years. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Fuller inclined to the view that positivism as a general approach to law might not be entirely free from blame. Fuller at 657-57. Rather, it seems that Nazi thinking encouraged German courts to follow a Fuller-style purposive interpretation of statutes, aiming to express the core of teleological meaning that could be extracted. President Bumke of the German Supreme Court observed: "[T]he judiciary . . . can fulfill the task imposed on it by the Third Reich only if it does not remain glued to the letter of the law, but rather penetrates to its innermost spirit." MÜLLER at 220. Of course, Fuller did not believe that evil aims could have sufficient coherence to be amenable to his preferred approach to statutory interpretation. Fuller at 636. A study of some of the German decisions in the Nazi period tends to support a contrary view.

25. MÜLLER at 92 (citations omitted).

which the victim had been seized by the throat.[26]

Predictably, the impatience with legal forms and strict legal constructions deepened during the war years. As early as 1934, the regime had created a People's Court (*Volksgerichtshof*) with jurisdiction over offenses of treason that grew to cover the offenses of espionage, sabotage, and undermining morale. Professional judges, who were entitled to wear the same robes as the justices of the Supreme Court, staffed the court in spite of its title. During the war, a broad view of its jurisdiction brought a great volume of business. While statistics are incomplete, it is estimated that the court imposed the death sentence on more than two thousand defendants.[27] While statute reserved the death penalty for public attempts to undermine morale, both the People's Court and the Supreme Court were ingenious in their interpretations. An opinion expressed to two drinking companions in a tavern was held to be "public,"[28] while a court convicted a Luftwaffe captain of the remarkable offense of subversion of his own person for recording defeatist remarks in his personal diary.[29]

Savagery in punishments intensified. A Decree on Asocial Elements empowered the Special Courts to impose the death penalty for the offense of "exploiting the unusual conditions imposed by the war to commit any crime." Under this provision, a court sentenced to death a railway worker, who had stolen small objects, such as brushes, combs, and articles of clothing, from damaged packages. The court based its finding that he had exploited unusual conditions imposed by war on the fact that the quality of wrapping paper had declined. Even before the war, the Supreme Court had ruled that a finding of unsound mind on the ground of diminished responsibility did not preclude the application of the death penalty,[30] and it held during the war that the death sentence could be imposed on one as young as fourteen.[31] Müller comments: "The Nazi

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26. *Id.* at 134.

27. *Id.* at 143.

28. *Id.* at 146.

29. URSULA VON KARDORFF, BERLINER AUFZEICHNUNGEN 1942-1943 at 76 (1962).

30. GRÜNBERGER, *supra* note 9, at 123 (citing Frankfurter Zeitung, May 29, 1937). *Cf.* Perry v. Lynaugh, 492 U.S. 302 (1989) (holding that the imposition of the death sentence on a mentally retarded accused was not categorically prohibited by the Eighth Amendment's cruel and unusual punishments clause).

31. GRÜNBERGER, *supra* note 9, at 123 (citing ANDREAS FRITTNER, DEUTSCHES GEISTESLEBEN UND NATIONALSOZIALSMUS 166 (1965)). *Cf.* Thompson v. Oklahoma, 487 U.S. 815 (1988) (in which, although the Supreme Court reversed the imposition of the death sentence on a defendant who was fifteen when he committed the crime in the

leaders had dreamed of a judicial system in which the harshest of sentences could be imposed after a minimum of formalities and with the Special Courts this wish was fulfilled."[32]

In this tale of judicial frightfulness and legal horror, one looks desperately for some redeeming players, for those who resisted, protested, or somehow alleviated this scene of terror played out by figures in legal robes. Müller found little relief. Two judges were executed for resistance, but this was for participating in the 1944 plot against Hitler and not for their conduct on the bench.[33] Müller finds only one case of resistance from the bench clearly documented—the case of Judge Lothar Kreyssig, who protested against the Nazi program of euthanasia for the mentally ill and later issued injunctions to several hospitals prohibiting them from transferring patients without the permission of the court. Under pressure, Judge Kreyssig took early retirement, and the regime took no action against him.[34]

Müller uses this example to suggest that the risks run by protesting judges were not tremendous. If others did not take Kreyssig's course, presumably it was because they either approved of what they were now required to do or else preferred doing it to forfeiting their positions. Consider Müller's comparison of German judges with those in Italy and Japan during the Fascist regimes in those states: Italian judges handed down twenty-nine death sentences and Japanese judges two. Estimates of the number of death sentences in Germany under Nazi statutes and decrees range from 32,000 to 80,000. Eighty percent of them were carried out. As Müller comments, "The jurists of the Third Reich had no peers anywhere in the world."[35]

Since the Allies won the war, we can surely take comfort that these monsters met the fate they deserved. Regrettably, if not unexpectedly, it did not work out that way. Original intentions of a thorough de-Nazification were met with the difficulty that no German judges could be found who had not committed themselves to the Nazi regime; in some areas ninety percent of the judges had been members of the Nazi party or one of its subsidiaries. By June 1946 in the western zones of occupation, the Allies gave up and allowed all judges who had been through a

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circumstances of the case, only four members of the Court—two of whom have since retired—took the view that imposing the death penalty on juveniles was unconstitutional).

32. MÜLLER at 159.

33. *Id.* at 192-93.

34. *Id.* at 194-95.

35. *Id.* at 197.

formal process of de-Nazification to be eligible for reappointment. Müller claims that "by 1948, thirty percent of the presiding judges and eighty to ninety percent of the assisting judges at the County Courts in the British Zone were former party members."[36]

High officials at the Nazi Ministry of Justice similarly escaped punishment. Franz Schlegelberger, senior civil servant in the Ministry of Justice for most of the Hitler years and Acting Minister of Justice in 1941-42, received a life imprisonment sentence at one of the Nuremberg Trials. He was released in 1950 and received a full pension from West German authorities that extended to his years in prison.[37] Josef Schaftheutle, who had been one of the framers of the Nazi laws for dealing with political offenders, became the official in charge of the Department of Criminal Law and Procedure in the post-war Ministry of Justice.[38] Hans Pugovel, who had advocated the "removal of inferior beings through killing," was named Minister of Justice in the state of Lower Saxony in 1976.[39] These were not isolated instances, but examples of a general practice.

The same judges functioned after the war as during the Nazi years appears fitting because in many instances they applied the same laws. Many aspects of the Nazi criminal laws were preserved, especially in the field of political offenses, in which the new conflict with the Soviet Union silenced western criticism. A former member of the Supreme Court commented benignly on this in 1971, stating: "In the field of law, particularly criminal law, the National Socialist regime . . . brought advances of a fundamental kind . . . improvements which have been maintained until the present day."[40]

Is there something peculiarly German or some explanation rooted in German history or German social conditions to account for the enthusiastic collaboration of judges and lawyers with the Nazi regime? Müller suggests that the severely authoritarian and nationalist temper of the German professional classes long predated Hitler and made lawyers ready to embrace his destruction of the Weimar republic, which they had always loathed. Certainly very few of the German elite supported Weimar,[41] and anti-Semitism flourished in the German professional

36. *Id.* at 202 (citations omitted).
37. *Id.* at 210.
38. *Id.* at 211.
39. *Id.* at 213.
40. *Id.* at 230 (citations omitted).
41. See GRÜNBERGER, *supra* note 9, at 3.

classes.[42]

One writer has suggested that the allegedly German phenomenon of either wielding aggressive authority or blindly submitting to it[43] derives from a psychic retardation in German national development. Not only was national unification achieved very late, but capitalism and industrial development came at a point when social and political arrangements in Germany remained in a late feudal stage. Thus, Germany never worked its way through social conflict to accommodation as England did. Political and social arrangements were simply imposed from above, and political opposition to the government was never comprehensible as anything but treason. The German ideal became *konfliktlosigkeit*, or resolution without conflict, and the nation's motto might have been Goethe's remark, "I would rather commit an injustice than endure disorder."[44]

Whatever the origin of Germany's enthusiastic submission to Hitler's will, the Nazi enterprise worked very well until it toppled itself through military overreaching. The legal system and those who operated it made an important contribution, in spite of Hitler's contempt for lawyers. The legal system not only provided the appropriate veneer of customary authority in customary dress, but was vigorous and ingenious in its interpretation of decrees and its application of principles in ways that pleased the Nazi overlords most of the time.

It seems quite in vain to attempt to salvage the honor of the law by writing off the Nazi years as a brutish interlude in which arbitrary force prevailed over law. In some ways, there were substantial departures from what we now regard as virtually inevitable features of a legal system. For example, there was no appeal from the decisions of special courts. But only fairly recently have common law states fully developed a system of criminal appeals. Also, the courts arrived at some decisions without a basis in formal law, simply by pointing to the obvious propriety of the outcome under principles of National Socialism. We are less frank about these matters, but most members of the criminal defense bar in the United States would probably agree that the Bill of Rights has virtually no application in major narcotics prosecutions. This is for exactly the same reasons that the Nazis openly proclaimed that they do not think that the hands of the executive should be tied when dealing with criminals. Also, the Nazi courts validated barbaric procedures, such as

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42. In 1927, 77% of all Prussian students voted to exclude non-Aryans from membership in student corporations. GRÜNBERGER, *supra* note 9, at 14.

43. This recalls the colorful, if bigoted, remark attributed to Winston Churchill that "the German is either at your throat or at your feet."

44. GRÜNBERGER, *supra* note 9, at 1-3 (1971).

the execution of the mentally ill and teenagers. But, the United States Supreme Court also has approved the execution of these sentences.[45]

Indeed, in a perverse way, the German legal system under the Nazis was the perfect embodiment of the ideal system envisaged by United States liberal legal theory. The courts were always acutely conscious of the policy implications of their decisions; their interpretations of the law were rarely wooden and mechanical, but were imbued with effort to fulfill the principles that underlay the political order of the nation. In every way, they sought to understand the law and shape the law in the light of the fundamental principles of National Socialist philosophy. Their arguments to this end were often agile and compelling, showing the judges to have been fine lawyers in the usual sense of such a commendation.

Müller's book ought to make us reflect, with some perturbation, on the state of United States law and society. We are a very long way from the horrors of Nazi Germany, but not so utterly removed from a pre-Fascist social order that no parallels can be discerned. Very recently, dissenting from the government's position on the war in the Gulf was stigmatized as un-American by popular opinion. It was viewed as disloyal and despicable conduct because it failed to support our troops. Patriotism, as in Nazi Germany, had to be prominently displayed through emblems and slogans at the risk of censure. The great majority of the United States public is surely convinced that the criminal law is a maze of technicalities designed to protect criminals. The federal courts, purged of most liberals by the passage of time and packed with judges who follow a correct line, seem to be swinging into agreement. The death penalty has been revived by the Supreme Court. The destruction of federal habeas corpus hastens the execution of death sentences, even in cases when the convict has had no full opportunity to present a plausible issue to the courts. The range of punishments in the federal system has been sharply escalated, and the nation has more prisoners in proportion to its population than it has ever had before, more than any developed state currently holds. Courts construe the scope of constitutional rights ever more narrowly.

Faced with this darkening landscape, we have little reason for thinking that United States judges and lawyers, if faced with comparable pressures, would behave any differently from the way their German counterparts did.

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45. See *supra* notes 30-31.