IN 1942, AT ABOUT the same time the United States Supreme Court was writing "of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," Dr. Joseph Goebbels undertook to instruct the judges of the Nazi People’s Court in the elements of jurisprudence. "In wartime," he explained, "it is not a matter of whether a judgment is just or unjust but whether the decision is expedient." Furthermore, "The idea that the judge must be convinced of the defendant’s guilt is to be discarded completely, One must proceed not from the law but from the resolution that the man must be wiped out.

These two quotations are more than capsule commentaries on democratic and totalitarian theories of law; they also illustrate the relative positions of the judiciary in the two countries. The reader who can visualize a German court that would talk back to Dr. Goebbels will have no trouble imagining a situation in which an American cabinet member would lecture the Supreme Court on its responsibilities. The odds on either possibility are roughly the same. In America the judge speaks ex cathedra (by virtue of his office) and as the final authority. In Nazi Germany he existed principally as an administrative appendage of the executive branch of government.

Purely on the theoretical side, it might be argued that Germany was at war and that the Minister of Propaganda and Public Enlightenment was justified in demanding some abridgment of civil liberties in the interest of national security. But America also was at war and, paradoxically, more than ever concerned over individual rights. In the summer of 1942 the

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Wehrmacht was riding high in Russia, and our North African invasion was still around the corner. The German national existence seemed in no immediate peril.

The FACT IS, of course, that Goebbels’ excursion into legal theory was neither a breaking of new ground nor an isolated act. It was just one incident in a series which had begun many years before. Hitler’s explanation of his conduct in suppressing the Roehm Putsch of 1934 was another link in the same chain. It is remarkable for its candor and for the fact that it established as a matter of public record the official attitude of the Nazi Party toward law and the judiciary: “Whenever someone reproaches me with not having used the ordinary courts, I can only say to him: ‘At that hour I was responsible for the fate of the German nation and hence the Supreme Law Lord (Oberster Gerichtsherr) of the German people.’"

An understanding of how this degradation of the judicial function was achieved and what it meant is crucial to a general understanding of the nature of National Socialism. In some respects it is implied by Germany’s political history and by the manner in which German law developed.

German law is not the product of an uninterrupted development. At least two factors have operated to prevent this. For one thing, Germany did not achieve a national existence until 1871, and even after that date the federal structure of the Reich tended to encourage the perpetuation of regional legal traditions. For another, the natural growth of a common or folk law was stopped short by the introduction of Roman law, which had been rediscovered by scholars at the Italian universities, in the 14th and 15th centuries.

England, unified politically and isolated geographically, was able to stand firm, and the common law flourished unchecked. Based on an ever-expanding series of judicial precedents rather than on statute, the common law nevertheless proved itself capable of adapting itself to changing social conditions. Its essence came to be a firm reliance on the spirit rather than on the letter. As Chief Justice Holmes of the United States Supreme Court wrote "The life of the law is not logic but experience."

The absolutism of Roman law called for the categorization of all laws in rigid and comprehensive codes. During the 16th and 17th centuries many German states, principalities and towns enacted such codes, but it was not until 1871 that a criminal code uniform for all of Germany was promulgated. Other Reich codes followed in swift succession.

The creation of a law applicable to all of Germany did not imply, how-
ever, a centralized administration of justice. Before 1933 a Reich Ministry of Justice existed, but its administrative functions were limited to supervision of the Supreme Court (Reichsgericht), the Supreme Economic Court (Reichswirtschaftsgericht) and the Patent Office.

There were also a few special types of courts under other Reich ministries. All other courts were supervised by the state ministries, which also controlled prisons, set standards for legal education and admission to the bar, and appointed judges and public prosecutors.

German ordinary courts included the Supreme Court, Courts of Appeal (Oberlandesgerichte), District Courts (Landgerichte), and Local Courts (Amtsgerichte). In addition, there was a complex of courts of special or limited jurisdiction, including Labor Courts, Administrative Courts, Honor Courts for Attorneys, Enailed Estates Courts, Shipping Courts, and Prize Courts. Not all of these were under the Ministry of Justice.

ANY OF THESE tribunals performed quasi-judicial functions which, in the United States, would be assigned either to the regular courts or to such agencies as the National Labor Relations Board or the Interstate Commerce Commission. Jurisdiction over criminal cases was carefully restricted, the Weimar Constitution forbidding the establishment of "extraordinary" courts.

During the economic crisis of the early 1930's, however, a number of ordinances and regulations, issued under emergency provisions of Article 48 of the Constitution, attempted to curb political unrest and in so doing curtailed procedural rights to a dangerous degree. The way was now open for the establishment by the first von Papen government of Special Courts (Sondergerichte) to try certain political offenses. These courts, in their composition and procedure, foreshadowed later Nazi efforts along the same lines.

This was the situation, then, which greeted National Socialism upon its accession to power in 1933:

Dr. Hermann Welte, minister of economics for Wurtemberg-Baden, speaks at ceremonies marking the transfer of the US Army medical depot at Weinheim to the German economy. The depot contains $2,700,000 worth of supplies. High-ranking American and German officials are shown at the ceremonies. (Signal Corps)

1. A codified law, drafted by men trained in the technique of Roman law, was in force throughout Germany. The spirit which lay behind it may have been over-impressed by the formal content of the statute and favorably disposed to abrupt legislative change. This was perhaps to Hitler's advantage.

2. The actual administration of justice was decentralized among the states. A strong regional tradition might have been expected to resist the trend toward totalitarianism.

Hitler undertook first to consolidate his own position. On March 24, 1933, the Reichstag passed the Enabling Act, turning over its powers to Hitler's government and, in effect, transferring the legislative function to the executive. Next, as has already been pointed out, he assumed the title of Supreme Law Lord, or Supreme Judge.

In two quick strokes he had arrogated to himself the powers and functions which, in America, are distributed among the President, the Congress and the Supreme Court in a pattern of checks and balances designed to make abuse of authority impossible. Whatever checks and balances remained in Germany after 1934 had their existence in the mind of one man.

HAVING VESTED in himself the necessary powers, Hitler was now ready to attack the organizational structure of the courts. In 1934 the sovereign powers of the states were transferred to the Reich, and in September of the following year State Ministries of Justice were liquidated and their legal powers centralized in Berlin. The stage was set for a uniform and systematized exploitation of justice.

Creation of new tribunals, principally for the trial of political and racial cases, had already begun. The People's Court, or Volksgerichtshof, was a child of the Reichstag fire. When the Supreme Court acquitted three of the four defendants in the trial which followed that event, its jurisdiction in cases of treason was taken away and given to the People's Court, which was to be composed of two professional judges and five trusted Nazi laymen. The number of lay representatives was later reduced to three. It is interesting to note that van der Lubbe, the one defendant convicted in the Reichstag trial, was sentenced
under a law passed after the alleged crime was committed.

Hereditary Farm Courts, Peasants Courts and Hereditary Health Courts were created to implement Nazi theories of blood and soil, and the purity of the German race. Finally, von Papen's Special Courts were re-visited to permit prosecution under favorable conditions of a variety of newly-invented criminal offenses.

It might be supposed that the Enabling Act had provided an ade-quate instrument for the translation of National Socialist ideology into law. Under its provisions, the executive could deviate not only from constitu-tional procedures but also from the substance of the constitution itself. If Hitler wanted to make free speech a capital offense, he had only to say so; it was law.

But apparently this power was not broad enough. Punishment had to be meted out for those offenses which would have been crimes if it had occurred to the Fuehrer to make them so. The law of June 28, 1935, defined crime by analogy—that is, crime which owed its existence to the fact that it resembled a recognized statutory crime—and crime according to "the sound instinct of the people." In addition, the courts were authorized to pronounce sentence on alternate grounds; thus a person might be convicted for theft or receiving stolen goods if neither offense was satisfactorily proved but it appeared that one or the other had taken place.

Hans Frank, President of the Academy of German law, summed up the new approach: "In the future, criminal behavior, even if it does not violate an existing law, can receive the deserved punishment if the offense is criminal according to the healthy feeling of the people." A second thought on the matter was contained in his statement before the International Military Tribunal in 1946: "A thousand years will pass, and this guilt of Germany will still not be erased."

These doctrines were perhaps the most revolting of all Nazi legal innovations. If by virtue of some super-rational insight or, more probably, because Hitler told him so, the judge detected crime where none had been before, he merely had to find a suitable analogy or fit it into the elastic framework of "the sound instinct of the people."

Superficially, it might appear that this Nazi theory of law, in which the judge was permitted to deviate almost at will from the formal statute, resembles the Anglo-American common law, where every effort is made to test the facts against accumulated experience in the form of precedents. Nothing could be further from the truth. The touchstone of the common law is still justice; Nazi judicial reasoning functioned in the rarefied, and frequently cloudy, atmosphere of "the will of the Fuehrer," "the healthy sentiment of the people," and "German Blood and Honor."

Crimes of this exoteric type were usually tried in Special Courts or the People's Court, and the history of these tribunals is an accurate reflection of the degeneration of justice under Hitler.

The Decree of March 21, 1933, set forth procedural regulations for the Special Courts. The pre-trial judicial examination required under the Code of Criminal Procedure was eliminated. Any offer of evidence could be refused, "if the court has come to the conclusion that the evidence is not necessary for clearing up the case." There was no appeal against decisions of Special Courts, and sentences were to be promptly executed. At least one Special Court was to be attached to each Court of Appeals. In actual practice they proved so useful that a Special Court was set up as a chamber in each District Court. Provided they had proved themselves reliable Nazis, the same judges sat in both the Special Courts and the regular criminal courts.

When the People's Court was organized the following year, it began to acquire its share of political and racial cases. Since originally it had jurisdiction only over cases of treason and high treason, it was necessary to redefine these offenses, and a 1934 law gave the

US, British and French trains remain idle at the Grunewald yards, Berlin. The Western Powers cancelled military train service after imposition of new Soviet Zone travel restrictions, announced on March 30. The Soviets had insisted on having their troops board and inspect trains traveling through their zone between Berlin and the western zones. Since the new restrictions, only a few US trains have reached Berlin with supplies. Air service is handling passenger travel and maintaining supply lines for Americans in Berlin.

(May 4, 1953)
court extensive discretionary powers in deciding what treason was and how it should be punished. The growing caseload ultimately led to the establishment of five separate chambers, or Senates, which met in various cities as occasion arose. The seat of the People's Court remained in Berlin. The building is now ACA headquarters, with the Control Council meeting in the former main courtroom.

The fact that it was necessary to have a court with exclusive jurisdiction over treason cases—and that this court was almost continuously in session—gives some clue to its nature. The number of treason cases tried in the United States during the past century could be counted on the fingers of one hand. But in Germany treason came to mean little more than opposition to National Socialism, whether active or passive, and "traitors" were numbered in the thousands.

As time went on new laws widened the jurisdiction of these extraordinary tribunals. The courts were vested with power to impose the death sentence in an increasingly greater variety of offenses, such as that of listening to foreign radio broadcasts. With the advent of war they really came into their own. The People's Court was given jurisdiction over violations of certain war ordinances; Night and Fog (Nachts und Nebels) cases were assigned to the Special Courts.

Night and Fog grew out of civilian resistance to German occupation, a matter of grave concern to the High Command. In the summer of 1941 a memorandum issued by Field Marshal Keitel put the case with some frankness: "In view of the vast size of the occupied areas in the East, the forces available for security purposes in those areas will be sufficient only if all resistance is punished not by legal prosecution of the guilty, but by spreading of such terror ... as is alone appropriate to eradicate every inclination to resist against the population." This statement might serve as a preamble to the Night and Fog Decree itself, which was issued four months later, on the same day the Japanese attacked Pearl Harbor.

One hundred fifty former Austrian internees of the Dachau concentration camp stand in front of the camp crematorium during a memorial service for the 238,000 persons who were cremated there during the Nazi regime. A priest gives thanks for those who were spared. The Austrians made a special pilgrimage to the camp on the 10th anniversary of its founding.

In a covering letter, Keitel explained further: "Efficient and enduring intimidation can only be achieved by capital punishment or by measures by which the relatives of the criminal and the general population do not learn his fate." Under the decree those accused of resistance could be turned over to Military commissions (Standgerichte), which, however, had power only to acquit or to impose the death sentence. If the death sentence was ordered, it had to be carried out within 24 hours. If outright acquittal did not appear likely or the death sentence a certainty, the commissions did not handle the case at all. The prisoner was taken to Germany and delivered to the Ministry of Justice for trial by the Special Courts.

Elaborate precautions were taken to insure that no one outside Germany would ever discover what disposition had been made of Night and Fog cases. The accused was not permitted to call witnesses or to introduce evidence on his own behalf because some word might get back to his family at home. No record was kept of the proceedings or of the sentence. In 1943 the courts were ordered not to appoint defense counsel unless the accused was unable to defend himself. Since in most cases the victim did not learn the charges against him until a few moments before the trial, and since he was not allowed to introduce either witnesses or evidence, it is doubtful whether even the ablest lawyer could have helped him.

A person convicted in one of these secret trials and given other than the death sentence was confined in a prison or concentration camp where even the jailers did not know his name. In the unlikely event that he was acquitted or if he had completed his sentence, he was turned over to the SS for "protective custody" for the duration of the war.

The Night and Fog Decree was applied in France, Belgium, Holland, Denmark, Norway, and Czechoslovakia. Indeed, its provisions were
stretched to include purely political offenses committed within the Reich itself. The secrecy in which the program was shrouded makes any precise estimate of the number of victims it claimed an impossibility, but Ministry records indicated that the figure was in excess of 7,000 as early as the Spring of 1944.

In 1942 the People’s Court began to receive its share of Night and Fog cases. But Hitler, who had refused a Wehrmacht request to try these cases on the ground that Army justice was not supporting the war effort vigorously enough, finally grew impatient with the manner in which the Ministry of Justice was cooperating. In 1944 he ordered the transfer of all Night and Fog cases to the Gestapo.

IF THE SPECIAL Courts, staffed with Party members and pursuing Party ends, could not meet Hitler’s exacting standards, it is no wonder that the ordinary courts often failed to please him. In his capacity of Supreme Law Lord, he took a keen interest in the administration of justice. As one Nazi official expressed it, “Here is a man who represents the ideal of the judge in its perfect sense and the German people elected him for their judge—first of all, of course, as judge over their fate in general, but also as ‘Supreme Magistrate and Judge.’” Hitler accepted this latter role quite literally.

The personal interest which he took in relatively minor cases caused some consternation in the Ministry of Justice, which never knew what he would dig up next. After a number of rebuffs, Acting Minister Schlegelberger wrote, in 1941: “It would be invaluable if you, my Fuehrer, would bring it to my attention when a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of their responsibility and are firmly resolved to discharge their duties accordingly ... Heil, my Fuehrer!”

This somewhat humiliating plea was scarcely necessary, since Hitler never hesitated to express his disapproval of a judgment and to cause it to be set aside. Upon his personal order, those sentenced to prison terms by the courts were turned over to the Gestapo for execution. Sometimes his will found its way into the proper legal channels. When he objected that a sentence in a certain case was too light, Schlegelberger was able to report that within 10 days of the original complaint the Supreme Court had quashed the sentence and the prisoner had been executed.

Evidently Hitler was unimpressed. In an impassioned speech before the Reichstag on April 26, 1942, he announced his dissatisfaction with the judiciary and his intention to remove “without regard to his person or his established rights whoever, in my view and according to my considered opinion, has failed to do his duty.” Four months later he authorized the Reich Minister of Justice “to deviate from any existing law” in exercising control over the judiciary and its decisions.

IN ORDER TO bring the actual administration of justice more closely into line with what Hitler wanted, the Ministry undertook in September of that year the distribution of Judges letters, or Richterbriebe, which told the bench exactly what was expected of it. One such letter discussed a case in which a special coffee ration had been distributed in a small town. A number of Jews applied for the ration but naturally did not receive it, whereupon the food authorities imposed fines upon them for making unsuccessful application.

One Jew appealed to the local court, which decided that the fines were illegal. The letter of comment is perhaps as good an example as any of what 10 years of Nazism had done to the legal mind.

“The judge should have asked himself, ‘What is the reaction of the Jew to a decision which, without devoting one word to the healthy folk attitude toward this insolent and arrogant Jewish conduct, takes 20 pages to prove that he and 500 other Jews are right and victorious over a German authority’?

‘Even if the judge was convinced that the Food Office had arrived at an incorrect judgment ... he should have chosen a form for his ruling which avoided at all costs harming the prestige of the Food Office and thus putting the Jew expressly in the right toward it.’

It is a matter of some wonder that the Jew, so utterly and thoroughly divested of his legal rights, was permitted to appeal at all. A decree issued in 1942 directed that Jews and Poles must never appear as witnesses in court against Germans. If it was absolutely necessary to have their testimony, they were to be interrogated privately and their evidence received “with utmost caution.” They were not sworn, but were of course liable to prosecution for perjury. As early as 1941 Jews in the Eastern territories could be put to death not only for such offenses as anti-German utterances or defacement of official notices, but even for serious contemplation of such acts.

As the war ground to its conclusion, the last vestiges of justice were discarded. In January, 1944, a decree provided that no defendant in any court was entitled to defense counsel if the judge decided it was unnecessary. In May of the same year judges were freed from all restrictions as to penalties to be imposed in criminal cases. Those offenders prejudicing or endangering the war effort—and the court was given widest latitude in interpretation—could be put to death if the punishment prescribed by law was “insufficient for expiation of the act according to the sentiment of the people.” And virtually no appeals could be taken against judgments of any court.

THE HISTORICAL facts connected with the breakdown of justice under the Third Reich are easily ascertained. The laws are on the books, the speeches were carefully reported, the memoranda were filed away with German thoroughness. More difficult to assess is the character of the man who, if they did not actually support the corruption of justice, were unable either to

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