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The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology

I. INTRODUCTION

The reunification of Germany once again has turned American heads toward German law. This interest in things German, of course, is nothing new. Savigny's historical school influenced American legal thought in the nineteenth century.\(^1\) Roscoe Pound and the legal realists drew on the work of Jhering and the Free Lawyers.\(^2\) More recently Niklas Luhmann and Jürgen Habermas have found an interested audience among American legal academics.\(^3\) Moreover, the German civil and criminal justice systems have been proposed as models for reform in the United States.\(^4\) In particular, it has been argued repeatedly that adopting the German “mixed court” of professional and lay judges would make the American criminal justice system more efficient and allow more criminal defendants to avail themselves of their constitutional right to jury trial.\(^5\)


\(^{5}\) Langbein, \textit{Mixed Court}, supra n. 4.
By contrast, American communitarians have been slow to draw on the riches of the German communitarian tradition in their attempt to unseat what they perceive as the dominant, rights-based, approach to legal and political theory in this country. Some, however, have begun to look eastward across the Atlantic for inspiration. The recent abortion decision by the German Constitutional Court, which pays much attention to communal norms, should attract further attention to German communitarianism, particularly in constitutional law.

This article sheds light on German-inspired proposals for reform of our criminal justice system and on the current communitarian debate from a common historical vantage point: the history of lay participation in modern German criminal trials. Most immediate, this history reveals that lay participation in the German criminal courts has been on a gradual decline ever since its inception in the middle of the nineteenth century. Today, the jury has been abandoned, the remaining lay participants, who sit on panels with professional judges, play a rather insignificant role in practice, and several German commentators call for the abolition of lay participation in criminal trials.


7. BVerfGE 88, 203 (May 28, 1993). For a brief discussion of this decision, see infra n. 274. The recent publication of Professor David Currie’s excellent overview of German constitutional law has made the decisions of the German Constitutional Court more accessible to those with an interest in the subject. See David P. Currie, The Constitution of the Federal Republic of Germany (1995).

8. This article does not deal with lay participation before 1798. Nor does it address lay participation in civil cases or in criminal appeals. In nineteenth century Germany, lay participation of any form in civil cases was never seriously considered as a practical option, see Landau, “Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870,” in The Trial Jury in England, France, Germany: 1700-1900, at 241, 284 (Antonio Padoa Schioppa ed. 1987); Erich Schwinge, Der Kampf um die Schwurgerichte bis zur Frankfurter Nationalversammlung, Strafrechtliche Abhandlungen, Heft 213, at 139-40 (1926) (reprint 1970). It should be noted, however, that a number of writers, including none other than the “Staatsphilosoph” Hegel along with the influential Germanist Georg Beseler and the Anglophile Rudolf von Gneist, at least initially did not restrict their support to lay participation in criminal cases. See, e.g., Georg Beseler, Volksrecht und Juristenrecht 249-69 (1843); Rudolf von Gneist, Die Bildung der Geschworenengerichte in Deutschland 240-43 (1849) (reprint 1967); Georg Wilhelm Friedrich Hegel, Elements of the Philosophy of Right §§ 227-228 (Allen W. Wood ed. & H.B. Nisbet trans., 1991). In England the civil jury survived until World War I, and, doctrinally, the English civil and criminal jury were joined at the hips until well into the nineteenth century. See Langbein, “The English Criminal Trial Jury on the Eve of the French Revolution,” in The Trial Jury in England, France, Germany: 1700-1900, at 13, 15 (Antonio Padoa Schioppa ed. 1987). Today, several German civil courts sit as collaborative courts of professional and lay judges. See, e.g., §§ 16, 35 Arbeitsgerichtsgesetzes (labor courts of the first and second instance sit as collaborative courts with one professional and two lay judges); see also Wolfgang Grunsky, Arbeitsgerichtsgesetz: Kommentar 221-22, 285-69 (6th ed. 1990). On collaborative courts in appeals for review of facts and law in criminal cases, see §§ 74(3), 76 GVG.
More important, the modern history of lay participation in German courts also illustrates the interplay between two versions of a central concept of German communitarianism: the Volks.\textsuperscript{9} The story of the relation between the empirical variety of the Volks concept and its metaphysical cousin is the story of two notions of community, one of which is compatible with the protection of individual rights, and another one that need not be.

From Romantic idealism to Nazi ideology, the history of German lay judging reflects the evolving relationship between two theories of lay participation: (1) lay judges protect the rights of the German Volks by ensuring the independence of the administration of justice from the government and (2) lay judges manifest the German Volks's unitary sense of right.

These theories of lay judging invoked very different senses of the concept of Volks. The first theory used the Volks concept in what might be called an empirical or political sense. It characterized the lay court as a Volks institution because lay participation permitted actual members of the Volks, i.e., ordinary citizens, to have a say in the judicial process and to protect their fellow citizens' rights against biased judges and overzealous prosecutors.

In contrast, the second theory, less familiar to Anglo-American ears, played on what one might call a metaphysical notion of Volks. That theory praised the lay court as a Volks institution because lay judges reflected the will (or Geist or legal consciousness) of a mysterious and literally disembodied entity called the Volks which was endowed with independent existential standing apart from people of flesh and blood, the ordinary constituents of the Volks.

The metaphysical Volks played an important role in the controversy over the adoption of the jury in the first half of the nineteenth century. Shortly after most German states installed the jury in the wake of the 1848 revolution, the jury's political function overshadowed its role as indicator of the will of the metaphysical Volks. The Weimar Republic saw a revival of the metaphysical concept of Volks, which went on to become the cornerstone of Nazi ideology. The theory and practice of law under the Nazis identified the will of the metaphysical Volks with that of Adolf Hitler.

The abuse of the metaphysical Volks notion in Nazi ideology demonstrated how a metaphysical concept of community can jeopardize the individual rights of the community's constituents. In Roland Freisler's Volksgerichtshof, or Volks Court, lay judges as representatives of the metaphysical Volks became the ideological mechanism for

\textsuperscript{9} "Volks" tends to be translated as "people," "nation," or "folk." I retain the German term as a technical term with two specific meanings. See infra text accompanying nn. 97-105.
trampling, instead of protecting, the rights of actual members of the
Volk in the courts of the Third Reich.

Part II traces the rise and fall of lay participation in German
courts from 1798 to the present. Part III follows the metaphysical
Volk on its long and winding road from Carl Joseph Anton Mittermaier's vision of a Volk jury to Freisler's Volk Court. The conclu-
sion briefly discusses the current status of lay participation in
Germany and considers what the current debates about criminal jus-
tice reform and communitarianism in this country might learn from
the German experience with an institution of criminal justice built in
part on a disembodied concept of community.

II. THE RISE AND FALL OF THE GERMAN JURY

As a preliminary matter, it is necessary to clarify how the term
"jury" will be used throughout this article. Lay participation has
taken two general shapes in the recent history of the German courts.
Jurors (Geschworene) are the lay participants in a jury court, or in-
dependent lay court (Schwurgericht). As in the Anglo-American
model, the lay participants in an independent lay court decide all
questions of fact independently of one or more professional judges
who decide questions of law only.10 These independent lay judges, or
jurors, differ from the so-called Schöffnen, lay judges in a collabora-
tive lay court (Schöffengericht).11 In a collaborative lay court, lay judges
sit with one or more professional judges and decide issues of law and
fact in conjunction with the professional judges. The current German
system retains the independent lay court (Schwurgericht) only in
name.12 Throughout this article, the term "jury" or "jurors" refers to
lay participants in independent lay courts and "lay judges" to lay par-
ticipants in collaborative lay courts.

The distinction between independent and collaborative lay courts
was of little significance to the debate about the adoption of the jury

10. From the outset of the German jury debate, opponents of the jury stressed the
difficulty of distinguishing between factual and legal questions. See Landa, supra n.
8, at 279, 303; Besele, supra n. 8, at 271; Hadding, "Schwurgerichte," in Deutschlan-
der Schwurgerichtsgedanke seit 1948, 39-42 (1974); Schwing, supra n. 8, at 116-23.
For a discussion of the distinction between judges as triers of law and jurors as triers
of fact in English law, see Green, "The English Criminal Trial Jury and the Law-
Finding Traditions on the Eve of the French Revolution," in The Trial Jury in Eng-
debate over this distinction in the United States, see Alschuler & Deiss, "A Brief His-
11. Professor Langbein translates Schöffengericht as "mixed court." See, e.g.,
Langbein, Mixed Court, supra n. 4. This article uses the term "collaborative lay court"
"highlight the difference between the division of labor in Schwurgericht and Schöf-
gengericht, and to avoid confusion between "mixed courts" and "mixed juries." See
Marianne Countable, The Law of the Other: The Mixed Jury and Changing Concep-
12. See § 74(2) GVG.
before the German revolution of 1848. All eyes were fixed on the Anglo-American system and its French version, both of which followed the independent model. The main concern of jury proponents was to topple the secret written procedure still in place in the German states not under French occupation. Questions about the kind of lay participation were of secondary importance. Although some commentators proposed collaborative models, the speedy legislative implementation of lay participation as one of the foremost demands of the 1848 movement did not allow for much experimentation. In the end, the majority of those German states that had not provided for lay participation in criminal trials simply adopted the French version of the Anglo-American model already in place in the French occupied Rhine states since 1798.

The distinction between the independent and collaborative models remained largely irrelevant until the latter half of the nineteenth century, when efforts to abandon the jury for the collaborative model began. We will return to the distinction when our story reaches this juncture.

A. Entrance: The French Jury and the Jury Debate Before 1848

For the moment, we remain at the turn of the nineteenth century. Since the mid-eighteenth century, governments throughout continental Europe had come under intensifying pressure for their failure to bring their practices in line with the demands of the Enlightenment. Substantive and procedural criminal law was attacked as a particularly anachronistic remnant of the Dark Ages. Cesare Beccaria's *Of Crimes and Punishments* made this point very forcefully and very successfully in the 1760s. The harsh substantive

13. See Schwingel supra n. 8, at 66.
15. An influential Germanist, Georg Beseler, initially favored some version of the collaborative model, see Beseler, supra n. 8, at 260, but at the Germanistentag in Lübeck of 1847 announced his unqualified support for the jury. Schwingel, supra n. 8, at 67 n.1, 152.
16. One of the most influential endorsements of the jury, Friedrich Gottfried Leue's *Das deutsche Schöffen-Gericht* (1847), illustrates the irrelevance of the distinction at this time. Instead of advocating a collaborative model over an independent one, as the title might suggest, Leue only made a point about translation: He preferred the translation Schöffen for jury and juré instead of the standard Geschorene (literally "those who have been sworn in") because not only the jurors were sworn in, so was the judge. Id. at vi, 22. Leue may have had something else in mind here as well. The use of the term Schöffen arguably supported Leue's efforts to stress the German origins of the jury. See infra text accompanying nn. 28-32.
17. Cesare Beccaria-Bonesana, *Dei delitti e delle pene* (1764). Beccaria's treatise was soon translated into the major European languages, including German. See Karl Ferdinand Hommel, *Des Herrn Marquis von Beccaria unsterbliches Werk über Verbrechen und Strafen* (1778) (the most influential German translation of Beccaria's work). Beccaria specifically advocated adoption of the Anglo-American jury. Bec-
provisions of the Constitutio Criminalis Carolina of 1532 (CCC), which remained the law in a number of German states as late as 1840, appeared barbaric. 18

The secret written procedure before criminal judges, who ruled largely unimpeded by statutory constrictions, made for a particularly popular target of criticism. 19 Perhaps the most influential German criminal law treatise of the late eighteenth and early nineteenth centuries, Paul Johann Anselm Feuerbach’s Revision of the Fundamental Principles and Concepts of the Positive Penal Law, 20 advocated public oral criminal trials. 21

In France, the 1789 revolution led to a fundamental reform of the criminal justice system, including the introduction of the jury. The French jury generally resembled the Anglo-American jury with two exceptions: The secret jury lists were drawn up by the prefect, a government bureaucrat, (in England the local honorary sheriff composed the public lists) 22 and the juries were required to announce special verdicts in response to a string of factual questions the judge had put to them.

In 1798, the French occupation brought the Rhine states the French jury, among other things. After a Prussian commission had reported on its immense popularity, the jury remained in the Rhine states even after the departure of the French in 1814 and thereby provided the jury movement with a convenient domestic model. In 1848, the issue therefore was not whether or not to introduce the jury, but whether or not to expand it beyond the borders of the Rhine states.


18. In Braunschweig the CCC remained in force until 1840, in Württemberg until 1839. See Schmidt, supra n. 14, at 267. In Prussia and Bavaria, by contrast, the turn of the century brought significant criminal justice reforms. After Frederick II had abolished torture and some particularly brutal punishments, see Schmidt, supra n. 14, at 248-51, 269-71, the Prussian Allgemeine Landrecht of 1794 reformed Prussian substantive criminal law. Paul Johann Anselm Feuerbach’s Bavarian Penal Code of 1813 is often portrayed as the first liberal penal code. See id. at 261-63.


21. For the leading biography of Feuerbach, see Gustav Radbruch, P.J.A. Feuerbach: Ein Juristenleben (3d ed. 1929). P.J.A. Feuerbach (1775-1833) was the father of Ludwig Feuerbach and grandfather of Anselm Feuerbach, the German Romantic painter.

22. See Gneist, supra n. 8, at 122-23.
the great supporter of public oral trials; published a work critical of the French jury that for decades shaped the jury debate and provided jury opponents with a barrage of arguments. In his *Observations on the Jury*, Feuerbach raised a string of concerns about the jury as a legal institution but showed some sympathy for the jury as a political institution. Feuerbach nevertheless rejected the jury even from a political standpoint because he saw it as inappropriate for the Germany of 1813. Feuerbach argued that, without a public spirit and sense of selfworth among the citizenry akin to that of the British, the jury would threaten, not protect, individual rights vis-à-vis the state. He found these prerequisites sorely lacking in the Germany of his day and strongly hinted that the jury already in place in certain German states and in France had come to be exploited by the powers that be to curtail the rights of the people. Feuerbach was particularly concerned about the authority of appointed government officials to draw up the jury lists. Shortly after the end of French occupation, Feuerbach, in 1819, revealed in an essay that his 1813 book had been about the French jury in particular, and not about the jury in general, and that only the fear of censorship had prevented him from making this distinction six years earlier. By then the jury debate, however, was already in full swing and his earlier work remained an arsenal for legal arguments against the jury in general.

As the jury debate progressed, the French origins of the Rhine model also caused many jury supporters considerable discomfort for a reason unrelated to the specifics of the French model. This uneasiness arose from the very fact that the Rhine jury, at least at first blush, appeared not as a homegrown product of German legal custom, but as a foreign import. The influential Germanists, including Georg Beseler, Friedrich Gottfried Leue, and Mittermaier, viewed the jury trial as part of the larger project of re-Germanizing German law to remedy the reception of Roman law centuries ago. A French institution forced upon German states by a French occupationary force obviously did not recommend itself as a vehicle for the long overdue re-Germanization of German criminal law. Accordingly, a veritable

23. See Schwinge, supra n. 8, at 156.
25. Two decades before Feuerbach, another author had voiced similar concerns about the adoption of the Anglo-American jury despite a general sympathy for the jury and the Anglo-American system in general. See Eberstein, *Entwurf eines Sitten- und Strafgesetzbuches für einen deutschen Staat* (1783) (in preface, reluctantly rejecting the jury because “impetuous fermentation he[ad] a good number of heads” (ungestüme Gehirn erhitzte so manche Köpfe)).
27. See, e.g., Beseler, supra n. 8, at 270-71; see also Gneist, supra n. 8, at 141, 143 (commenting on attacks on the jury as a foreign institution).
stream of studies appeared belaboring the German, or at least pan-Germanic, roots of the jury.\footnote{28} It should come as no surprise, moreover, that Mittermaier and Beseler took pains to stress the Anglo-American origin of the jury\footnote{29} and to exult the virtues of the Anglo-American jury over those of its French imitation.\footnote{30} The Anglo-Saxon ancestors of Anglo-American jurors, after all, had stood shoulder to shoulder with the forefathers of nineteenth century Germanists during Thing meetings, the earliest form of Germanic lay participation.\footnote{31} Scholars emphasized that lay participation in judicial administration had been a German custom all along, prior to the reception of Roman law anyway.\footnote{32}

In 1847, the pivotal Lübeck Germanist Congress (Germanistentag) endorsed the jury\footnote{33} and the establishment of jury courts became a central demand of the 1848 revolution.\footnote{34} The Frankfurt National Assembly (Nationalversammlung) of 1848 included the right to trial by jury among the basic rights of the German Volk\footnote{35} and by 1849 almost all German states, including Prussia and Bavaria.

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\footnote{28} For discussion and citations, see Schwinge, supra n. 8, at 92-99; see also Gneist, supra n. 8, at 24-31. While some viewed the jury as more Germanic than the collaborative model, see Kern, supra n. 14, at 117, others held the opposite view, see, e.g., Beseler, supra n. 8, at 271.

\footnote{29} See Beseler, supra n. 8, at 250.

\footnote{30} Mittermaier went one step further and explained that the French national character was ill-suited for the Anglo-American jury. See infra n. 182. At least one other important contributor to the jury debate, Rudolf von Gneist, favored the Anglo-American jury not only for its closer proximity to the common Germanic core. Gneist, supra n. 8. Gneist nevertheless did not advocate a wholesale importation of the Anglo-American jury, not least because he considered German jurisprudence superior to its English analogue. Id. at 78-80.


\footnote{32} See Schwinge, supra n. 8, at 93. Even Savigny, who opposed lay participation throughout his long career, came to accept public trials, referring to "the old German public oral procedure." See Friedrich Carl von Savigny, \textit{Die Prinzipien/fragen in Beziehung auf eine neue Strafprozeß-Ordnung} 34 (1846) (quoted in Haber, "Probleme der Strafprozeßgeschichte im Vormärz: Ein Beitrag zum Rechtsdenken des aufsteigenden Bürgertums," 91 \textit{Zeitschrift für die gesamte Strafrechtswissenschaft} 590, 635 n.134 (1979)).

\footnote{33} Upon Mittermaier's suggestion, a committee to study the jury question had been formed at the Frankfurter Germanistentag a year earlier. Landau, supra n. 8, at 263; Schwinge, supra n. 8, at 147. The committee included Mittermaier and Beseler along with other academic luminaries committed to the Germanist cause. Mittermaier's unequivocal endorsement of the jury in his address to the congress carried the day and later was described as the moment of official recognition of the jury. Marquardsen, "Mittermaier," 22 \textit{Allgemeine Deutsche Biographie} 25, 28 (1885). Mittermaier's presentation made a particularly large splash because he surprisingly dropped his earlier hesitations about the jury. See Schwinge, supra n. 8, at 147-49. Beseler soon followed suit and renounced his earlier sympathies for a collaborative model. See Schwinge, supra n. 8, at 67 n.1, 152; Beseler, supra n. 8, at 250-52.

\footnote{34} See Schwinge, supra n. 8, at 153.

\footnote{35} Landau, supra n. 8, at 285; see also id. at 285 n.241; Schwinge, supra n. 8, at 163-54.
ria, had adopted the jury.\textsuperscript{36} Against the urgings of many writers, including Mittermaier, Leue, and Rudolf von Gneist, and just about every other academic commentator,\textsuperscript{37} it was the readily available French, and not the Anglo-American, jury that the states adopted in response to the reformers' demands.\textsuperscript{38}

\section*{B. Center Stage: The Jury Between 1848 and 1924}

Originally, jury courts had jurisdiction not only over serious crimes but also over political cases. Beginning in the early 1850s, however, these cases once again fell to courts of exclusively professional judges.\textsuperscript{39} Soon after the introduction of the jury, some states also began experimenting with the collaborative model in cases of trivial crime.\textsuperscript{40} Nonetheless, the independent model was retained despite some early challenges and spread throughout the entire German Empire in 1879 with the enactment of the Judicial Organization Code (Gerichtsverfassungsgesetz, GVG) of 1877.

The GVG introduced a distinction between minor, intermediate, and serious crimes (Übertretungen, Vergehen, and Verbrechen).\textsuperscript{41} The three types of crimes roughly correlated with three types of courts. With the exception of certain trivial cases which were decided by a single professional judge, a collaborative lay court of one professional and two lay judges dealt with Übertretungen and lesser Vergehen (generally with a statutory penalty of up to three months in prison or a fine of 600 marks). A panel of five professional judges, the Strafkammer, served as the court of first instance for Vergehen and lesser Verbrechen (generally up to a sentence of five years in prison). A jury court of three professional judges and twelve jurors adjudicated the most serious Verbrechen.\textsuperscript{42}

The jury courts met in quarterly intervals.\textsuperscript{43} Jurors sat on a separate "juryor bench" (Geschworenbank)\textsuperscript{44} and could put questions to witnesses.\textsuperscript{45} At the end of the proceedings, the judge would pose a

\begin{footnotesize}
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\item\textsuperscript{36} All these states adopted a collegial bench model, mostly with five professional judges and twelve jurors. Landau, supra n. 8, at 276; Hadding, supra n. 10, at 30 (discussing Prussian model of five judges and twelve jurors).
\item\textsuperscript{37} See Schwinge, supra n. 8, at 114-15, 137-30, 158 (cautioning, however, that many admirers of the English jury did not propose its wholesale adoption).
\item\textsuperscript{38} Kern, supra n. 14, at 75.
\item\textsuperscript{39} Landau, supra n. 8, at 286-87.
\item\textsuperscript{40} Landau, supra n. 8, at 290-301; Hadding, supra n. 10, at 36-38; Wolfram W. Hahn, \textit{Die Entwicklung der Laiengerichtsbarkeit im Großherzogtum Baden während des 19. Jahrhunderts, Schriften zur Rechtsgeschichte, Heft 8}, at 129-36 (1974).
\item\textsuperscript{41} On the GVG of 1877, see generally Robert von Hippel, \textit{Der deutsche Strafprozeß} 150-55 (1941).
\item\textsuperscript{42} Id. at 154-55.
\item\textsuperscript{43} Kern, supra n. 14, at 114.
\item\textsuperscript{44} Id.
\item\textsuperscript{45} Id. at 115; see also Hadding, supra n. 10, at 33 (discussing similar provision in earlier Prussian system).
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series of factual questions to the jurors, including, among others, questions regarding the guilt or innocence of the accused and the presence or absence of mitigating circumstances (mildernde Um-stände), and the attorneys would present closing arguments. Finally, the judge would instruct the jurors on the law. Upon the conclusion of deliberations, the jury foreman would announce whether the requisite majority had agreed on the response to each question.

After the enactment of the GVG, several attempts to limit the jurisdiction of the jury courts failed until 1924. The collaborative court, however, continued to enlist supporters. Although the collaborative court did not make inroads into the jurisdiction of the jury court, it did expand its jurisdiction in 1905 to alleviate the trial caseload of the overburdened five-judge panels. During the early years of the Weimar Republic, liberal justice ministers like Gustav Radbruch showed no great interest in curtailing the jury’s influence. The fate of the jury, however, took a decided turn for the worse with the appointment of the conservative Rudolf Heinze as Radbruch’s successor. In May of 1923, Heinze submitted a draft of an act regarding the reorganization of the criminal courts, which, among other things, called for replacing the independent lay courts with large collaborative courts and for dramatically expanding the jurisdiction of the single judge court to reach most cases of intermediate crime. The draft ran into heavy resistance by the Social Democrats in the Reichstag and was sent to the legal committee.

C. Exit and Curtain Call: 1924 to Present

On November 23, 1923, Erich Emminger, a former Bavarian prosecutor and judge, assumed the post of justice minister. Barely two weeks later, on December 8, 1923, the Reichstag passed an En-
ablung Law (Ermächtigungsgesetz),\textsuperscript{55} which upon consultation with a commission of each house of parliament authorized the Reich government to issue whatever Emergency Acts it considered necessary in the light of the emergency facing "Volk and Reich."\textsuperscript{56} Emminger wasted no time and, as one of the first Emergency Acts, on January 4, 1924, issued an Act Regarding Judicial Organization and Criminal Law Administration that in essence passed into law Heinze's draft that had failed to garner a majority of the Reichstag less than seven months earlier.\textsuperscript{57}

This Emergency Act, which came to be known as the Lex Emminger, marked the end of the German jury. Although the Act retained the Schwurgericht by name, it converted the independent lay courts into large collaborative courts and reduced the number of lay participants from twelve to six while retaining the three professional judges.\textsuperscript{58} In addition, the Act significantly expanded the jurisdiction of the single professional judge at the expense of the jurisdiction of the traditional collaborative court of two lay judges and one professional judge.\textsuperscript{59} This collaborative court in turn assumed jurisdiction over the cases of the old five-judge court, the Strafkammer, which was transformed into a collaborative court of appeals, as well as over those cases that the Act had removed from the jurisdiction of the new "Schwurgericht."

The Lex Emminger triggered considerable political protest, not only for its elimination of the jury, but also for many of its other reforms, especially the expansion of the single judge's jurisdiction and of prosecutorial discretion.\textsuperscript{60} Initial reactions challenged the government's authority to pass the Act under the umbrella of the Entitlement Act.\textsuperscript{61} Eventually, the parties left of center, most prominently the Social Democrats and the Communists, demanded the reestablishment of the jury.\textsuperscript{62} Outside the legislatures, only the German Bar Association (Deutscher Anwaltsverein) spoke out strongly against the Act.\textsuperscript{63} Emminger's former judicial and prosecutorial colleagues, how-

\textsuperscript{55} Ermächtigungsgesetz of Dec. 8, 1923 (RGBl I 1179), not to be confused with the more infamous Enabling Law of Mar. 24, 1933 (RGBl I 141).
\textsuperscript{56} On the turbulent political situation in 1923, see, e.g., Vormbaum, supra n. 54, at 21-29.
\textsuperscript{57} Verordnung über Gerichtsverfassung und Strafrechtspflege of January 4, 1924 (RGBl I 15).
\textsuperscript{58} Id. § 12; See E. Löwe & Werner Rosenberg, DieStrafprozeßordnung für das deutsche Reich vom 22. März 1924 nebst dem Gerichtsverfassungsgesetz und den das Strafverfahren betreffenden Bestimmungen der übrigen Reichsgesetze 1036-37 (16th ed. 1925) (discussing §§ 81-82 GVG).
\textsuperscript{59} Löwe & Rosenberg, supra n. 58, at 1035 (discussing § 80 GVG).
\textsuperscript{60} On the latter, see Vormbaum, supra n. 54, at 150-70.
\textsuperscript{61} The Supreme Court, however, had validated the Act within months. RGSt 58, 120 (Mar. 24, 1924).
\textsuperscript{62} Vormbaum, supra n. 54, at 69-73; Hadding, supra n. 10, at 87-90.
\textsuperscript{63} Vormbaum, supra n. 54, at 78-79; Hadding, supra n. 10, at 91-98.
ever, did not object to the demise of the jury. Academic commentators likewise did not bemoan the disappearance of an institution that, in their considered opinion, had outlived its original purpose of protecting individual rights by ensuring the independence of the justice system from an all-powerful government.

Lay participation fared fairly well during the pre-war years of the Third Reich. Nazi writers tended to embrace lay participants as representatives of the healthy sentiment of the Volk. A commission charged with the drafting of a Nazi criminal procedure code recommended that collaborative panels with a majority of lay judges, called Volk judges (Volksrichter) in Nazi jargon, preside over all criminal trials. Some Nazi commentators even suggested staffing appellate courts with a majority of lay judges.

Nevertheless, the outbreak of World War II put an end to virtually all lay participation in the German criminal justice system. On the first day of the war, September 1, 1939, all traditional lay courts were dismantled. Only one trial court retained lay participation: the infamous Volksgerichtshof, or Volk Court, which sat as a collaborative court.

After 1945, Bavaria briefly reestablished jury courts in 1947. The Uniformity Act of 1950, however, brought Bavaria back into line and turned the procedural clock back to the Lex Emminger. Finally, in 1974, not quite one hundred years after the enactment of the original GVG, the number of lay judges in the large collaborative

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64. Vormbaum, supra n. 54, at 81-82; Hadding, supra n. 10, at 98-99.
65. Hadding, supra n. 10, at 99-101; cf. Landau, supra n. 8, at 303 (role of jury as guarantor function of individual rights had been on the decline since 1850).
66. On the tension between the Nazi Führer principle and lay participation, see infra text accompanying nn. 245-48.
68. Schmidt, supra n. 14, at 315; see also id. at 315 n. 469 (quoting Freisler, “Der Volksrichter in der deutschen Strafrechtspflege,” in Beiträge zur Rechtserneuerung, Heft 3 (1937)); Kern, supra n. 14, at 251.
69. See Kern, supra n. 14, at 263.
70. Verordnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege of September 1, 1939 (RGBl I 1658) [so-called Vereinfachungsverordnung, or Simplification Act]; Kern, supra n. 14, at 226, 243, 245.
72. Two collaborative courts of appeals reviewed “extraordinary appeals” [außerordentliche Einsprüche], a concoction of Nazi law to permit prosecutors to retry acquitted defendants at their leisure and without specifying a factual or legal basis for the appeal, as long as “the protection of the Volk” required a renewed prosecution. See Wagner, “Die Umgestaltung der Gerichtsverfassung und des Verfahrens- und Richterrechts im nationalsozialistischen Staat,” in 1 Die deutsche Justiz und der Nationalsozialismus 244, 268-70 (1968) (quoting Dritte Verordnung zur Vereinfachung der Strafrechtspflege of May 29, 1943, art. 6 (RGBl I 342)); see also Gesetz zur Änderung von Vorschriften des allgemeinen Strafverfahrens of Sept. 16, 1939, §§ 3-7 (RGBl I 1841).
73. Schmidt, supra n. 14, at 315.
74. Gesetz zur Wiederherstellung der Rechtseinheit of Sept. 12, 1950 [so-called Vereinheitlichungsgesetz] (BGBl I 455).
court was reduced from six to two while the three professional judges were retained. The GVG had established an independent jury court with three professional judges and twelve jurors; the Lex Emminger had halved the number of lay participants and had surrendered their independence in making factual determinations. Now, the number of lay participants was again reduced by two thirds, thereby turning a 2-to-1 lay majority into a 3-to-2 minority.\textsuperscript{75}

Since the 1974 reform, lay judges have sat on two of the three types of trial court, the 1-2 court of one professional and two law judges—which, until recently, could impose up to three years’ imprisonment—and the 3-2 court—which deals with cases beyond the upper limit of the 1-2 court’s jurisdiction. A second professional judge may be added to the 1-2 court in complex cases within its jurisdiction. The third trial court is the single judge court, in which a professional judge disposes of cases beneath the lower limit of the 1-2 court’s jurisdiction (until recently, crimes with a statutory penalty of up to six months’ imprisonment).

This is how things stood until very recently. Ostensibly to streamline the German criminal justice system in response to case load increases after unification,\textsuperscript{76} the 1993 Law for the Relief of the Administration of Justice\textsuperscript{77} temporarily reduced the number of professional judges on the large collaborative court from three to two in certain cases.\textsuperscript{78}

This recent legislative intervention, however, does not signal a revived interest in lay participation. On the contrary, the Relief Law illustrates the minimal impact lay judges have on the German criminal justice system and, by further expanding the single judge’s jurisdiction, continues the diminution of lay participation in German criminal courts. First, the conversion of a 3-2 mixed court into a 2-2 court is likely to have a negligible effect on the balance of power between professional and lay judges because, in a 2-2 court as in a 3-2 court, the professional judges need the assent of only one lay judge to

\textsuperscript{75} Erstes Gesetz zur Reform des Strafverfahrensrechts of Dec. 9, 1974 (BGBl I 3393). As late as the mid-seventies, a handful of jury supporters survived in Germany’s academic circles. See Hadding, supra n. 10, at 122-26. The waning popularity of lay courts in West Germany stood in sharp contrast to the celebration of lay judging in East Germany. See, e.g., Schmidt, supra n. 14, at 311-12 & n.455. Until 1954, the East German government churned out a large number of “Volk judges” who were given considerable authority but little legal training. See infra text accompanying n. 276.


\textsuperscript{77} Gesetz zur Entlastung der Rechtspflege of Jan. 11, 1993 (BGBl I 50).

\textsuperscript{78} GVG § 76(2) (through Feb. 28, 1998). The court continues to sit with three professional and two lay judges if it functions as a Schwurgericht, i.e., if it deals with one of two dozen or so more serious crimes. See GVG § 74(2). The court also retains the option of sitting with three professional and two lay judges in particularly complex cases.
obtain the two-thirds majority required for conviction and sentence. 79 The presiding judge in a 2-2 court breaks the tie in any decision requiring a simple majority. 80

Second, the Relief Law reduces the number of professional judges on a panel to free up the third professional judge to participate in another trial. Reducing the number of professional judges per trial was far more likely to increase efficiency than reducing the number of lay judges simply because German lay judges do little to retard criminal proceedings: they rarely exercise their right to put questions to witnesses to supplement the presiding judge's interrogation. 81 This lack of lay participation at trial should come as no surprise since the professional judges deny their lay colleagues access to the dossier, the all-important case file prepared by the prosecution on the basis of which the presiding judge interrogates the witnesses. 82

Finally, the Relief Law substantially expands the jurisdiction of the single professional judge. The single judge court previously had jurisdiction only over Vergehen—crimes with a minimum statutory penalty of less than one year in prison or a fine—whose statutory maximum penalty did not exceed six months' imprisonment. Now the professional judge sitting alone disposes of all Vergehen cases in which a sentence of more than two years' imprisonment "is not to be anticipated," even if the statutory maximum penalty for the crime exceeds two years in prison. 83 Should it turn out in the course of the proceedings that the prosecution and the judge guessed incorrectly and a sentence in excess of two years' imprisonment appears appropriate, the professional judge can impose a prison term of up to four years. 84 The single judge also may impose fines of any severity, regardless of the alternative prison sentence provided by statute. 85

Given that over 80% of German criminal cases result in the imposi-

79. See § 263(2) StPO (two-thirds majority required).
80. § 196(4) GVG; § 263 StPO; see Karlsruher Kommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgericht mit Einführungsgesetz 1208 (§ 263 StPO Rn. 8) (3d ed. 1993) (hereinafter Karlsruher Kommentar) (illustrating decisions requiring simple majority).
81. See § 240(2) StPO (right to question witnesses); Hans-Heiner Kühne, "Laienrichter im Strafprozeß?" 1985 Zeitschrift für Rechtspolitik 237, 238 (passivity of lay judges).
82. See Karlsruher Kommentar, supra n. 80, at 1902 (§ 30 GVG Rn. 2); see also § 241(2) StPO (presiding judge may disallow irrelevant or improper questions by lay judges).
83. § 25(2) GVG.
84. The jurisdictional maximum penalty for the 1-2 court was also raised from three to four years' imprisonment. § 24 GVG; see supra text accompanying nn. 75-76. In this situation, she does not have the option of transferring the case to a collaborative lay court. See Karlsruher Kommentar, supra n. 80, at 1896 (§ 24 GVG Rn. 13); Kissel, "Gerichtsverfassung unter dem Gesetz zur Entlastung der Rechtspflege," 1993 Neue Juristische Wochenschrift 489, 491 & n.35.
85. Karlsruher Kommentar, supra n. 80, at 1895 (§ 24 GVG Rn. 4), 1898 (§ 25 GVG Rn. 5).
tion of a fine and only about 1% in the imposition of a prison sentence of more than two years, few cases today remain beyond the jurisdiction of the single professional judge.  

III. THE GERMAN LAY JUDGE AND THE VOLK

Now that the rise and decline of lay participation in German criminal courts has been charted, the stage is set for examining the role of the empirical and metaphysical notions of Volk in the history of German lay judging. The place of the Volk in the nineteenth century jury debate will be explored by focusing on the work of Carl Joseph Anton Mittermaier, a prolific writer on the jury and its main academic proponent during his lifetime. The remainder of part III will discuss the role of the Volk concept in the theory and practice of lay participation in Nazi courts.

A. C.J.A. Mittermaier

C.J.A. Mittermaier (1787-1867) was the leading scholar of German and comparative criminal procedure of the first half of the nineteenth century. Arguably, he was the internationally best known German legal scholar of his time. Mittermaier and his mentor, P.J.A. Feuerbach, attempted to transform the study of comparative law in Germany from an anecdotal subspecies of popular travel literature into a rigorous study of foreign laws and juridical practices.

Mittermaier’s rise to fame began when Feuerbach hired him as his personal assistant (Privatsekretär). In Feuerbach’s services, Mittermaier spent most of his time translating and excerpting French and Italian legislation. Mittermaier was a prolific author, so much so that no complete bibliography of his estimated 600 works exists. Although he wrote on a wide range of topics, the bulk of his scholarly output dealt with problems of criminal procedure and penology. Mittermaier was one of the leaders of the European abolitionist movement. In characteristically well-documented fashion, his treatise on the death penalty broke new ground by arguing against...
capital punishment on the basis of empirical studies establishing the
absence of a deterrent effect, the possibility of wrongful executions,
and the societal contributions of convicted serious offenders.\textsuperscript{92}

Mittermaier also enjoyed an illustrious political career. He was a
member of Baden’s legislative commission (Gesetzgebungskommission),
served for several years in the Baden state legislature, and, in
1848, was elected president of the German Vorparlament in Frankfur
and a member of the national constitutional assembly (verfassungsge
dende Nationalversammlung).\textsuperscript{93}

Mittermaier stands out as a scholar of criminal law who refused
to be categorized according to the traditional philosophical rubrics of
consequentialism and retributivism.\textsuperscript{94} Eschewing such labels,
he turned his scholarly curiosity to the comparative study of legislative
proposals and texts, as well as procedural and penological practices,
in their historical and political context.

Two reasons suggest Mittermaier as a profitable focal point for
an analysis of Volk enthusiasm in the German jury debate. He was
the most influential proponent of the jury and, at the same time, one
of the most level-headed participants in the often fiery debate about
the jury. He distanced himself repeatedly from the Hegelians, who
emerged as the most radical proponents of the jury.\textsuperscript{95} Mittermaier
instead associated himself with the Germanists, though he did not go
to the extremes of certain Volk enthusiasts who assigned to the or
Dinary German a sense of justice unencumbered by the artificial cogni
tive apparatus of Roman law.\textsuperscript{96}

B. The Volk Jury and the Legal Consciousness of the Volk

Volk was a pet term of nineteenth century Germany and was put
to many different uses, not only in jurisprudence.\textsuperscript{97} For our purposes,

\textsuperscript{92} C.J.A. Mittermaier, Die Todesstrafe nach dem Ergebnis der wissenschaftlichen
Forschung, der Fortschritte der Gesetzgebung und der Erfahrung (1862).
\textsuperscript{93} Kleinheyer & Schröder, supra n. 87, at 181-82; Marquardsen, supra n. 33, at
28.
\textsuperscript{94} See infra text accompanying n. 114.
\textsuperscript{95} See infra text accompanying n. 114.
\textsuperscript{96} On the variety of Volk concepts, see Franz Schnabel, Deutsche Geschichte im
ther references) [hereinafter Reyscher]; see also Friedrich Carl von Savigny, 1 System
des heutigen römischen Rechts 30 (1840) (distinguishing four versions of the Volk con
cept); 26 Jacob Grimm & Wilhelm Grimm, Deutsches Wörterbuch 453-71 (1991) (re
print of vol. 12(2), Rudolf Meißner ed. 1951) (wide variety of definitions of “Volk”); see
generally Koselleck, “Volk, Nation, Nationalismus, Masse,” in 7 Geschichtliche
Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland
389-431 (Otto Brunner, Werner Conze & Reinhart Koselleck, eds. 1992). This is not
to say that the malleability and ubiquity of the Volk concept went entirely unnoticed
at the time. See, e.g., Joachim Rücker, Idealismus, Jurisprudenz und Politik bei
it suffices to isolate two notions of the concept of *Volk* that contributed to the jury debate. What one might call the atomistic-empirical notion of *Volk* appeared in writings that praised the jury as protecting *Volk* members against biased judges and overzealous prosecutors by giving the defendants’ fellow citizens a voice in the administration of justice.

This empirical notion of *Volk* may be distinguished from the metaphysical notion of *Volk* which inspired depictions of the jury verdict as a manifestation of the legal will of a separate form of being, the *Volk*. This notion of the will of the metaphysical *Volk* often went far beyond Rousseau’s idea of a general will of the polity, an idea that was much discussed at the time. Many writers viewed the *Volk* as an ontologically independent and permanent conceptual entity with certain attributes, including a sense of right, a will, and character traits.

To differentiate between an atomistic-empirical and a metaphysical notion of *Volk* is difficult because many nineteenth century writers did not differentiate between the two notions or oscillated between them. Like their counterparts in other fields, Mittermaier and his fellow jurists often employed the term *Volk* in a non-metaphysical sense. Frequently, when Mittermaier and his contemporaries spoke of the participation of the *Volk* in the administration of criminal justice, they simply referred to the male citizens of the German states other than professional judges and lawyers. *Volk* also often referred to the members of the state other than the executive branch of government. Even the then-ubiquitous concept of the *Volk* as a cultural community of individuals who shared a common language, a common law, and a common history (or, more dramatically, a common fate) did not necessarily make claims to special ontological status.

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100. See infra text accompanying n. 115-58.
101. Savigny was a notable exception when he distinguished between four notions of *Volk*. See Savigny, supra n. 97, at 30.
103. Provided these citizens qualified under the census. See infra text accompanying n. 192.
104. E.g., Gneist, supra n. 8, at 1-2.
105. Consider, for instance, the great philologist Jacob Grimm, who combined a boundless enthusiasm for the German *Volk* community with a deep seated skepticism of all things metaphysical (which is not to say, however, that—much like his mentor Savigny—he did not in fact also employ a metaphysical and organic concept of *Volk*, see Helmut Jendreieck, *Hegel und Jacob Grimm* 152-77 (1975); see also Veronika
One therefore should not suggest that Mittermaier and his contemporaries viewed the metaphysical Volk concept as the prominent one. Nonetheless, one cannot deny that they did not fully appreciate the potential conflict between the purported commands of a disembodied concept of community, on the one hand, and the convictions and rights of the community's members, on the other.\textsuperscript{106}

1. Volk and Law

Mittermaier's reputation made him the most significant German supporter of the Anglo-American jury of his time.\textsuperscript{107} Mittermaier's theory of the jury combined the relativistic and empirical bent of his mentor, Feuerbach, with the Volk enthusiasm of his contemporaries. It will therefore be worthwhile briefly to consider these influences before turning to Mittermaier's own work on the jury.

As mentioned above, Feuerbach, in 1813, published an influential work criticizing the Anglo-American jury as a legal institution, but praising it as a political institution in non-authoritarian systems.\textsuperscript{108} Accomodating his sympathies for the Anglo-American jury as a political institution and his strong opposition to the establishment of a jury system in oppressive systems, Feuerbach repeatedly stressed the necessity of evaluating the jury in its political context.\textsuperscript{109} In opposition to Savigny's historical school, which he saw as advocating the resolution of even the most fact-intensive legal question with the highly abstract concepts of the Roman law, Feuerbach embraced the jury for its ability to consider each case in the context of its immediate circumstances as they are judged in the framework of each juror's personal life experiences.\textsuperscript{110} Paying tribute to his Kantian

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\textsuperscript{106} Consider, however, the Cassandran comment made by a more level-headed jury proponent in 1848: "It is a bold poetic thought, it is a romantic [idea] . . . to see in the judgment of twelve randomly selected men . . . the so-called public consciousness . . . Would not it be the most bitter of ironies, the most cruel of all fortuities, to send someone to the gallows on the basis of the most daring of all assertions, that the consciousness of guilt and innocence reflects itself in the totality of the Volk in the very proportion that divided the twelve [jurors]." Heinrich Dernburg, Ueber den Werth und die Bedeutung der Schwurgerichte und die Mittel, dieselben criminalrechtlich zu vervollkommnen 14 (1848) (quoted in Schwinge, supra n. 8, at 116).

\textsuperscript{107} See Kleinheyer & Schröder, supra n. 87, at 182.

\textsuperscript{108} Feuerbach, Betrachtungen, supra n. 24. For discussion of Ludwig Harscher von Almendingen, another, and less ambivalent, early supporter of the jury, see Kleinheyer & Schröder, supra n. 87, at 342; 1 Neue deutsche Biographie 204 (1953) (authored by W. Struck); Sohm, "Ludwig Harscher v. Almendingen als Kriminalist," 80 Zeitschrift für die gesamte Strafrechtswissenschaft 592-638 (1968).

\textsuperscript{109} Feuerbach, Betrachtungen, supra n. 24, at 47; Feuerbach, Erklärung, supra n. 26, at 232.

\textsuperscript{110} Paul Johann Anselm Feuerbach, Einige Worte über historische Rechtsgelehrsamkeit and einheimische Gesetzgebung, in Kleine Schriften vermischten Inhalts 135, 135-38 (1833).
roots, Feuerbach, however, felt very uncomfortable with notions like truth instincts or feelings of justice guiding the jury's deliberations.

Writing in 1813, at a time when the splintered German states were still preoccupied with ending French dominance in Central Europe and a unified German nation seemed but a remote possibility, Feuerbach did not yet speak in terms of the German Volk. He did not hesitate, however, to employ the notion of a national character. He frequently, and at great length, expounded the character traits of the English nation, which he admired for its public spirit.

In contrast to Feuerbach, other German scholars of the time argued for the establishment of a German jury system on the ground that only lay members of the Volk, not legal experts, possessed a general sense of truth. The mind of the ordinary Volk member, so the argument went, had escaped contamination by the artificial intellectual constructs of the law (and legal training) and therefore remained open to sense the commands of natural justice. As his teacher had done before him, Mittermaier distanced himself from these views.

During the first half of the nineteenth century, Hegel and his disciples came to exercise a strong influence on German thought. The Volksgeist played an important role in Hegel's philosophy of law and of history. Hegel was a great admirer of Montesquieu, who had

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111. For a discussion of Feuerbach's debt to Kant, see Wolfgang Naucke, Kant und die psychologische Zwangstheorie Feuerbachs (1962).
112. Feuerbach, Betrachtungen, supra n. 24, at 159.
113. Id. at 74; Feuerbach, Erklärung, supra n. 26, at 238; Paul Johann Anselm Feuerbach, Die hohe Würde des Richteramts, in Kleine Schriften vermischten Inhalts 124 (1833).
114. See, e.g., Ludwig Frey, Das Geschworenengericht aus historischen, straf- und staatsrechtlichen Gesichtspunkten betrachtet 39-40 (1835) ("Ein innatives Rechtsgefühl, das, keiner schulgerechten, wissenschaftlichen Ausbildung bedürfend, vollendet, fertig in der Seele eines jeden Menschen lebt, ist es also, das den Bürger-Geschwornen erkennen läßt, wann eine Handlung das Eigenthum, die persönliche oder politische Freiheit, oder das Leben seines Mitbürger oder Mitmenschen gefährdet, oder beeinträchtigt.") (quoted in Whitman, supra n. 2, at 181); cf. Beseler, supra n. 8, at 258, 267 (judges lack the Volk's "immediate perception" of the law); 261 (contrasting "living justice that penetrates the nature of things (das Wesen der Dinge)" with "rigid adherence to forms (starres Formenwesen)"). A French doctrine of evidentiary law of the time cast the jury's verdict as revealing its intime conviction, i.e., its "oracular moral conviction." Julius Glaser, Beiträge zur Lehre vom Beweis im Strafprozeß 18 (1883) (quoted in Landau, supra n. 8, at 281). For criticism of the notion of a truth instinct by Germanists other than Mittermaier, see Leue, supra n. 16, at 51-52; see also Gneist, supra n. 8, at 70; cf. Frey (!), supra, at 42-43 (criticizing unnamed English and French jury supporters for portraying jurors as passive transmitters of truth who exercise no independent judgment and merely follow their natural truth instinct).
pioneered\textsuperscript{116} the study of what he called a people’s “esprit général,”\textsuperscript{117} “l’esprit de la nation,”\textsuperscript{118} or “le caractère d’une nation.”\textsuperscript{119} In the \textit{Philosophy of Right} of 1821, Hegel defined the \textit{Volkgeist} as a stage in the actualization of the \textit{Weltgeist}.\textsuperscript{120} An actual and organic \textit{Geist},\textsuperscript{121} the \textit{Volkgeist} gives every state its individuality.\textsuperscript{122} As an existing individual (“existierende[s] Individu[um]”), the \textit{Volkgeist} possesses objective reality and selfconsciousness.\textsuperscript{123}

Hegel specifically rejected Rousseau’s concept of the general will for portraying the general will as the common element among the particular wills of individuals and not as a separate conceptual entity “which makes the will [of the state] in and of itself rational.”\textsuperscript{124} As the will of the state is conceptualized above and beyond the individual members of the state, “it is only through being a member [Glied] of the state that the individual himself has objectivity, truth and ethical life [Sittlichkeit].”\textsuperscript{125}

Hegel distinguished between \textit{Volk} and state on the ground that a \textit{Volk} does not take the form of a state until and unless it binds itself through rational laws and objective institutions.\textsuperscript{126} It may therefore be argued that Hegel meant to say merely that the individual derives her objectivity from the \textit{Volk} only if the \textit{Volk} has become a state, i.e., only if the \textit{Volk} has organized itself in a perfectly objective and rational way so that it completely manifests Reason, or \textit{Geist}.\textsuperscript{127} Whatever Hegel’s position on the \textit{Volk} might have been, it is clear

\begin{itemize}
\item \textsuperscript{116} For a detailed discussion of the role of the \textit{Volkgeist} in German legal theory before Montesquieu and until the beginning of the nineteenth century, see Jan Schröl, “Zur Vorgeschichte der \textit{Volkgeist}lehrle: Gesetzgebungs- und Rechtsquellentheorie im 17. und 18. Jahrhundert,” 109 \textit{Zeitschrift der Savigny-Stiftung für Rechtsgeschichte} (Germanistische Abteilung) 1 (1992).
\item \textsuperscript{117} Montesquieu, De l’esprit des lois bk. xix (1748).
\item \textsuperscript{118} Id. at bk. xix, ch. 5.
\item \textsuperscript{119} Id. at bk. xix, ch. 27.
\item \textsuperscript{120} See Hegel, supra n. 8, §§ 259, 337, 340, 352; see also id. §§ 33, 344.
\item \textsuperscript{121} Id. §§ 33, 331.
\item \textsuperscript{122} Id. at Z259 (Hegel’s addition to § 259).
\item \textsuperscript{123} Id. § 340.
\item \textsuperscript{124} Id. at A258 (comment to § 258) (Eduard Gans compiled the comments on the basis of notes others had taken during Hegel’s lectures).
\item \textsuperscript{125} Id. at A258.
\item \textsuperscript{126} Id. §§ 349, 350.
\item \textsuperscript{127} This interpretation would explain why Hegel used \textit{Volk} and state as interchangeable in the section on Sittlichkeit in the Philosophy of Right. See id. § 156, Z281; see Ilting, “Die Struktur der Hegelschen Rechtsphilosophie,” in 2 \textit{Materialien zu Hegels Rechtsphilosophie} 52, 76 n.31 (Manfred Riedel ed. 1975). In the \textit{Philosophy of History}, Hegel does claim that the particular member of the \textit{Volk} represents a mere manifestation of the \textit{Volkgeist}, much like the \textit{Volkgeist} manifests the \textit{Weltgeist}. See Dittmann, supra n. 115, at 44-45. These comments in the \textit{Philosophy of History}, however, do not necessarily apply to the relationship between the individual and the metaphysical \textit{Volk} because, in the \textit{Philosophy of History}, Hegel uses \textit{Volkgeist} and national character interchangeably and often employs national character in an anthropological sense. For an account of the relation between \textit{Volkgeist} and \textit{Menschengeist} that echoes Hegel’s account of the relation between \textit{Volkgeist} and \textit{Weltgeist}, see Savigny, supra n. 97, at 20-21.
\end{itemize}
that he repeatedly objected to equating the Volk with the set of citizens excluding the government, i.e., in Hegel’s theory of the rational state, the monarch.  

This model of the relationship between the individual and the Volk explains little about the empirical footing of the Volk concept and gives little guidance on the question of how the Volk’s position on a legal issue should be divined. The Philosophy of Right suggests that the monarch’s position would reflect the Volk’s position. Hegel hesitated to place much weight on the views of actual Volk members, especially if these views should not coincide with the monarch’s views. According to Hegel, the members of the Volk do not know what they want simply because they are, by definition, not in a position to engage in deep reflection, the only path to the commands of reason.

Although Hegel’s Volksgeist theory influenced many of his contemporaries, not least among them Savigny and Georg Friedrich Puchta, Hegel and his followers did not rest their jury theory on the Volk concept. Drawing instead on Hegel’s theory of punishment, they argued that the jury verdict respected the offender’s dignity as an indirect self-judgment of the accused. While Hegel sympathized with the inquisitorial Prussian practice of convicting only after a confession because it would guarantee the defendant’s acceptance of his punishment and thereby maintain his freedom, he ultimately rejected it because the guilty defendant might continue to deny his guilt and thereby thwart the interests of justice. Hegel similarly objected to relying on the judge’s determination of the defendant’s guilt or innocence because doing so would not treat the defendant as free. He endorsed the jury as a compromise to ensure

128. See Hegel, supra n. 8, § 279.
129. Id.
130. Id. at A301 (“[If the term ‘the people’ [das Volk] denotes a particular category of members of the state, it refers to that category of citizens who do not know their own will.”)
133. See Hegel, supra n. 8, §§ 225, 227, 228; see also Eduard Gans, Beiträge zur Revision der preußischen Gesetzgebung 76-77 (1831); Schwing, supra n. 8, at 70-74, 102-03, 106-08 (discussing jury theory of Christian Reinhold Köstlin, a nineteenth century Hegelian philosopher of criminal law), 105-06 (discussing Gans’ jury views).
that the verdict come, if not from the defendant himself, from his "soul." 134

Hegel commented at great length on the national characters of various Volker. He portrayed the English as "the Volk of intellectual perception [,who] recognize the rational less in its universal character than in its particular form." 135 The character of the German Volk, by contrast, resounds with deep thoroughness and intimacy. 136 The Italian Volk distinguishes itself through "immediacy of individuality." 137 Finally, the French Volk displayed a "firmness of understanding and a flexibility of wit." 138 As we shall see, Mittermaier had far less complimentary things to say about the French national character. 139

In fairness to Hegel, his view of the relation between national character and Volksgeist remained unclear. 140 It could therefore be argued that he did not view the quoted character traits as attributes of various free-standing conceptual entities, but commented on the shared psychological traits of individual members of a given Volk, not the traits of the Volk itself.

At around the same time, Savigny's historical school, particularly in its later version influenced by Puchta, identified the Volksgeist as the source of positive law. 141 Savigny distinguished between four different versions of the Volk concept:

1. the natural whole, in which the state truly originates and continuously exists, . . .;
2. the totality of all individuals living in the state contemporaneously;
3. these individuals without the government, i.e., the subjects in contrast to the rulers;
4. in republican states, as in Rome, that organized convention of individuals, in which supreme authority actually rests according to the constitution.

134. Hegel, supra n. 8, at Z227.
136. Id.
137. Id.
138. Id.
139. See infran. 182.
140. See Brie, supra n. 99, at 19.
After commenting on his contemporaries' tendency to conflate these versions of the Volk concept, Savigny declared that he spoke of Volk in the first sense, i.e., of the "ideal Volk" which enjoyed "eternal existence."  

Hermann Kantorowicz has cautioned against hastily equating Savigny’s and Puchta’s Volksgkeist notion with Hegel’s complex philosophical construct and several other authors have argued that Savigny and Puchta always employed Volksgkeist as synonymous with national character. Siegfried Brie, however, has carefully documented substantial parallels between Hegel’s writings on the Volksgkeist and Savigny’s and Puchta’s work. In the final analysis, the Volksgkeist notion of the historical school retains a distinct metaphysical quality. In particular, the historical school never quite explained the magical emergence of positive law from the Volksgkeist as anything other than the mystical workings of a non-empirical concept.  

142. Savigny, supra n. 97, at 30-31; see generally Rückert, Reyscher, supra n. 97, at 140-41, 227, 256, 326, 338 (contrasting Savigny’s and Puchta’s metaphysical and organic Volk concept with the political variant of the concept).  


144. Wilhelm Schuppe, Das Gewohnheitsrecht, zugleich eine Kritik der beiden ersten Paragraphen des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reich 34 (1890); Felix Dahm, Rechtspolitische Studien 240 (1883).  

145. Brie, supra n. 99, at 22, 26-35. But see Norberto Bobbio, “Hegel und die Naturrechtslehre,” in 2 Materiales zu Hegels Rechtsphilosophie 81, 85-86 (Manfred Riedel ed. 1975) (stressing dissimilarities between Hegel’s and the historical school’s use of Volksgkeist); id. at 106 n. 13 (citing G. Solari, 2 Filosofia del diritto privato: Storicismo e diritto privato 162-63 (1940)).  

146. See, e.g., Savigny, supra n. 97, at 19 (“the creation of law is located in this natural whole [of a spiritual (geistigen) community], because in this common Volksgkeist, which permeates the individuals, one finds the power to generate law”); see also Brie, supra n. 99, at 32-33. Although Savigny postulated the Volksgkeist as the ultimate source of law, he also recognized the influence of custom, legislation, and legal science on the development of law. See Savigny, supra n. 97, at 16-18, 34-57. It has been suggested that Savigny thought his major contribution to legal scholarship lay not in his theory of the Volksgkeist as the originator of law, but in his claim that the development of law was to be seen as driven by legal science, not by the arbitrary decisions of legislators, or, even worse, of the populace. Jakobs, “Karl Larenz und der Nationalsozialismus,” 1993 Juristenzzeitung 805, 815 [hereinafter Karl Larenz]; see also Jakobs, “Der Ursprung der geschichtlichen Rechtswissenschaft in der Abwendung Savignys von der idealistischen Philosophie,” 57 Tzdschrift vor Rechtsgeciedens 241-73 (1989). Whatever Savigny would have liked to have seen as his major contribution, however, there can be no doubt that his Volksgkeist theory did have a significant impact on German legal thought. The point is not to evaluate Savigny’s
The historical school did not come under fire for its nebulous Volksgeist theory until the latter half of the nineteenth century. Savigny and his followers instead attracted the ire of their contemporaries for their theory of the jurist’s role as modern representative of the Volksgeist. According to Savigny, the Volk loses its ability to generate law—Volk law (Volksrecht)—as societal life becomes increasingly complex over the course of history. At some point, a new class, the jurists, emerges from the Volk to take over the job of creating law—jurists’ law (Juristenrecht). In Germany, Juristenrecht meant the reception and refinement of Roman law because Roman law provided the jurists with a system sophisticated enough to deal with the complexities of modern life. Roman law stayed in touch with the German Volksgeist because the jurists originally emerged from the German Volk and offered their services to the Volk merely to relieve it of one of its traditional responsibilities, the creation of law. At any rate, Savigny argued, the distinction between the class of jurists and the Volk was a false one because, after all, anyone could become a lawyer. In a letter to Georg Beseler, Savigny explained that jurists were very much in touch with the life of the Volk and therefore as capable of reflecting the Volksgeist as anyone else: “They live right among the upper classes, share their customs and views of life, and just as others have the opportunity to familiarize themselves with the life of the law through experience in their own familial and financial affairs.” Needless to say, Savigny and his fellow Romanists saw no need for lay participation of any form in criminal trials.

This attempt by Savigny to root Roman law and its jurists in the German Volk did not sit well with Germanists like Beseler who sought to eradicate centuries of Roman law influence and reestablish a “truly” German law. Beseler, who first advocated a collaborative court but later became a strong jury supporter, was among the position but to expose the origins of the Volksgeist notion in the jury debate of the nineteenth century. Although Savigny’s Volksgeist theory undoubtedly influenced proponents of lay participation, Savigny himself opposed the jury or any other form of lay participation. See infra text accompanying n. 152.

147. See, e.g. Wilhelm Arnold, Recht und Wissenschaft nach geschichtlicher Ansicht 24 (1863); P. Harum, Von der Entstehung des Rechts 6 (1863); Karl Magnus Bergbohm, 1 Jurisprudenz und Rechtspolitik: Kritische Abhandlungen 490 n.15 (1892).

148. Savigny, supra n. 97, at 45.

149. Id.

150. Id. at 49.


152. Id. at 61-62; see also Schröder, “Savignys Spezialistendogma und die ’soziologische’ Jurisprudenz,” 1976 Rechtsstheorie 23, 31-33 (discussing other Romanists’ opposition to lay courts at the Lübeck Germanistentag of 1847).

153. See supra n. 33.
more moderate exponents of this Germanist reform movement. Although he continued to view himself as an adherent of the historical school, Beseler attempted to reconcile his disdain for the reception of Roman law\textsuperscript{154} with the Savigny-Puchta Volksgeist theory.\textsuperscript{155} Beseler advocated a reinstatement of the Volk as the source of law. Realizing that the Volk's law creating facilities had lain unused for centuries, Beseler recommended a careful study of the German Volk's legal intuitions and customs.\textsuperscript{156} Painstaking archaeological expeditions into the legal consciousness of the German Volk, Beseler hoped, would bring to light "a uniquely German perception of law"\textsuperscript{157} long buried under layers of imported Roman law. Beseler's theory had recourse to a non-empirical notion of Volk whenever it shifted from unearthing the Volk's dormant legal customs to reinvigorating the Volk's sense of justice so that the Volk could resume its forgotten craft of generating law.\textsuperscript{158}

2. Mittermaier and the Volk Jury

Mittermaier published a great many works on the jury. All of Mittermaier's many contributions reflect his sincere admiration for the public spirit and the sense of justice he saw reflected in the Anglo-American jury system. Between 1819 and 1866, over the course of five decades, Mittermaier repeatedly published commentaries on the Anglo-American, the French, and, eventually, the German jury in action and in law.\textsuperscript{159} In his last work on the subject, The Volk Court

\textsuperscript{154} See, e.g., Beseler, supra n. 8, at 111 (reception of Roman law has shattered the Volk's ability to "immediately perceive" the law), 130, 287.
\textsuperscript{155} See Brie, supra n. 99.
\textsuperscript{156} Beseler, supra n. 8, at 109.
\textsuperscript{157} Id. at 136.
\textsuperscript{158} See, e.g., id. at 109, 111 (speaking of the Volks's "immediate perception" of law and norms); see also id. at 119 ("Volk law lives in the consciousness of the Volk"); Hattenhauer, supra n. 143, at 188-89.
\textsuperscript{159} Carl Joseph Anton Mittermaier, \textit{Die öffentliche mündliche Strafrechtspflege und das Geschwornengericht in Vergleichung mit dem deutschen Strafverfahren} (1819) [hereinafter \textit{Die Strafrechtspflege}]\textit{; Das deutsche Strafverfahren in der Fortbildung durch Gerichts-Gebrauch und Partikular-Gesetzbücher und in genauer Vergleichung mit dem englischen und französischen Straf-Prozesse} (2d ed. 1832) [hereinafter \textit{Das deutsche Strafverfahren}]\textit{; Die Lehre vom Beweise im deutschen Strafprozesse nach der Fortbildung durch Gerichtsgebrauch und deutsche Gesetzbücher in Vergleichung mit den Ansichten des englischen und französischen Strafverfahrens} (1834) \textit{; Die Mündlichkeit, das Anklageprinzip, die Öffentlichkeit und das Geschwornengericht in ihrer Durchführung in den verschieden Gesetzbüchern dargestellt und nach den Forderungen des Rechts und der Zweckmäßigkeit mit Rücksicht auf die Erfahrungen der verschiedenen Länder geprüft} (1845) \textit{; Das englische, schottische und nordamerikanische Strafverfahren im Zusammenhange mit den politischen, sittlichen und sozialen Zuständen und in den Einzelheiten der Rechts- übung} (1851) [hereinafter \textit{Das Strafverfahren}]\textit{; Die Gesetzgebung und Rechtsübungen über Strafverfahren nach ihrer neuesten Fortbildung} (1856) [hereinafter \textit{Die Gesetzgebung}]\textit{; Erfahrungen über die Wirksamkeit der Schwurgerichte in Europa und Amerika} (1865). This list does not include Mittermaier's countless articles on the subject, which he frequently consolidated for publication in book form.
in the Form of Jury and Collaborative Lay Courts,160 which appeared one year before his death, Mittermaier propounded a theory of the jury based partly upon a metaphysical concept of the Volk. Although, as we will see below, by the time The Volk Court appeared in 1866, the idealist Volk concept already had lost considerable influence, it is in this, his final word on the jury, that Mittermaier most clearly exposed the significant role of the metaphysical Volk concept implicit in the vision of the jury he shared with his fellow jury supporters during the first half of the nineteenth century.

Mittermaier's mature theory of the jury rings with metaphysical overtones when he speaks of emerging concepts such as Volksgeist and Volksrechtsbewußtsein (the Volk's legal consciousness) as apart from the public spirit or the sense of justice of each individual juror. Very rarely does he hint that jurors might be led not exclusively by the Volk's legal consciousness, but also by their personal convictions of what is right and wrong.161 Most often Mittermaier portrays (and praises) jurors as mere representatives of the Volk's legal consciousness.162

Mittermaier's account does not specify whether personal convictions should trump the dictates of Volk consciousness or vice versa.163 His repeated emphasis on the role of the juror as enforcer of the Volk's consciousness, however, suggests that the Volk should have primacy over the individual.164 Mittermaier did not consider that this resolution of the conflict between individual conviction and Volk conviction could prove inconsistent with the protection of the individual's rights that he himself had identified as the soul of the Anglo-American jury. As we shall see below, Nazi ideology exploited this conflict between the metaphysical concept of Volk and the individual and resolved it in favor of the Volk with catastrophic consequences for the rights of the individual.

Mittermaier's taste for the conscientious study of foreign laws and practices and his theoretical inclinations drew him in opposite directions, with his Germanized Volk jury getting stuck in the middle. On the one hand, Mittermaier's vision of the jury relied on his groundbreaking historical, political and social analysis of the Anglo-

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160. Carl Joseph Anton Mittermaier, Das Volksgericht in Gestalt der Schwur- und Schöffengerichte, Sammlung gemeinverständlicher wissenschaftlicher Vorträge, Heft 18 (1866) [hereinafter Das Volksgericht].
161. Das Volksgericht, supra n. 160, at 40.
162. Id. at 17, 25, 27, 37, 39.
163. Instead of considering potential conflicts between the sense of justice of an individual juror and that of the Volk, Mittermaier pays particular attention to conflicts among political parties which, according to Mittermaier, lead to partisan jury selections and biased verdicts. Das Volksgericht, supra n. 160, at 7. On the significance of political prosecutions for jury reform efforts before 1848, see Haber, supra n. 32.
164. Das Volksgericht, supra n. 160, at 17, 25, 27, 37, 39.
American jury, which led him to conclude that the jury emerged as a means of settling sticky legal disputes over the course of British history.\textsuperscript{165}

On the other hand, Mittermaier reconceptualized this empirical account in terms of an ultimately non-empirical \textit{Volk} concept. The English, Scottish and North American\textsuperscript{166} \textit{Völker} emerged as quasi-mystical peoples\textsuperscript{167} with qualities such as a moral and public spirit,\textsuperscript{168} a moral sense,\textsuperscript{169} a sense of law and right,\textsuperscript{170} a religious sense,\textsuperscript{171} a political sense,\textsuperscript{172} a practical sense,\textsuperscript{173} love of truth,\textsuperscript{174} courage,\textsuperscript{175} openness,\textsuperscript{176} persistence in the defense of rights,\textsuperscript{177} respect for the law,\textsuperscript{178} moral sincerity,\textsuperscript{179} a fine sense of perception,\textsuperscript{180} a gift for quick absorption and dissection of facts,\textsuperscript{181} and goal-oriented thinking.\textsuperscript{182}

In the end, Mittermaier’s grasp of comparative criminal procedure far exceeded his philosophical curiosity. While he made significant contributions to the field of comparative law with his lengthy studies of foreign legal institutions, he jumped on the \textit{Volk} bandwagon of his time with little hesitation.\textsuperscript{183} The precise relation be-

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\item Die Gesetzegebung, supra n. 159, at 132, 220-21; \textit{Das Strafverfahren}, supra n. 159, at 12, 44.
\item It is unclear whether French- or German-Americans would qualify as members of the North American \textit{Volk} and acquired the following attributes during their cross-Atlantic voyage.
\item Distinctions between the three blurred at times.
\item \textit{Die Gesetzegebung}, supra n. 159, at 131.
\item Id. at 134; \textit{Das deutsche Strafverfahren}, supra n. 159, at 113.
\item \textit{Die Gesetzegebung}, supra n. 159, at 224.
\item \textit{Das Strafverfahren}, supra n. 159, at 39.
\item Id. at 46; \textit{Das deutsche Strafverfahren}, supra n. 159, at 98.
\item \textit{Das Strafverfahren}, supra n. 159, at 44; \textit{Das deutsche Strafverfahren}, supra n. 159, at 98.
\item \textit{Das Strafverfahren}, supra n. 159, at 38.
\item Id.
\item Id.
\item Id.
\item Id. at 3, 38.
\item Id. at 38, 41, 55.
\item Id. at 44.
\item Id.
\item Interestingly, Mittermaier had relatively little to say about the German national character. He attributed to the German \textit{Volk} a sense of justice that prevented German judges from intentionally misleading the jury and led German jurors to do a more thorough and careful deliberating job and better to resist appeals to their emotions than did French jurors. \textit{Das Volksgericht}, supra n. 160, at 14, 30; see also Gneist, supra n. 8, at 131, 138. Mittermaier did not stand alone in his low opinion of the French national character. See, e.g., Gneist, supra n. 8, at 131 (opining that the jury was inappropriate for France on account of the “romanische Nationalgeist” of the French). Beseler, however, limited his comments to a particular segment of the French population, see, e.g., Beseler, supra n. 8, at 289 (“in certain [French] classes, ostentation, debauchery, and generally godless, egotistical behavior have become rampant”), and specifically excluded the courts, which “stood pure and spotless,” id.
\item Mittermaier, however, showed far greater appreciation for the need to consider the jury in its historical, political, and social context than most of his compatri-
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tween the individual juror and the Volk concept simply did not raise
his philosophical eyebrows. Mittermaier clearly perceived himself as
a student of procedure first, and as a legal theorist a remote second.

With the introduction of the Volk concept, Mittermaier’s image of
the jury drifted off farther and farther into a land without reality
checks. In Mittermaier’s Volk universe, not only the individual juror
and the Volk coexist in perfect harmony. Mittermaier described the
entire Anglo-American jury trial as a thing of harmonious beauty. 184
The courtroom scene is permeated by a sense of fairness and justice
in an atmosphere reminiscent of a religious ceremony. No harsh
words cross the participants’ lips, 185 the prosecutor willingly assists
defendant and defense counsel, 186 both sides refrain from appeals to
the jurors non-legal sentiments, because such appeals would fail to
impress the jury, 187 and the quasi-mystical jurors are fair without
fail. 188

Mittermaier’s last writing on the jury thus expressed a yearning
for a perfectly harmonious criminal justice system revolving around
the ordering concept of the Volk’s consciousness, with every jury trial
a celebration of the wonders of the Volksgeist and an opportunity for
all participants, presumably including the defendant, to align their
personal convictions with the will of the metaphysical Volk. On its
trip from the British Isles, inhabited largely by “Englishmen with a
congenital incapacity for metaphysics,” 189 across the Channel and
into Germany, the Anglo-American jury had been remolded according
to a vision of national harmony reflective of the legal consciousness
of a unitary metaphysical Volk.

The pervasive emphasis on the metaphysical Volk during the de-
cades that proved decisive for the establishment of the jury in Ger-
many, i.e., roughly the first half of the nineteenth century, meant
more than a curious deformation of the Anglo-American model. It
also reflected an ambiguity about the democratic function of the jury

184. Mittermaier’s impression of harmonious cooperation might have been helped
by the fact that restrictions on the employment of defense counsel were not com-
pletely lifted until 1836. See Landsman, “The Rise of the Contentious Spirit: Adver-
sary Procedure in Eighteenth Century England,” 75 Cornell L. Rev. 497, 498 n. 3
(citing 6 & 7 Will. 4, ch. 114 (1836)).
185. Die Gesetzgebung, supra n. 159, at 79-80.
186. Id. at 185.
187. Id. at 86.
188. Except, once again, in political matters. Das Straforfahren, supra n. 159, at
46, 47 n.19; see supra n. 159.
189. George Bernard Shaw, The Perfect Wagnerite: A Commentary on the Niblung’s
Ring 60 (4th ed. 1967) (1898).
that would surface fairly soon after the jury had been adopted by the
German states after the Bürger revolution of 1848. The more ab-
stract the concept of Volk remained in the jury debate, the less real
was the prospect of actually having to turn over the administration of
criminal justice to members of the Pöbel whose very lack of Bildung
had enabled them to retain their naturally unencumbered access to
truth and justice.

As Günter Haber has argued with considerable force, the liberal
Bürger who pressed for criminal justice reform before 1848, though
they spoke often and with fervor of the Volk, may have been largely
concerned with shielding themselves against prosecutions for the
sorts of political press crimes committed exclusively by fellow mem-
ers of the ascending Bürgertum.190 Supporters of the jury as a rad-
ical democratic institution open to the poor and the uneducated were
few and far between and often ended up in external or internal
exile.191

The call for public jury trials at the time was not considered in-
consistent with a census of property and Bildung that excluded sig-
nificant portions of the public from participation in the
administration of criminal justice, whether as judge or as juror. At
least during the early decades of the jury debate, it was commonly
held that even access to the court room should be restricted. For in-
stance, the great proponent of public trials in Germany, P.J.A. Feuer-
bach, urged as late as 1825 that only respected German citizens of
property and status should be permitted to observe criminal trials.192

3. Positivist Interlude: From Mittermaier’s Volk to the Nazis’
Volk

Shortly after the adoption of the jury in the mid nineteenth cen-
tury, the jury debate moved from academic treatises and political
pamphlets to the legislative arena. The debate no longer paid much
attention to the jury’s role as mouthpiece of the metaphysical Volk,193
but focused on its political role as the protector of the rights of indi-
vidual Volk members. The Volk came to be defined as the totality of
citizens or as the electorate.194 The disappearance of the metaphysi-
cal Volk and its Geist from the debate about lay participation re-
flected a general trend toward positivism in German scholarship in
general, and in German legal thought in particular. Despite Savi-

190. Haber, supra n. 32.
191. Id. at 629-31.
192. Paul Johann Anselm Feuerbach, 2 Betrachtungen über die Öffentlichkeit und
Mündlichkeit der Gerechtigkeitspflege 219 (1825). On the census, see generally Ha-
ber, supra n. 32, at 609-27.
193. For criticisms of the notion of Volksgeist as a source of law at the turn of the
century, see Riezler, supra n. 115, at 156 n.45.
gny's earlier protestations, the creation of the German Empire in 1871 brought with it the codification of German law. German jurists began to see their job as interpreting and applying the codes, not as speculating on the emanations of the Volksgeist. Rudolf von Jhering, to this point a leading exponent of the historical school, famously announced in 1877 that Savigny had it all backwards and that the Volksgeist did not create law, but law the Volksgeist.

Stripped of its metaphysical pretensions, the jury's fate therefore turned on the question whether the judiciary had become sufficiently independent of state pressure to be entrusted with protecting the defendant's rights without the check of twelve laypeople who deliberated independently on the defendant's guilt or innocence. As distrust of the judiciary dissipated, so did support for the jury. The official justification given in 1974 for the most recent reduction of lay participation in German criminal courts reiterated an attitude that had begun to spread among scholars and politicians more than a century.

196. This is not to say that references to the Volksgeist or, more generally, metaphysical community concepts simply disappeared during this positivistic period in German thought. See generally Hans-Georg Gadamer, Wahrheit und Methode 185-228 (3d ed. 1972) (idealist debt of historicists, including Ranke, who continued to speak of states as "real spiritual beings" (real geistige Wesen)); see also Otto von Gierke, Das Wesen der menschlichen Verbände 26, 94 (1902); see also Otto von Gierke, Der (rote) Tag, no. 203-204, Aug. 30/Sept. 1, 1914. Though Gierke postulated the independent existence of the community as an entity above its constituents, he also stressed (what he considered to be the typically German) organic interconnection between the concept of community and its members and militated against viewing the community as an entity abstracted from its empirical basis. See, e.g., Otto Gierke, 2 Das deutsche Genossenschaftsrecht 906 (1873). The Nazis relied on Gierke early and often, see, e.g., Landau, "Römisches Recht und deutsches Gemeinrecht: Zur rechts-politischen Zielsetzung im nationalsozialistischen Parteiprogramm," in Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin 11, 20, 40 (Michael Stolleis & Dieter Simon eds. 1989). The Nazis' debt to his thought has yet to be explored in detail. See Stolleis, "Die Rechtsgeschichte im Nationalsozialismus: Umriss eines wissenschaftsgeschichtlichen Themas," in Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin 1, 7 n.28 (Michael Stolleis & Dieter Simon eds. 1989). Professor Stolleis has suggested that Gierke was popular with the Nazis because of his attacks on the BGB and Laband's positivism, but also found his Nazi critics who complained that he remained mired in nineteenth century individualism, id., precisely because he stressed the ontological interconnection of individual and community, as opposed to the ontological primacy of the community.


197. To be precise, Jhering's famous motto spoke of the Volk's sense of right, not the Volksgeist: "Nicht das Rechtsgefühl hat das Recht erzeugt, sondern das Recht das Rechtsgefühl." Rudolf von Jhering, 1 Der Zweck im Recht xvi (4th ed. 1904) (1877); see also Rudolf von Jhering, Über die Entstehung des Rechtsgefühles (Okko Behrends ed. 1986) (1884).
before: "the state is more trustworthy and the independence of the professional judiciary has been secured." 198

Soon after 1848, the collaborative model grew in significance. The collaborative model, of course, did not carve out an area of independent deliberation for the lay participants and therefore limited the lay participants' ability to check the bias of the professional judges. 199 Although lay judges in a mixed court could deliberate on questions of law and of fact under the guidance of the presiding professional judge on their panel, they had lost their authority to decide the defendant's guilt or innocence in secret and independent deliberations. As early as 1819, Mittermaier had commented on the strong influence professional judges could exert on their lay colleagues because of their superior legal expertise, experience, and status. 200

When the time of the collaborative court had finally come in 1924, only the parties left of center and the German Bar Association mourned the disappearance of the protection of individual rights provided by the jury. No glowing defenses of the jury as the manifestation of the will of the Volk appeared in the scholarly journals. 201 On the contrary, legal academics shed few if any tears over the demise of an institution many considered an anachronism from the heady days of 1848 when judges appeared as the crown's puppets. In sharp contrast to the feverish publishing activity during the first half of the nineteenth activity, only one notable scholarly work on the jury appeared during the Weimar Republic. Tellingly, it was a history of the German jury debate before 1848. 202

4. Metaphysical Revival: The Volk Court and the Healthy Sentiment of the Volk

The arrival of Nazi ideology ended the drought of theoretical treatises on the Volksgeist in general, and the jury's grounding in the metaphysical Volk in particular. Long before the "triumph" of Nazi doctrine, however, a diverse collection of writers had developed approaches to legal theory that assigned the community a more central role. This renewed attention to the community came in many differ-

198. Langbein, *Mixed Court*, supra n. 4, at 213 (citing Gesetzentwurf der Bundesregierung, Entwurf eines Ersten Gesetzes zur Reform des Strafverfahrensrechts (Drucksache 7/551) 54 (1974)).

199. See Hadding, supra n. 10, at 38-39. As Professor Langbein points out, as early as eighteenth century England, "the jury system served as [a] . . . safeguard against judicial excesses, since it divided the adjudicative power and allocated much of it away from the bench." Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources," 50 U. Chi. L. Rev. 1, 35 (1983).

200. Mittermaier, *Die Strafrechtspflege*, supra n. 159; see also Stenglein, 1 Verhandlungen des Zweiertausendzigsten Deutschen Juristentages 108, 110 (1892); Kern, supra n. 14, at 117; Hadding, supra n. 10, at 38.

201. See Schröder, supra n. 152, at 31-33 (Free Lawyers' opposition to jury).

202. See Schwinge, supra n. 8 (originally published in 1926).
ent shapes and sizes and, by the 1920s, covered the political spectrum from liberal Free Lawyers like Herrmann Kantorowicz to archconservatives like Carl Schmitt, who would become the leading ideologue of Nazi jurisprudence.

In the early decades of this century, when the all-encompassing new German codes, combined with a thoroughgoing legal positivism, threatened to reduce judges to "subsumption automatons" without regard for individual justice or community interests, Eugen Ehrlich and other Free Lawyers called attention to sources of law other than the statutory texts.\footnote{See, e.g., Eugen Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft (1903); Gnaeus Flavius (Herrmann Kantorowicz), Der Kampf um die Rechtswissenschaft (1906); Ernst Fuchs, Schreibjustiz und Richterkönigtum: Ein Mahnruf zur Schul- und Justizreform (1907). For English discussions of the Free Law movement, see W. Friedmann, Legal Theory 342-44 (5th ed. 1967); Herget & Wallace, supra n. 2; Foulkes, "On the German Free Law School (Freirechtsschule)," 55 Archiv für Rechts- und Sozialphilosophie 367, 383-91 (1969); Kantorowicz, "Some Rationalism About Realism," 43 Yale L.J. 1240, 1240-41 (1934).} Focusing on the indeterminacy of legal texts, particularly the so-called "gaps" in the law, the Free Lawyers argued that judges do and must rely on their sense of justice, which in turn should reflect the Volk's legal consciousness.\footnote{See, e.g., Ehrlich, supra n. 143, at 225, 235.}

By 1929, when Hermann Isay added some metaphysical (and somewhat irrationalist) spice to the Free Lawyers' message,\footnote{For our purposes, it is irrelevant whether Isay should be considered a Free Lawyer or not.} conservative anti-Weimar authors had realized the political potential of sociological jurisprudence. The Free Lawyers' emphasis on extra-statutory sources of law, originally designed to soften the codes' harsh edges in individual cases, now became a convenient avenue for conservative resistance to acts of the Weimar legislature.\footnote{See, e.g., 1924 Juristische Wochenschrift 90 (Eingabe des Vorstandes des Deutschen Richtervereins beim Reichsgericht an die Reichsregierung of Jan. 8, 1924); 3 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (1926) (proceedings at the 1926 Staatsrechtslehreretag with heated debates between, among others, Hans Kelsen and Erich Kaufmann about suprapositive law). On the appropriation of the Free Lawyers' emphasis on extra-statutory sources of law by the generally anti-parliamentarian Weimar courts, see Rückert, "Richtertum als Organ des Rechtsgeistes: Die Weimarer Erfüllung einer alten Versuchung," in Geisteswissenschaften zwischen Kaiserreich und Republik: Zur Entwicklung von Nationalökonomie, Rechtswissenschaft und Sozialwissenschaften im 20. Jahrhundert 287 (Knut Wolfgang Nörr, Bertram Scheffold & Friedrich Tenbruck eds. 1994).} Isay himself had a substantially more conservative bent than original Free Lawyers like Herrmann Kantorowicz, who started out as a Social Democrat and later turned to the Radical Democrats.\footnote{See Günther Roßmanith, Rechtsgefühl und Entscheidungsfindung: Hermann Isay (1873-1938), 50-52 (1975) (on Isay); Kleinheyer & Schröder, supra n. 87, at 146 (on Kantorowicz); see also Rückert, supra n. 206, at 272 n.17 (other conservative supporters of the Free Law Movement).} Isay postulated that the judge personified the community's sense of right which, in sublimated form, influenced judicial decisions through the judge's
sense of right. Needless to say, Isay did not object to the disappearance of the jury which he must have seen as superfluous given his view of the judge’s ability to divine and manifest the community’s sense of right.

Although Isay spoke of the community’s sense of right, he stopped well short of the mysticization of the Volk community as an independent higher form of being that Carl Schmitt and many others made fashionable and intellectually acceptable years before 1933 and that the slew of Nazi writers on law and lay participation incessantly regurgitated and embellished after Hitler’s rise to power. Already in his *Verfassungslehre* of 1927, which only recently enjoyed its 7th reprint and continues to be considered by many as the leading work on German constitutional theory, Schmitt postulated the primacy of a metaphysical concept of community over actual persons. According to Schmitt, “the political unity of the existing Volk” constitutes the operative entity in a constitutional democracy because this unity “has a higher and elevated, more intensive kind of being than a group of people that somehow lives together.” A government therefore derived its legitimacy not from representing the actual members of the Volk, but the Volk as a political unity.

After 1933, Nazi ideology came to exploit this metaphysical Volk concept as a foundation of lay participation in the criminal justice system in two ways. First, it gave content to the otherwise empty concept of the Volk’s legal consciousness, which was renamed gesundes Volksempfinden (healthy sentiment of the Volk). Second, it maintained the appearance of close contact with the Volk’s legal consciousness by retaining one very visible lay court, the infamous Volksgerichtshof, which also came to signify the complete and utter triumph of the jury as mouthpiece of the metaphysical Volk over the

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208. Hermann Isay, *Rechtsnorm und Entscheidung* 85-86, 115-16 (1929). Despite the obvious similarities between Savigny’s and Isay’s view of the judge’s role, Isay distanced himself from the historical school’s Volksgeist theory. Id. at 113.

209. For a detailed discussion of the enormous popularity of this “new” concept of Volk during the Weimar period, see Lepsius, supra n. 194, at 13-32.

210. Nazi authors in fact almost universally ignored Isay’s work. See Roßmanith, supra n. 207, at 102. The Nazis stripped Isay, who was Jewish, of his notary’s office in 1933 and of his professoriate a year later. Id. at 17. Abandoned by his former colleagues in practice and scholarship, Isay died in 1938. Id. at 18.


212. Id. at 212, 235, 262.

213. On lay participation during the Third Reich, see generally Ulrike Benz, *Zur Rolle der Laienrichter im Strafprozeß* 56-59 (1982).

214. For a discussion of the relation between the notion of gesundes Volksempfinden and the Volksgeist concept of the historical school, see Rückert, supra n. 102; Gernhuber, “Das völkische Recht: Ein Beitrag zur Rechtstheorie des Nationalsozialismus,” in Tübinger Festschrift für E. Kern 161, 168 (1968) (remarking that medical terminology appeared in the codification dispute between Thibaut and Savigny); see also Savigny, supra n. 97, at 31-32 (speaking of health and disease of the Volk).
jury as protector of the individual Volks member against an overbearing state.

This section first highlights the dominant role the metaphysical Volks concept played in Nazi legal ideology and particularly in the Nazi view of lay participation in the criminal courts. It then demonstrates how Nazi ideology cut any ties that might have remained between the metaphysical concept of Volks and actual persons216 and instead installed Adolf Hitler as the ultimate interpreter of the Volks’s will, with obvious catastrophic consequences for the rights of those who, empirically speaking, constituted the Volks. Finally, we turn our attention to the Volksgerichtshof, the Volk Court, the only remaining lay trial court after 1939, as the most chilling illustration of the Nazis’ perversion of the idea of Volks participation in legal proceedings.

We need not detain ourselves with an exhaustive study of the place of the Volks in Nazi legal ideology. There is no doubt that Nazi legal doctrine in general, and criminal law ideology in particular, revolved around the concept of Volks as a mystical entity distinct from the populace.217 The following sample of slogans taken from various Nazi sources, including court opinions, will suffice.218 Beginning in

216. This is not to say that the Nazis did not also do everything to pervert the empirical notion of Volks by excluding those Germans whom they considered undesirable. As an example, consider the amendment to section 1 of the German Civil Code [Bürgerliches Gesetzbuch] proposed by Karl Larenz in 1935: “Law comrade is only who is Volks comrade: Volks comrade is who is of German blood. (Rechtsgenosse ist nur, wer Volksgenosse ist: Volksgenosse ist, wer deutschen Blutes ist.)” Larenz, “Rechtsperson und subjektives Recht: Zur Wandlung der Rechtsgrundbegriffe,” in Grundfragen der neuen Rechtswissenschaft 225, 241 (Karl Larenz ed. 1935) (emphasis in original). In other words, the law did not protect any one the Nazis did not consider of German blood, including most prominently all Jews. See Parteiprogramm der NSDAP, at § 4 (“Siedlungsbürger kann nur sein, wer Volksgenosse kann, Volksgenosse kann nur sein, wer deutschen Blutes ist, ohne Rücksicht auf Konfession. Kein Jude kann daher Volksgenosse sein.”); Reichsbürgergesetz of Sept. 15, 1935 (RGBI 1935 I 1146); Erste Verordnung zum Reichsbürgergesetz, Nov. 14, 1935, §§ 1, 4 (RGBI 1935 I 1333).

217. It is worth noting at this point that Nazi Volks ideology shaped German law not only, or perhaps even primarily, through legislative intervention. Professor Bernd Rüthers has demonstrated how, in private law, the Nazis managed to retain tenets of procedural and substantive law, while, at the same time, completely overhauling the legal system according to their goals. Although they took a more direct approach in criminal law by repeatedly expanding its scope, increasing the severity of criminal sanctions, and limiting the rights of criminal defendants, the draft of a Nazi penal code never became law because Hitler viewed it as a potential limitation on his discretion. See Bernd Rüthers, Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus 105 (3rd ed. 1988) [hereinafter Die unbegrenzte Auslegung].

218. The following discussion will draw heavily on the excellent collection of Third Reich materials accumulated by Professor Rüthers in his two probing studies of Nazi legal ideology. Bernd Rüthers, Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich (2d ed. 1989); Rüthers, Die unbegrenzte Auslegung, supra n. 217. The presentation of barebones slogans is particularly suited to a discussion of Nazi ideology which revolved in simple phrases of mystical persuasive force. For specific examples of the use of the concept of healthy sentiment of the Volks, see Rückert, supra n. 102, at 214-95.
1926, the later Reichsrechtsführer, Hans Frank, repeatedly stressed that "whatever benefits the Volk is law; whatever harms the Volk is illegal."²¹⁹ The later president of the Volksgerichtshof, Roland Freisler, was fond of proclaiming that "just is whatever pleases the German Volk."²²⁰ The Oberlandesgericht (State Court of Appeals) Jena declared in a 1938 decision that "the purpose of law is maintaining the purity and the existence of, as well as protecting and advancing, the German Volk."²²¹

Before we consider the place of individual rights in Nazi dogma, it should be noted that many Nazi Volk enthusiasts were fond of stressing their roots in the Volksgeist theories of Hegel and Savigny.²²² This obviously does not make Nazi facilitators of Hegel or Savigny.²²³ Neither Hegel nor Savigny set out to establish the primacy of the community over its members. In Hegel's universe, the Volk and the individual ultimately stand on equal footing in the sense that they both are but manifestations of Geist.²²⁴ The Nazis' story began and ended with the German Volksgeist. Hegel and Savigny spoke not only of the Volksgeist, but also of the more fundamental Weltgeist or Menschengeist, respectively.²²⁵

²¹⁹. "Alles, was dem Volk nützt, ist Recht; alles, was ihm schadet, ist unrecht." Frank in a 1926 speech to lawyers in Munich (cited, with other sources, in Rüthers, Die unbegrenzte Auslegung, supra n. 217, at 119 n.27).


²²¹. "Zweck des Rechts ist Reinerhaltung, Erhaltung, Schutz und Förderung des deutschen Volkes." For other examples, see Rüthers, Die unbegrenzte Auslegung, supra n. 217, at 146, 168, 180, 181, 218, 223; Rüthers, Entartetes Recht, supra n. 218, at 32.

²²². See Rüthers, Die unbegrenzte Auslegung, supra n. 217, at 126; see also id. at 278-81, 304-07; Rüthers, Entartetes Recht, supra n. 218, at 78-83; Rottleuthner, "Die Substantialisierung des Formrechts: Zur Rolle des Neuhegelianismus in der deutschen Jurisprudenz," in Aktualität und Folgen der Philosophie Hegels 211 (O. Negt ed. 1970); Rückert, supra n. 102; see also Gernhuber, supra n. 215, at 174-76 (prevalence and historical roots of Nazi theories of psychic reality of the Volksgeist), 183-87 (neo-Hegelian strand of Nazi scholarship, especially Karl Larenz). For general presentations of Nazi Volksgeist theory, see Larenz, "Volksgeist und Recht: Zur Revision der Rechtsanschauung der historischen Schule," 1 Zeitschrift für deutsche Kulturphilosophie 40 (1934/35); Luetgebrune, "Volksgeist und neues Recht," 1 Zeitschrift für die Akademie für Deutsches Recht 19 (1934).


²²⁴. For a discussion of the place of the individual in Hegel's "communitarianism" from the perspective of punishment theory, see Dubber, supra n. 132, at 1601-21.

²²⁵. See supra text accompanying n. 120 & n. 127.
It is not necessary to discuss all the ways in which Nazi ideology mistreated Hegel and Savigny. For one thing, only a few Nazi theorists—Karl Larenz might come to mind—may actually have believed that their work in some sense followed Hegel or Savigny. At any rate, although Hegel and Savigny shared a somewhat anti-democratic skepticism of popular opinion, they can hardly be faulted for not having foreseen that the Nazis would a century later exploit the potential conflict between the metaphysical Volk and the Volk members by extinguishing the rights and lives of the latter in the name of the former.

Nazi legal ideology and practice manipulated the Volk concept in two ways. First, it sacrificed individual rights at the altar of the mystical Volk. Second, it equated the will of the Volk with that of Adolf Hitler. Much of Nazi legal writing concerned itself with erasing the achievements of the Enlightenment and of German liberalism by inventing an all-encompassing and all-powerful Volk concept that swallowed the individual whole. The individual was first and foremost a member of the Volk community and as such did not possess any individual rights at all.

The ultimate identity of the Führer and the Volk as sources of Nazi law is well documented. Nazi legal ideology declared the program of the NSDAP, and more specifically, Hitler’s predilections, the supreme source of law which dominated all other sources of law and eventually was said to reveal the emanations of the much mystified Volksgeist. As one commentator put it in 1936: “the National Socialist worldview has come to guide the Volk’s sentiment (Volksempfinden).” The banner adorning the German Lawyers’ Meeting (Deutscher Juristentag) of 1936 loudly proclaimed that “the will of the Führer is the law of the Volk.”

As the Nazis separated the Volk concept from its empirical roots and filled it with their political goals, so the distinction

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226. On Larenz’ Hegelian ambitions, see Jakobs, supra n. 146.
227. See Rüthers, Die unbegrenzte Auslegung, supra n. 218, at 340; Rüthers, Entartetes Recht, supra n. 218, at 38, 43; Duquesne, supra n. 223, at 226 (“l’individu n’existe que comme cellule d’une communauté populaire en laquelle il est absorbé”).
228. Rüthers, Entartetes Recht, supra n. 218, at 28 & n.39; Rüthers, Die unbegrenzte Auslegung, supra n. 217, at 127-32; Gernhuber, supra n. 214, at 178-83.
231. Rüthers, Entartetes Recht, supra n. 218, at 48; see also Gernhuber, supra n. 215, at 187 (beginning in 1937, judges swore personal oath of allegiance to Hitler).
232. Cf. Rückert, supra n. 102, at 224 (surveys not a means of determining the healthy sentiment of the Volk); see also Brimo, supra n. 223, at 163-66.
233. It should be noted that a number of Nazi ideologues, Carl Schmitt and Karl Larenz in particular, prided themselves on replacing empty abstract concepts with so-called “concrete” concepts. These concepts, however, did not derive their concreteness
between the rights of the individual and the interests of the Volk evaporated. With the Volk the operative concept in law, the potential conflict between the Volk and the individual was resolved by being declared the reactionary remnant of an individualistic liberal philosophy. The judge no longer was to respect the rights of the individual litigant, but to ensure that no gap appeared between the Volk and "its law." The individual simply no longer possessed any rights against the Nazi state, which represented the will of the Volk. "You are nothing, your Volk is everything."

Although Volk hysteria engulfed all fields of the law, it could, and did, do the worst damage in the area of criminal law. In June 1935 section 2 of the Penal Code was amended to read as follows: "That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the fundamental principle of a penal statute and the healthy sentiment of the Volk." That same year, the Law Bureau of the Nazi party announced that "National Socialist criminal law must be based on the duty of loyalty to the Volk . . ." In 1938, Freisler revealed that the proposed new Nazi Penal Code was to begin with an announcement of the fundamental principle of Nazi criminal law: "The healthy sentiment of the Volk as to legality and illegality [Recht und Unrecht] determines content and application of the penal laws."

from an empirical basis but from what was cast as a neo-Hegelian belief in the ontological primacy of concepts. Rüthers, Entartetes Recht, supra n. 218, at 78-84. Nazi legal ideology therefore retained the concepts of traditional legal theory and greatly amplified their significance by equipping them with the power to generate law without reference to legislation.

234. Rüthers, Entartetes Recht, supra n. 218, at 38.
235. See Karl Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie 33 (1934).
236. Rüthers, Entartetes Recht, supra n. 218, at 43.
237. See Heinrich Lange, Vom alten zum neuen Schuldrecht (1934); Lange, "Gemarksklauseln und neues Recht," 1933 Juristische Wochenschrift 2858.
238. See Rüthers, Die unbegrenzte Auslegung, supra n. 217; Rüthers, Entartetes Recht, supra n. 218. The Volk concept not only dominated the law but flooded the German language. As one philologist remarked about the Nazi period, "Volk is now used in speaking and writing as frequently as salt is used in eating, one adds a pinch of Volk to everything." Victor Klemperer, LTI (Lingua Tertii Imperii): Notizbuch eines Philologen 36 (1947).
239. Gesetz zur Änderung des Strafgesetzbuches of June 28, 1935 (1935 RGBI I 839). In addition to this general principle of statutory interpretation, three crime definitions specifically referred to the healthy sentiment of the Volk. See StGB §§ 240, 253, 330. For similar legislative and judicial invocations of the healthy sentiment of the German Volk, see Rückert, supra n. 102, at 216-19; see also Gesetze des NS-Staates: Dokumente eines Unrechtsystems 95, 103-05 (Uwe Brodersen ed. 2d ed. 1982); Sonnen, "Straferhebbarkeit—Unrechtsurteile als Regel oder Ausnahme?", in Strafjustiz und Polizei im Dritten Reich 41 (Udo Reifner & Bernd-Rüdiger Sonnen eds. 1984).
The *Volk* fixation of Nazi criminal law manifested itself in a decided turn toward extreme incapacitationism and an endorsement of retroactive penal provisions. The new goal of criminal law was announced to be the protection of the *Volk*.\(^{242}\) As early as 1934, a leading legal periodical published a guideline issued by the justice ministry of Thuringia which summarized the annulment of more than a century of criminal law reform: “Once: no punishment without law! Now: no crime without punishment.”\(^{243}\)

Lay participation as a direct link between the healthy sentiment of the German *Volk* and the criminal law assumed a prominent place in Nazi ideology.\(^{244}\) Interestingly, the lay courts briefly formed the battle ground for a struggle between the *Volk* principle and another tenet of National Socialism, the so-called *Führer* principle.\(^{245}\) In a nutshell, the *Führer* principle idolized Hitler as the single minded and decisive decisionmaker who leads the German *Volk* to a bright future free of democratic quibbling.\(^{246}\) In the early years of the Third Reich, some commentators lobbied for the application of the *Führer* principle to the criminal court system. According to these writers, the *Führer* principle required that the professional judge must assume a dominant role in trials with lay participants. At least in academic circles, if not in practice,\(^{247}\) this view appears to have been rejected as incompatible with the important function lay judges and jurors played as living proof of the *Volk* roots of the Nazi criminal justice system.\(^{248}\)

This is not to say of course that Hitler, and therefore Nazi ideology, had any interest in permitting lay participants to influence the outcome of criminal proceedings. Hitler thought very little of the legal system and even less of lawyers.\(^{249}\) The system was slow and, even after Nazi dogma had permeated it thoroughly, always

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244. See supra text accompanying nn. 67-69.
245. See Kern, supra n. 14, at 253; Müller, “Das Strafprozeßrecht des Dritten Reiches,” in *Strafjustiz und Polizei im Dritten Reich* 59, 63-64 (Udo Reifner & Bernd-Rüdiger Sonnen eds. 1984).
246. In the final analysis, the *Führer* principle and the *Volk* principle are of course indistinguishable, as the *Führer* becomes equated with the *Volk*. See supra text accompanying nn. 220-23; see also Brimo, supra n. 223, at 166-67.
247. See Müller, *Strafprozeßrecht*, supra n. 245, at 63-64; see also infra text accompanying nn. 259-62.
248. See, e.g., Curt Rothenberger, *Der deutsche Richter* 42 (1943) (lay participation is important “because the most important source of law is the healthy sentiment of the *Volk*”); cf. id. at 119-20 (discussing Nazi officials’ important role in selecting lay participants); see generally Kern, supra n. 14, at 255-60.
threatened to reach results inconsistent with Hitler’s wishes. To
Hitler, lay judges were only another source of uncertainty and
retardation.\footnote{250}

In practice, the \textit{Volk} judges therefore mainly served to legitimize
a thoroughly totalitarian criminal court system. This function be-
came particularly evident after the abolition of all lay trial courts on
the first day of World War II, with one significant exception: the in-
famous \textit{Volksgerichtshof} or \textit{Volk} Court.

The \textit{Volk} Court was established in 1934\footnote{251} following the
embarrassingly meager results of the celebrated \textit{Reichstag} fire trial
which did not, as the Nazis had hoped, implicate the Communist
Party in any way.\footnote{252} The \textit{Volk} Court assumed the jurisdic-
tion of the Supreme Court (Reichsgericht) over criminal matters of the first
instance.\footnote{253} In effect it became the court of first and last instance
for political crimes, particularly high treason.\footnote{254} Unlike the panels
of the Supreme Court, which consisted of five professional judges, the
panels of the \textit{Volk} Court included two professional and three lay
judges.\footnote{255} Although the Court floundered during the first years of its
existence as doubts about its jurisdiction remained, it continuously
grew in importance until it reached its point of highest visibility
during the trial of those allegedly connected with the assassination
attempt on Hitler of July 20, 1944. In 1936, the Court was converted
from a special to a regular court\footnote{256} and its judges were entitled to
wear the red robes previously reserved for judges of the Supreme
Court.\footnote{257} The number of professional judges on the Court rose from
twelve in 1934 to thirty-seven in 1945 in proportion to increases in
the Court’s jurisdiction and importance.\footnote{258} The number of lay judges
on the Court also skyrocketed from nineteen in 1934 to 173 in
1944.\footnote{259}

The background of the \textit{Volk} Court’s lay judges most dramatically
exposes the Nazi vision of \textit{Volk} participation in the criminal courts.

\footnote{250. See Müller, \textit{Strafprozeßrecht}, supra n. 245, at 64 (discussing Nazis’ discomfort
with lay participation); Hadding, supra n. 10, at 105.}

\footnote{251. Gesetz zur Änderung von Vorschriften des Strafrechts und des
Strafverfahrens of Apr. 24, 1934 (RGBI I 341).}

\footnote{252. On the trial, see Wagner, supra n. 72, at 13-16.}

\footnote{253. Law of Apr. 24, 1934, supra n. 251, arts. III, IX, XII. For tables summarizing
the Court’s jurisdiction in 1942, as well as the Court’s activities until 1945, see H.W.
Koch, \textit{In the Name of the Volk: Political Justice in Hitler’s Germany} 128-32 (1989).
}

\footnote{254. See Benz, supra n. 214, at 58.}

\footnote{255. Wagner, supra n. 72, at 19. Unlike German lay judges today, see supra text
accompanying n. 82; Kern, supra n. 14, at 118, the \textit{Volk} judges of the \textit{Volksgerichtshof}
were not denied access to the \textit{dossier}. See Wagner, supra n. 72, at 25 n.61.}

\footnote{256. Wagner, supra n. 72, at 22; see Gesetz über den Volksgerichtshof und über die
fünfundzwanzigste Änderung des Besoldungsgesetzes of Apr. 18, 1936 (RGBI I 369).
}

\footnote{257. Wagner, supra n. 72, at 21; see Erlaß des Führers und Reichskanzlers über
die Amtstracht in der Reichsjustizverwaltung of June 19, 1936 (RGBI I 503).
}

\footnote{258. Wagner, supra n. 72, at 22-23.}

\footnote{259. Id. at 23-24.}
Lay judges were selected\(^{260}\) to permit the Court to fulfill its function, "to annihilate the enemies of National Socialism."\(^{261}\) Among the Court's forty-three lay judges in 1935 were seventeen army officers, three high-level police officers, thirteen SA and SS leaders, and ten Nazi functionaries, civil servants, and others.\(^{262}\) 

Volk judges in 1944 included forty army officers, thirteen high-level police officers, eighty-two functionaries of the SA, SS, National Socialist Drivers' Corps, and Hitler Youth, ten leaders in the Work Corps (Reichsarbeitsdienst), as well as twenty-eight others, mostly political functionaries, Hitler Youth leaders and civil servants.\(^{263}\)

Roland Freisler's Volk Court, according to Nazi ideology the supreme judicial expression and enforcement mechanism of the healthy sentiment of the German Volk, demonstrated most graphically how a totalitarian ideology can occupy the vacuous notion of Volk consciousness whose attributes are of course wholly non-verifiable.\(^{264}\) In the later years of the Third Reich, a typical panel consisted of Freisler, another lawyer, and two SA men.\(^{265}\) No one can forget the image of Freisler, hurling insults at hollow faced defendants forced to hold up their ill-fitting and beltless pants as he presided over the proceedings in front of a huge Swastika flag, a flag that represented Nazi ideology which in turn defined the will of the Volk. The travesty was complete: "In the name of the German Volk," thousands of its members were destroyed.\(^{266}\) Individual rights meant nothing, the Volk everything.

Appointed by Hitler and reduced to extras by Freisler's self-aggrandizing wrath,\(^{267}\) the lay judges of the Volk Court represented the Nazi exploitation of the metaphysical Volk concept. Their mere presence fulfilled their only function in the Nazi criminal law system. The lay judges represented the actual members of the Volk whose

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\(^{260}\) Hitler appointed all lay judges upon recommendation by the minister of justice. According to Freisler, this process selected those lay judges who "like no others are qualified to base the administration of law on the Volk itself." Freisler, "Die lebenswichtigen Aufgaben des Volksgerichtshofs," 1936 Deutsche Justiz 656 (quoted in Wagner, supra n. 72, at 25 n.61).

\(^{261}\) Statement of Heinrich Parisius, senior prosecutor before the Court, in 1939 (quoted in Benedicta Maria Kempner, Priester vor Hitlers Tribunalen 444 (1966)).

\(^{262}\) Wagner, supra n. 72, at 25.

\(^{263}\) Id. at 25.

\(^{264}\) Freisler assumed the presidency of the Volk Court in August 1942. Wagner, supra n. 72, at 24.

\(^{265}\) Der Nationalsozialismus: Dokumente 1933-1945, at 161 (Walter Hofer ed. 1957); see Vierte Verordnung zur Vereinfachung der Strafverfolgung of Dec. 13, 1944 (RGBl I 339).

\(^{266}\) See "Im Namen des Deutschen Volkes!": Todesurteile des Volksgerichtshofs (Heinz Millermeier ed. 1980). Since 1934, German courts were required to announce their decisions "in the name of the German Volk." Erstes Gesetz zur Uberleitung der Rechtspflege auf das Reich of Feb. 18, 1934, art. 1 (RGBl I 91) ("Sämtliche Gerichte sprechen Recht im Namen des Deutschen Volkes.").

\(^{267}\) See Müller, Strafprozeßrecht, supra n. 245, at 63-64.
legal convictions in fact no longer bore any relevance to the legal consciousness of the Volk. The lay court trial had become a terrible charade, in which the professional and lay judges with much solemn seriousness paid homage to the emanations of the Volk will through its mouthpiece Adolf Hitler.

In the Volk Court, the metaphysical and empirical notions of Volk had reached their most extreme point of contradiction. And the Nazis resolved the contradiction in favor of a radically anti-empirical Volk concept whose attributes were defined solely by their totalitarian ideology. Lay courts, now a mere shadow of a symbol, helped enforce the metaphysical Volk’s will at the expense of the rights of the members of the Volk.268

IV. Conclusion

We have followed the rise and demise of lay participation in German courts and explored the role of two versions of the Volk concept in the history of the German lay courts. The histories of German lay participation and of the Volk concept are connected because lay participation in criminal trials emerged as a political demand during a period in the nineteenth century when the Volk became an important operative concept in German thought.

Today, the Volk concept continues to play a less central, though still important, role in German law. It is no accident that the German Code of Criminal Procedure still requires that the judgment of the court be announced “in the name of the Volk,”269—though no longer in the name of the German Volk.270 Shortly after the war, explicit references to the healthy sentiment of the Volk were either excised from the codes or rephrased. West German courts, however, continued to apply the Nazi standard of the Volk’s healthy sentiment—though in its “true content”—until the revisions were implemented.271 Today, references to the Volk’s sense of right (Rechtsgefühl, Rechtsempfinden) or legal consciousness (Rechts-

268. See also Rückert, supra n. 102, at 246 (“In the end, the Volk lost its parliament and, in exchange, received Volk law.”).

269. StPO § 268(1).

270. See supra n. 266.

bewußtsein) have replaced invocations of the Volk’s healthy sentiment.\textsuperscript{272} German lawyers, judges, and politicians alike do not hesitate to invoke the “sense of decency of all those who think fairly and justly” (Anstandsgefühl aller billig und gerecht Denkenden) or the “community’s general conceptions of justice” (allgemeine Gerechtigkeitsvorstellungen der Gemeinschaft).\textsuperscript{273} As one American commentator on German constitutional law put it recently and carefully, “the authority of the community, as represented by the state, finds a more congenial abode in German than in American constitutionalism.”\textsuperscript{274}

Surely, the Nazis’ use of a disembodied community concept to eradicate the rights of that community’s members does not demonstrate that community concepts have no place in the law. The Nazis’ exploitation of one notion of community for the purpose of destroying

\textsuperscript{272} See, e.g., BGHSt 35, 270, 277 (May 5, 1988) (interpreting the reference to “Rechtempfinden des Volkes” in § 240 StGB, which had replaced the reference to “gesundes Volksempfinden” in the Nazi version of § 240, see supra n. 239; Gernhuber, supra n. 215, at 200. Gernhuber points out that, while the Nazis’ slogan of the healthy sentiment of the Volk has become the target of much ridicule, German jurists once again speak of the Volk’s sense of right without explaining, or even considering, how one determines just what the Volk senses about a specific legal issue. Id. at 199. What Gernhuber calls the German jurists’ naïveté on the question of access to and definition of the Volk’s sense of right, id., may have been understandable during the early nineteenth century, when the Volk concept was in its infancy and its different variants were just beginning to emerge. After the Nazis’ exploitation of the Volk concept, however, one can hardly claim naïveté on the issue.


\textsuperscript{274} Kammers, “German Constitutionalism: A Prolegomenon,” 40 Emory L.J. 837, 867 (1991). The community, particularly its “general legal consciousness,” figured prominently in the recent abortion decision of the German Constitutional Court, though not as a source of law. BVerfGE 88, 203 (May 28, 1993). The court stressed that laws designed to protect a constitutional right, here the fetus’s right to life, should seek to strengthen and support relevant normative conceptions alive in the Volk and to create a legal consciousness respectful of the right in question. Id. at 253; see also id. at 261, 319 (state’s constitutional duty to maintain and strengthen the “general consciousness” regarding the fetus’s right to life); 272, 278 (“general legal consciousness” must continue to appreciate constitutional status of fetus’s right to life); cf. 284, 320, 321 (“the legal order” distinguishes between legal and illegal acts). The court also announced that only the criminal prohibition of abortion would generate the appropriate “general legal consciousness,” because only the criminal law could deal with conduct which, like abortion, is “particularly socially detrimental [sozial-schädlich] and unbearable for the ordered coexistence of human beings.” Id. at 258. The court acknowledged the ubiquity of abortion and the difference between the “legal consciousness” of former East Germans—who had grown accustomed to a liberal abortion policy—and that of former West Germans. Id. at 264-65. The first dissent also pointed out that prosecutions for abortion had virtually disappeared and that three recent polls had shown two thirds of (West?) Germans to consider abortion permissible. Id. at 354. Nonetheless, the court did not address the question whether the criminalization of abortion was no longer in accord with the “general legal consciousness” and, if not, whether such a change in the “general legal consciousness” would affect the state’s duties to protect the fetus’s right to life and to balance that right against the woman’s right to privacy.
the dignity of individuals, however, does suggest that anyone invoking the community's norms or attitudes think long and hard about, and make explicit, what concept of community she employs, what sort of community she has mind, and how she obtained access to that community's norms or attitudes. To the extent it considers the difficulty of defining community norms, Anglo-American scholarship tends to view the problem of invoking the authority of the community as either paying too much attention to the majority's position by confusing the community's position on a given issue with the majority's position, or paying too little attention to the majority's position by confusing the community's position with one's own position—especially if the person invoking the community is a judge. The role of the Volks concept in the German jury debate, however, illustrates another problem that may arise if one attempts to determine what "the community" really wants: confusing the community's position with the "position" of a disembodied concept representing that community.\footnote{275}

Given the less metaphysical bent of Anglo-American scholarship, this latter confusion is less likely to occur than are the other two. At any rate, to invoke such a disembodied community concept in an important sense no longer means to refer to the community at all. In that case, the concept "community"—or some related concept such as "Volks" or "society"—takes on a significance of its own independent of a given community of persons and no longer can be said to represent that community (even assuming that there is some concept that can be said to "stand for," but not replace, a collection of persons). A theory that relies on such a concept, and on such a disembodied concept alone, therefore in an important sense no longer counts as a communitarian theory.

The mass demonstrations which eventually brought about the collapse of the East German communist regime illustrate the gaps that can arise between a metaphysical community concept and the actual community it is meant to represent. In theory, law and politics in the German Democratic Republic revolved around the Volks: the Volks Chamber (Volkskammer) passed laws applied by the Volks Judges (Volksrichter)\footnote{276} and enforced by the Volks Police (Volkspolizei).

\footnote{275} In his Verfassungskhre, Carl Schmitt took the primacy of the community a step further. Instead of the metaphysical concept of the Volks as political unity deriving its political significance from its representation of the actual people, it is the other way around entirely. Even an assembly of all members of the Volks could never do more than represent the political unity of the Volks. See Schmitt, supra n. 212, at 206.

\footnote{276} A particularly enthusiastic Volks judge named Otto Jürgens was recently convicted of perversion of justice and unjust imprisonment for his involvement in the so-called Waldheim cases. In 1950, more than 3400 defendants were convicted in the Saxonian town of Waldheim of Nazi and war crimes. Trials often lasted only a few minutes each. Most defendants were sentenced to substantial prison terms, thirty-two were sentenced to death, of whom twenty-four were executed. Staatsanwalt fordert fünf Jahre Haft im Leipziger Waldheim-Prozeß, Frankfurter Allgemeine Zeitung, Aug. 27, 1993; Albert Funk, Laut, aber milde, Frankfurter Allgemeine
polizei). Even the guards on East Germany's western border, who shot and killed hundreds of their fellow Volk members who had managed to survive the minefields and gun traps, were members of the Volk Army (Nationale Volksarmee).\textsuperscript{277} The demonstrators' now famous slogan of "We are the Volk!" ("Wir sind das Volk!") pointed out, however, that a legal and political system which, all in the name of the Volk, oppressed and jailed political opponents, spied on hundreds of thousands of citizens, and converted its borders into a death strip did not reflect the preferences of actual members of the Volk.\textsuperscript{278}

Although the Volk concept, in one form or another, retains considerable pull in contemporary German jurisprudence,\textsuperscript{279} lay participation no longer is seen as a necessary outlet for the will of the Volk. If one follows Savigny and Isay and sees professional judges as representing the community's sense of right in one way or another,\textsuperscript{280} the contributions of lay judges, who had been said to have a unique connection to the Volk's legal consciousness, become at best redundant. Stripped of their monopoly as mouthpieces of the Volk's legal consciousness, however, German lay judges have to derive their significance mainly from protecting the defendant's individual rights against the biased professional judge.

The fate of the German lay judges therefore turns largely on the need to keep an eye on professional judges. Without professional judges who favor the state and side with the prosecutor against the defendant, lay judges become superfluous. In 1974, the German government therefore could present the independence of the professional judiciary as a sufficient reason to reduce the influence of lay judges to the lowest level since 1848 (1798 in the former Rhine states).\textsuperscript{281}

Not all commentators join in the German government's declaration of judicial independence. While no one would doubt that German

\textsuperscript{277} On the popularity of the Volk concept in East Germany, see generally Herbert Bartholmes, \textit{Das Wort "Volk" im Sprachgebrauch des SED} (1964).

\textsuperscript{278} Marx, as a strict materialist, was wary of the Volk concept and certainly would have disapproved of a metaphysical Volk concept dislodged from its popular basis. See Bartholmes, supra n. 277, at 32.

\textsuperscript{279} The Volk concept assumes a central, and particularly troublesome, role in German immigration law. Under German immigration law, Eastern Europeans can obtain a German passport if they can prove themselves to be Volk Germans (Volksdeutsche). One is a Volk German if one had professed one's commitment to the German Volk by the time of the mass expatriation of German nationals from Eastern Europe at the end of the war. For an opinion with a particularly chilling tone reminiscent of Nazi opinions excluding large segments of the German population from the German Volk, see BVerwG, Judgment of Feb. 16, 1993 (G C 25/92 (Hamburg)), 1993 \textit{Neue Juristische Wochenschrift} 2129.

\textsuperscript{280} See supra texts accompanying nn. 148-51 & 208.

\textsuperscript{281} See Langbein, \textit{Mixed Court}, supra n. 4, at 213 (citing Gesetzesentwurf der Bundesregierung, Entwurf eines Ersten Gesetzes zur Reform des Strafverfahrensrechts (Drucksache 7/551) 54 (1974)).
judges no longer sit in fear of being fired, demoted, or delegated to the provinces for decisions unfavorable to the government, some have argued that judicial bias remains in the German criminal justice system. For example, it has been argued that the inquisitorial nature of the investigation and disposition of German criminal cases leads the judge to view herself as united with the prosecutor in their common investigatory pursuit. In particular, it has been suggested that the German judge’s customarily heavy reliance on the case file prepared by the prosecution, the dossier, leads her to overestimate the weight of the evidence against the defendant. \(^{282}\)

Nonetheless, given that the independence of the judiciary from the government has been officially recognized by the government and that non-lawyers are no longer said to enjoy special access privileges to the Volk’s sense of right, lay judges in Germany today are deprived of their two most important historical foundations. It therefore does not come as a surprise that the jurisdiction of the professional judge sitting alone continues to be expanded, that lay judges often play a negligible role in the everyday trial practice of the collaborative courts, and that several German scholars have recommended further limitations on lay participation, including the outright abolition of lay participation in German criminal courts.\(^{283}\)

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