

## LAW'S VIOLENCE AND THE BOUNDARY BETWEEN CORPORAL DISCIPLINE AND PHYSICAL ABUSE IN GERMAN SOUTH WEST AFRICA

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“Were the inhibition against violence perfect, law would be unnecessary; were it not capable of being overcome through social signals, law would not be possible.”<sup>1</sup>

People generally see law and violence as antagonistic.<sup>2</sup> In this view, law serves to minimize violence in society and is no more coercive than necessary. Violence is disruptive and by countering violence, law contributes to social order. Applications of force by agents of the law entail a necessary response to illegitimate violence.<sup>3</sup> This legal violence, then, is ultimately anti-violent, serving in the end to reduce the level of violence in society overall. In this respect, law has a negative relation to violence.

Robert Cover and others challenge this view, positing a positive or

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1. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1613 (1986).

2. I use the terms “violence,” “force,” and “coercion” to mean the application of physical force; it will be clear from context when these words are used otherwise. I employ this usage to distinguish the use of physical force from forms of suasion or coercion that lack physical force, such as discipline.

3. As used in this article, “law” does not just mean the law contained in legal codes, derived from custom, or established by precedent. Rather, a more expansive view of law is indicated: “When the state’s agents apply their understanding of law and bring to bear the specter and reality of force and violence that is the state’s, this is the *state’s law*.” THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* 6 (1996). Law in this view encompasses the actions taken in the expression and execution of law by everyone who administers law. For the problems in defining law see, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 1 (1994) (providing a comprehensive discussion of the function of the law); HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* 1 (A.H. Campbell ed., Octagon Books 1980) (discussing the philosophy of the law generally); and Laura Nader, *The Anthropological Study of Law*, in *LAW AND ANTHROPOLOGY* 3 (Peter Sack & Jonathan Aleck eds., 1992) (providing a discussion of the main themes about law that have concerned anthropologists).

generative relation between law and violence.<sup>4</sup> Cover argues that physical sanction ultimately underlies any legal system. “A legal world is built only to the extent that there are commitments that place bodies on the line.”<sup>5</sup> For Cover, if law were not embedded in a system that implements its, sometimes violent, commands, then it would not be law at all.<sup>6</sup>

This article explores another positive relationship between law and violence. Law does not merely respond to violence in an effort to diminish it but also determines and reflects what might be termed an economy of violence. Law plays a central role in defining what a society will recognize as violence and in allocating the ability to legitimately act in a violent manner.

This positive relationship between law and violence can be seen most readily in instances in which legitimate and illegitimate violence shade into one another, because then each partakes the most of the other. This article examines one such instance in detail. During German colonial rule over South West Africa (present day Namibia),<sup>7</sup> the contradictory tendencies in law’s relationship to violence played themselves out in the response of law and legal institutions to settlers’ violence against Africans. The physical abuse of Africans—usually workers—at the hands of settlers was a regular feature of the colony’s

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4. See Cover, *supra* note 1, at 1601, *passim* (“Legal interpretation takes place in a field of pain and death.”); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (“But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion.”); WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS 281, 283 (Peter Demetz ed., Edmund Jephcott trans., 1978) (“If, therefore, conclusions can be drawn from military violence, as being primordial and paradigmatic of all violence used for natural ends, there is inherent in all such violence a lawmaking character.”); Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in THE FATE OF LAW 209, 212 (Austin Sarat & Thomas R. Kearns eds., 1991) (“In our view, any theory of law must locate violence at the center of its concerns”).

5. Cover, *supra* note 1, at 1605.

6. See *id.* at 1613, 1617.

7. Throughout this article I refer to present-day Namibia as South West Africa or German Southwest Africa (a practice uncomfortably shared by Afrikaners with quasi-irredentist sentiments). My reason for this is simply to avoid confusion because my sources almost invariably use the name “South West Africa.” In places in which it is obvious that I am referring to either early Namibian nationalism or to present-day Namibia, I will use the word Namibia. Although I also use the word “native” without scare quotes throughout the article, they are always intended. “Natives” [*Eingeborenen*] or “Blacks” are the words that appear throughout the primary sources, and I use them only to paraphrase the attitudes and sentiments therein. Otherwise I use the term Africans or Namibians, which seems more appropriate in this case. When I am referring to a specific African people, I will use their tribal name, for example, “Herero” or “Nama.” Interestingly, most primary sources use the word “African” only to mean European settlers of Africa, but this usage is infrequent. Where the document uses the term “whites,” I use it as well. Otherwise, I attempt to substitute a more specific name such as “Germans” or “settlers.”

social landscape.<sup>8</sup> Legal institutions and colonial officials vacillated between treating this abuse as criminal assault and as an exercise of “the right to paternal discipline [*väterliches Züchtigungsrecht*].” Ultimately, colonial law accommodated settlers’ violent treatment of Africans by recognizing it as a type of extralegal yet legitimate violence.

This article is organized as follows. Part One sketches the way the article will approach the issue of law and violence. Part Two provides a very brief summary of the history of German colonial rule in South West Africa. Part Three discusses the status of the right of discipline in German law up to and during the colonial period. Part Four turns to the colonial situation itself, examining the colonial debate over the right to discipline in the context of settlers’ abuse of farm workers. Part Five follows this debate into the diamond mines discovered toward the end of the German colonial period and mined by African migrant workers under frequently abusive foremen.

## I. LAW AND VIOLENCE

Law is usually seen as opposed in spirit to violence generally, and the relation between the two is assumed to be negative. In this view, the state’s monopoly on legitimate violence renders society less violent overall.<sup>9</sup> This view accords with a part of the classical liberal tradition, which offers a myth of the state’s<sup>10</sup> origin from a state of nature. In the state of nature—at least after a pre-scarcity Edenic interlude—individuals preyed on one another. To secure life and property against each another, people “agreed” to subject themselves to the coercive practices of a state.<sup>11</sup> According to this founding myth, then, the state’s

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8. See, e.g., HELMUT BLEY, *SOUTH-WEST AFRICA UNDER GERMAN RULE 1894-1914*, at 266-67 (Hugh Ridley trans., 1971) (discussing the political, social, and economic systems of German South-West Africa); HORST DRECHSLER, *LET US DIE FIGHTING: THE STRUGGLE OF THE HERERO AND NAMA AGAINST GERMAN IMPERIALISM (1884-1915)*, at 234-37 (Bernd Zöllner trans., Zed Press 1980) (discussing the physical abuse used by Germans against the native population).

9. Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills eds., Oxford University Press 1946) (1919) (defining the state as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force*”).

10. Throughout this article I use “state” to mean the modern state under the rule of law.

11. For example, while explicitly rejecting social contract theory, John Stuart Mill derives state authority from the individual’s reciprocal obligation engendered by the protection offered by society. In return for this protection, an individual has a duty to “observe a certain line of conduct towards the rest.” *ON LIBERTY* 70 (David Spitz ed., 1975). Mill writes that this conduct includes not only one’s own behavior toward another, but also the obligation to support a policing function. See also, JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 32-33 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1690) (“For liberty is to be free from restraint and violence from others, which cannot be where there is not law; but freedom is not, as we are told: a liberty for every man to

monopoly on violence remedies the more violent individual predations in a state of nature.

Criminal law provides the paradigmatic example of the state's violence in this traditional view. Here, the state employs coercive measures against members of society who commit violence against other members.<sup>12</sup> Admittedly, very few would care to live in a society that did not police violence in this way—indeed, this policing function, in part, constitutes society itself. However, the liberal tradition only views such violence as a potential problem if it surpasses the minimum necessary for maintaining the negative space of individual liberty.<sup>13</sup> Kept at the level sufficient to maintain internal order and external defense, the state's violence seems unexceptionable.

The liberal description of the origin and extent of the state's coercive power in many respects parallels that of much more critical internalization theories. For example, in *The Civilizing Process*, Norbert Elias showed, through a discussion of the development of table manners, how outward directed violence gave way to internalized norms of behavior.<sup>14</sup> Social control became less a matter of direct coercion and more a matter of socialization.<sup>15</sup> Michel Foucault, of course, has described this process extensively, in his many descriptions of the process of social discipline. Foucault rejects the idea of enlightened progress in, for example, the punishment of crime, the treatment of the insane, and the liberation of sexuality.<sup>16</sup> Instead, he reinterprets what

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do what he lists . . . but a liberty to dispose and order as he lists his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.”).

12. Criminal law, of course, accomplishes far more than policing violence. See Stuart A. Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 L. & SOC. INQUIRY 857, 859 (1998) (providing an overview of the field of political criminology, which “focus[es] on the nature and the distribution of power as it shapes the social and political construction of crime and influences crime control policies”).

13. See, e.g., THE FEDERALIST NO. 28 (Alexander Hamilton) (justifying the state's use of force as a response “to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions”).

14. See NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* 1 (Edmund Jephcott trans., Urizen Books 1978) (1939) (discussing the relationship between violence and normative behavior).

15. *Id.* at 257 (“The transformation of interpersonal external compulsion into individual internal compulsion . . . leads to a situation in which many affective impulses cannot be lived out as spontaneously as before. The autonomous individual self-controls produced in this way in social life, such as ‘rational thought’ or the ‘moral conscience,’ now interpose themselves more sternly than ever before between spontaneous and emotional impulses, on the one hand, and the skeletal muscles, on the other, preventing the former with greater severity from directly determining the latter (i.e., action) without the permission of these control mechanism.”).

16. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 302 (Alan

most take to be progress as an ever-increasing articulation of internalized means of social control—the body’s saturation with discursive power structures.<sup>17</sup> The internalization of powers minimizes the need for authority to express itself through direct physical coercion.<sup>18</sup> While powerful and no doubt true, internalization theory often fails to account for not only the persistence, but also the increasing magnitude of outward expressions of violence.

Construing law’s violence as secondary to its discipline, however, obscures the ways in which violence and law are more intimately bound. The historian Alf Lüdtke points out “the simultaneity of the physically violent character of the ‘modern state’ and the symbolic presence of this violence—including within the forms of social reproduction.”<sup>19</sup> That is, violence has both a direct and indirect relation to law; both “hard” and “soft” violence characterize the modern state and its laws. So the development of law, like other forms of discipline, does not only entail an increase in the internalization of laws’ norms and a corresponding decrease in the physical expression or maintenance of the same through

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Sheridan trans., 1979) (exploring the history of punishment from early modern times to the 20th century); FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON I* (Richard Howard trans., 1965) (discussing the treatment of the insane); FOUCAULT, *THE HISTORY OF SEXUALITY I* (Robert Hurley trans., 1978) (discussing the discourse of sexuality). See also PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE 191-97* (Richard Nice trans., 1977) (describing how violence can be displaced in power structures by putatively universal cultural values).

17. See, e.g., FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 16, at 11 (“Hence, too, my main concern will be to locate the forms of power, the channels it takes, and the discourses it permeates in order to reach the most tenuous and individual modes of behavior, the paths that give it access to the rare or scarcely perceivable forms of desire, how it penetrates and controls everyday pleasure—all this entailing effects that may be those of refusal, blockage, and invalidation, but also incitement and intensification: in short, the ‘polymorphous techniques of power.’”).

18. See, e.g., FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 16, at 302 (“But, conversely, the carceral pyramid gives to the power to inflict legal punishment a context in which it appears to be free of all excess and all violence. In the subtle gradation of the apparatuses of discipline and of the successive ‘embeddings’ that they involve, the prison does not at all represent the unleashing of a different kind of power, but simply an additional degree in the intensity of a mechanism that has continued to operate since the earliest forms of legal punishment.”). For a discussion of Foucault’s concept of power in the context of legal scholarship, see Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721 (1996). Winter criticizes legal scholarship for either reifying power or reducing it to the ability to apply force. He describes Foucault’s conception of power as a corrective that “neither facilely subjectivizes power nor falsely elides agency.” *Id.* at 728. “For Foucault, socio-cultural construction is an all-pervasive process from which no one escapes and in which everyone participates. Power as such is neither a “thing” nor a quality, capacity, or possession of particular people. Rather, power is an emergent quality that can only take shape through the joint agency of all those who participate in a given set of social relations.” *Id.*

19. ALF LÜDTKE, *POLICE AND STATE IN PRUSSIA, 1815-1850* 8 (Peter Burgess trans., 1989) (discussing state domination in transition to industrial capitalism).

violence. Rather, the modern state under the rule of law also uses direct force to achieve its ends. Lütke's approach to law, like that of internalization theory, remains instrumental. He relates law to the "continuing necessity of extra-economic force for the safeguarding of the production process (and social reproduction) both demonstratively and in the abstract."<sup>20</sup>

Anne Marie Smith also notes internalization theory's inattention to violence, writing that "[a]lthough Foucault asserts that bio-power fully displaced sovereign power during the early modern period, we are now witnessing the deployment of new forms of brutal subtractive power in key points within complex Western societies."<sup>21</sup> Smith cites Foucault's "fail[ure] to give adequate attention to the presence of subtractive strategies within contemporary disciplinary regimes."<sup>22</sup> As a corrective to this gap in Foucauldian theory, Smith suggests "we should think instead in terms of hybrid formations [of power] in which subtractive modes—domination, exclusion, genocide and so on—are combined with productive modes—the organization of consent."<sup>23</sup>

A conception of law as fundamentally opposed to violence also characterizes critical treatments of colonial law. In her review of this field, Sally Engle Merry argues that colonial law had a dual nature.<sup>24</sup> On the one hand, colonial law had a disciplinary function, "reshap[ing] culture and consciousness," and advanced the material interests of colonizers, "serv[ing] to extract land from precolonial users and to create a wage labor force out of peasant and subsistence producers."<sup>25</sup> On the other hand, and to a lesser extent, law provided a way for the colonized to contest extractive colonial practices.<sup>26</sup> Merry adds, "law provided a way for the colonial state to restrain the more brutal aspects of settlers'

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20. *Id.* Also, for Lütke law's violence is atavistic in that we tend to associate its direct forms of compulsion with older social institutions and practices, while viewing its "soft" forms as modern. *Id.*

21. ANNA MARIE SMITH, *LACLAU & MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY* 163 (1998) (providing an overview and critique of the work of Laclau and Mouffe).

22. *Id.* See also Sarat & Kearns, *supra* note 4, at 266 ("So long as critical legal theory seeks only to expose the will and desire that inevitably are part of the interpretive task and rests content with deconstructing law's ideologies, we will be blind to the ways in which ideological oppression ultimately depends on law's monopoly of violence.").

23. SMITH, *supra* note 21, at 163.

24. Sally Engle Merry, *Law and Colonialism*, 25 *L. & SOC'Y REV.* 889, 891 (1991) (discussing the role of law in the colonizing process).

25. *Id.*

26. *Id.* ("[I]t provided a way for these groups to mobilize the ideology of the colonizers to protect lands and to resist some of the more excessive demands of the settlers for land and labor.").

exploitation of land and labor.”<sup>27</sup> We will see below, that while colonial law may have constrained some colonial violence, it also domesticated, redefined, and enabled such violence.

This article departs from both liberal and internalization theories in that it does not understand the modern state under the rule of law as a turn away from violence. Rather, the state represents a particular way of organizing and distributing violence. This thesis enables an understanding of some of the modern era’s most salient events—state sponsored acts of violence like war, genocide, depression, and avoidable famine—as something other than exceptional. This thesis must take violence’s irreducibility as its starting point, but this assumption appears unobjectionable, at least as a matter of historical fact.<sup>28</sup>

This article also departs from many discussions of legitimate violence in that it does not take this violence as primarily instrumental.<sup>29</sup> While violence no doubt has instrumental uses, it is essentially irrational with respect to power structures. That is, even legitimate violence does not necessarily serve rational interests, nor is it purely a matter of discipline. In fact, as we will see, in South West Africa the colonial government allowed and enabled violence that undermined colonial interests.

## II. THE COLONIAL CONTEXT

The main groupings of peoples in 19th century Namibia were the Ovambo, the Berg-Damara, the Herero, the Nama, and the “Bushmen.”<sup>30</sup> The Ovambo, who lived in the far north of the territory near the border

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27. *Id.*

28. *See, e.g.,* BARBARA EHRENREICH, *BLOOD RITES: ORIGINS AND HISTORY OF THE PASSIONS OF WAR* (1997) (providing a fascinating account of the violence’s universality and persistence).

29. *See, e.g.,* Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 *LAW & SOC’Y REV.* 1129, 1133 (2000) (arguing that “racial power sharing” in the administration of the criminal justice system in territorial New Mexico served the interests of Mexican and European-American elites); Robert P. Ingalls, *Lynching and Establishment Violence in Tampa, 1858-1935*, 53 *J.S. HIST.* 613 (1987) *available at* <http://www.jstor.org> (tying the rise and fall of lynching to changing economic interests).

30. The demo/ethno-graphics of 19th century Namibia were complicated and are confusing, in parts thanks to changing conventions of nomination. This article will use Europeanized rather than Xhosian spellings of places and people, since this is the practice of most of my sources. Robert Gordon argues that the somewhat pejorative name “bushmen” should be retained in favor of more ethnologically accurate names, such as *San*, because the latter names divide a group that colonial oppression consigned to a common fate and resistance. *See* ROBERT GORDON, *THE BUSHMAN MYTH: THE MAKING OF A NAMIBIAN UNDERCLASS* 4-8 (1992) (discussing the politics of labeling bushmen).

of Angola, remained isolated from the other groups and German occupiers until late in the first decade of the 20th century when they were hired as migrant mine workers. Mostly concentrated in the Northeastern part of Namibia, the “Bushmen” do not seem to have played a role in the events with which I am concerned. The Berg-Damara apparently had been assimilated by groups of Herero and Nama who had moved into their territory, displacing and sometimes enslaving them.<sup>31</sup> These last two groups, who played the greatest role vis-à-vis German colonialism, had themselves occupied the territory in earlier times. The Herero had migrated from the north centuries before; the Nama were more recent arrivals from the south. The many Nama communities could be grouped into two larger units: the Nama proper, who had settled in Namibia much earlier, and the Oorlam Nama, who migrated to Namibia in the nineteenth century. The Oorlam Nama had moved to Namibia from the south to escape servitude on Boer towns and farms and were often of mixed African and European descent.<sup>32</sup> These groups seemed quickly to have gained dominant positions in Nama politics. In the 1880’s, the Herero dominated the country north of Windhoek; Nama groups held sway in the South. These two most powerful nations in the territory colonized by Germany fought one another throughout the century and again in the early part of the decade.<sup>33</sup>

Excluding the earlier presence of missionaries, German involvement in Namibia lasted from 1884-1915. The German colonial period can be divided into four phases. During the period from German “acquisition” of South West Africa until the submission of Hendrik Witbooi in 1894, Africans remained by and large independent of German rule.<sup>34</sup> Expansion of German territory and administration depended on the sufferance of African communities. The end of Witbooi’s original struggle with the Germans in 1894 marked the start of German military and administrative consolidation of power under the governorship of Theodor Leutwein.<sup>35</sup> With Witboois often fighting

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31. See, e.g., Max Schmidt, *Die Nama, Bergdama und Namib-Buschleute*, in 2 DAS EINGEBORENENRECHT: SITTEN UND GEWOHNHEITSRECHTE DER EINGEBORENEN DER EHEMALIGEN DEUTSCHEN KOLONIEN IN AFRIKA UND IN DER SÜDSEE 273 (Erich Schultz-Ewerth & Leonhard Adam eds., 1930).

32. Brigitte Lau, *Introduction* to THE HENDRIK WITBOOI PAPERS iii-iv (Brigitte Lau ed., 1990). One of the last of these groups to migrate, in fact, were called Rehoboth Bastards (bastards).

33. See J.H. ESTERHUYSE, SOUTH WEST AFRICA 1880-1894: THE ESTABLISHMENT OF GERMAN AUTHORITY IN SOUTH WEST AFRICA 35-36 (1968) (discussing the Herero-Nama War).

34. *Id.*

35. See *Denkschrift über Eingeborenenpolitik und Hereroaufstand in Deutsch-Südwestafrika*

alongside of them, the Germans put down uprisings among and forced treaties on many Nama communities. Dependent on German support against his rivals and paid handsomely for his acquiescence to German rule, Herero leader Samuel Maharero also cooperated with the colonizers.<sup>36</sup> Herero loss of property during this time, in part through coerced indebtedness to German traders and in part through a *rinderpest* epidemic, provided the conditions for the Herero uprising in 1904.<sup>37</sup> During the third phase (1904-7), the Herero and Nama revolted separately against German rule. Around 85% of the Herero and about half of the Nama, including Hendrik Witbooi, were killed or died as a result of the effects of these revolts.<sup>38</sup> The methods employed by the Germans to put down the uprising, and especially the “Extermination Order” of Leutwein’s replacement General Lothar von Trotha, have since gained notoriety as particularly brutal colonial practices.<sup>39</sup> The period from 1907 until Germany lost its colonies in World War I saw the partial dissolution of African communities, a system of forced labor for most Africans, and the imprisonment or deportation of many others.

The use of corporal punishment by private citizens was common in German South West Africa. White employers and foremen, on farms and in mines, regularly “disciplined” native workers. Inevitably “the

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6, 518 STENOGRAPHISCHE BERICHTE DES REICHESTAGES, 11 Legislatur-Periode I (1903/1905) [hereinafter Denkschrift]. Leutwein is necessarily a major figure in any treatment of German colonialism in South West Africa. See DRECHSLER, *supra* note 8, *passim*; BLEY, *supra* note 8, *passim*. Leutwein’s own memoir of his governorship is THEODOR LEUTWEIN, ELF JAHRE GOUVERNEUR IN DEUTSCH-SÜDWESTAFRIKA *passim* (1907).

36. The Herero leader Samuel Maharero’s part in squandering tribal property is discussed in Gerhardus Pool’s book, SAMUEL MAHARERO. E.g. GERHARD POOL, SAMUEL MAHARERO 115-17 (1991).

37. See DRECHSLER, *supra* note 8, at 117-19. See also BLEY, *supra* note 8, at 124.

38. DRECHSLER, *supra* note 8, at 214. The Herero are currently seeking restitution from the German government for German actions in South West Africa. See Sidney L. Haring, *German Reparations To The Herero Nation: An Assertion Of Herero Nationhood In The Path Of Namibian Development?*, 104 W. VA. L. REV. 393 (2002).

39. The German actions during the uprisings are often, and I believe correctly, described as genocidal. See Jeremy Silvester et al., *The Herero Holocaust? The Disputed History Of The 1904 Genocide*, available at <http://www.namibweb.com/hererohol.htm> (“Today there almost seems to be a consensus that the genocide really did happen.”). See also JON M. BRIDGMAN, *THE REVOLT OF THE HEREROS* (1981) (providing an account of German violence against the Herero). Some progressive scholars have taken issue with this characterization. See Brigitte Lau, *Uncertain certainties: The Herero-German war of 1904*, MIBAGUS: JOURNAL OF FREE THOUGHT AND CULTURE, April 1989, at 4-6 & 8, available at <http://www.traditionsverband.de/magazin/ungewiss.html> (discussing German atrocities). Tilman Dederling rebuts Lau’s argument in *The German-Herero War of 1904: Revisionism of Genocide or Imaginary Historiography?*, J. OF S. AFRN. STUD. 80 (1993) (discussing the German-Herero War). Silvester et al. have more recently described the late Lau’s arguments as “largely discredited.” Silvester, *supra*.

right to paternal discipline” became an issue in the continuing debate about native policy. In Germany this right had no certain legal status outside of schools and the home, but in the colony few settlers or administrators questioned it.<sup>40</sup> Rather, it was excesses in the exercise of discipline that sparked controversy—controversy over where discipline ended and criminal abuse [*Mißhandlung*] began. Ultimately these disputes fractured into contradictory legal claims about the status of native workers, and indeed all natives, in colonial society. Administrators generally viewed the treatment of native workers as a public issue, to be regulated by colonial officials and limited by the German criminal code. Employers, on the other hand, saw the issue as an essentially private one, involving their rights under civil law to manage their businesses as they wished. This distinction proved crucial because while the criminal code allowed no apparent room for unequal victims (the characteristics of the victim did not affect the nature of the crime), civil rights and obligations varied according to status. In the colony, in other words, the law made no explicit distinction between natives and whites as crime victims, while the two group’s civil status differed greatly. Colonial administrators’, courts’, and newspapers’ handling of salient cases of abused native workers involved negotiating the disposition of status under different realms of law. The nearest thing to a consensus in legal practice resulting from these controversies was the understanding that cases of excessive discipline would prompt criminal prosecution, but that in such cases natives indeed would not be accorded the full status of victim implicit in the criminal code. Whether engaged by criminal or civil law, natives occupied a position unequal to whites.

Why did this compromise come about? What function did it serve? Several possible answers present themselves. The first answer posits the practice of discipline by settlers as a quasi-police authority, functioning to increase settler security. The second answer proposes that colonial discipline served as a means to control and discipline labor, that is, it benefited the various German economic interests in the colony. However, if we search for the threshold between discipline and abuse in the colony, we find it beyond where the need for security or disciplining labor might have established it. There was an excess in the colonial practice of discipline that escapes these two categories. Here colonial

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40. Though corporal discipline still occurred in the military, there it was on uncertain legal footing. See REINHART KOSELLECK, *PREÜßEN ZWISCHEN REFORM UND REVOLUTION: ALLGEMEINE LANDRECHT, VERWALTUNG UND SOZIALE BEWEGUNG VON 1791 BIS 1848* 655-59 (1967).

ideology itself must be accorded explanatory priority, and corporal discipline seen first and foremost as a way to realize and perpetuate a racially differentiated social structure. Casting settlers' violence against Africans as something other than violence was one expression of this differentiation.

In the next section, I will examine the arguments of the various participants in the colonial debate over the boundary between discipline and abuse. The first part of this section will highlight the legal issues inherent in the "right to paternal discipline" and trace its historical development in modern German law up to the colonial period. The next part turns to the application of the right to discipline (right to discipline) in German colonies—particularly in South West Africa—and the brief and incomplete debate that accompanied it. The final part entails a close reading of a particular case involving the abuse of African mine workers and the resultant controversies beyond the courtroom.

### III. RIGHT TO DISCIPLINE AND THE PRUSSIAN LAW OF DOMESTICS

#### *A. Right to Discipline and Criminal Abuse.*

The central legal issue raised by a right to discipline is how to distinguish lawful discipline from criminal abuse.<sup>41</sup> The German Imperial Criminal Code [*Strafgesetzbuch*, hereafter StGB], promulgated in 1870, defined the crime of common assault in this manner: "Anyone who intentionally does injury to the body or health of another shall be guilty of assault and liable to confinement not exceeding three years or to a fine not exceeding one thousand marks."<sup>42</sup>

This definition—particularly the criterion of deliberateness—left jurists considerable leeway in determining what acts were to be considered abuse. Jurist could apply either descriptive or normative criteria in making this determination. Descriptive criteria might focus on either subjective or objective facts of the case. These criteria invoke, respectively, the nature of the action without regard to its results or the effect of the action on its target. Citing a scholarly consensus around the

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41. My discussion here is indebted to DIETHELM KIENAPFEL, *KÖRPERLICHE ZÜCHTIGUNG UND SOZIALE ADÄQUANZ IM STRAFRECHT passim* (1961). Like most modern jurists writing about the right to discipline, Kienapfel focuses on corporal punishment in schools. Nonetheless, his methodical presentation of the subject provides a nice overview of the legal issues and literature relating to the right to discipline. *Id.*

42. StGB § 223 (1871). The following sections define and set penalties for assault with a weapon, assault resulting in grievous bodily harm. These types of assault carry greater penalties, but the basic definition of assault—the intent to injure—remains the same.

definition of abuse as “an improper, severe, ill-intended treatment [*ein unangemessenes, schlimmes, übles Behandeln*],” Diethelm Kienapfel remarks that “severe [*schlimm*]” corresponds to the objective nature of the crime, “ill-intended [*übel*]” to its subjective nature.<sup>43</sup> All acts of discipline would be included under a strictly descriptive concept of abuse; discipline is deliberate by nature. In contrast, the adjective “improper [*unangemessen*]” points to a normative definition of abuse. Such a definition becomes necessary, the common argument goes, because certain actions, like discipline, that clearly meet the descriptive criteria of criminal abuse are just as clearly not considered abuse in their broader social context. A popular analogy here is with surgery. This analogy is far from innocent because it allows a legally and socially controversial issue, corporal punishment in schools, to be placed in an area of near social unanimity, the efficacy of invasive surgery.

The admission of normative criteria into the definition of criminal abuse, as well as other crimes, alters the balance between the nature of the act (subjective and/or objective) and the intentions of the actor. This legal position at the fulcrum, which Kienapfel describes as the “dualistic concept” of abuse, ideally allows the educative use of corporal punishment while describing its limits: viciousness in the application of discipline or injury to the body.<sup>44</sup> However, legal practice, particularly in the colony, could not maintain this equilibrium. Once intention became central for colonial jurists in the determination of criminality, the statutory limits to the exercise of the right of discipline potentially lost relevance. While excesses of discipline still might be clearly recognized by courts, the defendant’s intent to commit a crime assumed a central role. In all cases, the courts regularly considered ignorance of an act’s illegality to provide partial or complete exoneration. Still, (un)awareness of illegality proved especially relevant to discipline/abuse cases because the law recognized a category of physical assault (discipline) as legitimate. Merely claiming to have exercised right to discipline suggested one’s intentions had not been illegal.

A case decided in 1880 by the Reichsgericht, the German high court, illustrates the difficulties in clearly defining the threshold between corporal punishment and criminal abuse. The case involved a teacher

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43. KIENAPFEL, *supra* note 41, at 28-29.

44. Injury to honor is also relevant to the issues of both bodily discipline and criminal abuse. The Prussian Law of Domesticity stated that the physical punishment of a servant was not to be seen as an injury to his honor. A child’s honor, too, seems to have been unaffected by discipline, while the honor of natives appears never to have been addressed by colonial courts, administrators, or jurists.

who, in disciplining a boy, had “gone beyond the appropriate measure” without, however, causing permanent injury to the boy’s health.<sup>45</sup> The lower court acquitted the teacher on the grounds that the state of Lippe’s law governing schools called for criminal prosecution of acts of excessive discipline only if they caused lasting injury to the student’s health. Other instances of over-zealous punishment would be handled by school officials. The *Reichsgericht* rejected this reasoning, asserting instead that the StGB superseded state law, and therefore only it, unconstrained by any state statute, provided the definitions of crimes. Because such a literalist interpretation of the StGB would leave no room for any legal discipline, the high court swiftly retreated. “The presupposition of punishability,” it wrote in the same opinion,

is illegality; so long as state law, within its jurisdiction, grants officials the right to discipline, such an act, in the execution [of state law] and within the bounds of the same, does not fall under criminal law, even if it presents itself objectively as assault in the sense of the Penal Code.<sup>46</sup>

Here, the court allowed state law to limit the StGB; the former could define discipline—its means, objects, and occasions—which would not then be considered illegal and actionable under the criminal law. The criminal code and criminal process would become relevant only when the limits of right to discipline had been transgressed. This allocation of law-making authority, presented by the *Reichsgericht* as an assertion of the StGB’s preeminence, actually conceded to states the power to define criminal assault independently of criminal law.

One reason the court could not find solid ground is that its decision spanned several areas of law. Right to Discipline, might stem from administrative law (for state employees), private law (for parents and

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45. RGSt 5 (1880), 10(10). “[H]at der angeklagte Lehrer bei der Züchtigung des Knaben G. das rechte Maß überschritten; indessen ist die Züchtigung für die Gesundheit des Knaben ohne jede nachteilige Folge geblieben.” *Id.* (Author’s translation: “Did the accused teacher’s discipline of the Boy G. exceed the appropriate measure, inasmuch as no permanent damage to the boy’s health resulted from it?”). “5. 1. Wie sind die dem Lehrer erlaubte, die bloß disciplinell strafbare Züchtigung und die von dem Lehrer begangene strafbare Körperverletzung eines Schülers von einander abzugrenzen?” *Id.* (Author’s translation: “5.1. How do you distinguish between those things that the teacher is allowed to do, [excessive] discipline merely punishable by disciplinary measures, and criminally punishable assault?”).

46. *Id.* at 12. This sentence amounted to a standard formula for such cases; *see also* RGSt 97 (1883) 302, 302 (“97. Steht die Nr. 6 der preußischen Kabinettsordre vom 14. Mai 1825 betr. die Schulzucht (G.S.S. 149), nach welcher ein Mißbrauch des Züchtigungsrechtes nur, wenn dem Kinde eine wirkliche Verletzung zugefügt ist, an dem Lehrer im gerichtlichen Wege bestraft werden kann, noch zu Recht?”) *Id.* (Author’s translation: “97. Is Nr. 6 of the Prussian Cabinet Order of May 14, 1825 concerning discipline in schools, according to which a teacher can be prosecuted by a court only when an abuse of the right to discipline results in a real injury to the child, still valid law?”).

private teachers), or even church law (for teachers in religious schools). Thus, in discipline/abuse cases, criminal courts found themselves in the peculiar position of having to decide the legality of statute in another realm of law. In the present case, after seeming to leave the substance of right to discipline for others to determine, the Reichsgericht reasserted its prerogative to limit the right according to its reading of criminal law. Right to Discipline, the court declared, must serve the “physical and mental development of pupils” and “the scope of this right will be determined and limited by this aim.”<sup>47</sup> The consequences of discipline, the severity and longevity of its marks on the student’s body, afforded the means to judge whether or not the teacher had overstepped these limits. “Discipline which threatens the [child’s] physical or mental integrity lies outside the scope of the teacher’s permitted disciplinary authority.”<sup>48</sup> Having strayed beyond this authority, an accused teacher could no longer call on right to discipline in his defense. In trying to set the boundary of criminal behavior, the court inevitably ended up defining the goals and extent of a teacher’s prerogative to discipline students under state law. This attempt merely represented the obverse of the case’s original position to which the court objected: the limitations on criminal prosecution set by state law.

The Reichsgericht resolved its dilemma by breaking the continuum between discipline and abuse at a point determined by intentionality. “[Discipline is] punishable as assault if the teacher knowingly overstepped the right to discipline; that is, he was conscious that his act was excessive.”<sup>49</sup> The court stressed the actor’s intentions; he had committed a crime if “he disciplined in order to mistreat.”<sup>50</sup> This emphasis provided a logical solution to the problem, but failed on a practical level to address those very same borderline discipline/abuse cases at issue to begin with. Intention may be easy to determine in extreme cases of abuse; claims to have been merely exercising right to discipline can be readily dismissed if, for example, a teacher stabbed or shot a student. However, such claims cannot be easily decided, or decided at all, in liminal cases of abuse. One can easily imagine a teacher, who in anger hit a child too many times or with a stick instead of a switch or on the back instead of the hands, plausibly claiming not to have properly understood the legal limits of right to discipline, as settlers accused of criminal assault against natives often did in South West

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47. RGSt 5 at 13 (“[D]ie körperliche und geistige Entwicklung des Zöglings. . .”).

48. *Id.* at 14.

49. *Id.* at 14.

50. *Id.* at 15 (“[E]r züchtigt, um zu mißhandeln.”).

Africa.

*B. The Historical Development of Right to Discipline in Prussian Law of Domestics [Gesinderecht].*

Tracing the historical and legal development of right to discipline with an eye to its application in the colony proves a somewhat less straightforward task than it might seem at first glance. The difficulty arises from colonial jurists' failure to ground the right legally—at least in regard to the discipline of workers—in any clear way. Colonial courts merely asserted the existence of right to discipline without explicating its legal basis. This tactic appeared necessary in light of contemporary developments in metropolitan law. These developments cast serious doubt on the right to discipline of anyone except teachers and parents. Thus, the real legal foundation for the colonial right to discipline lay in all but obsolete laws of the early nineteenth century. Of course, at that time there was no German national state and thus no German law per se, raising the question of which of the German states' laws concerning discipline were relevant to the colonial situation. For a number of reasons, I will trace the development of right to discipline in Prussian law, except where the law of the united Germany still clearly recognized this right. Without doubt this choice is the most practical, since much nineteenth-century German history focuses on Prussia, but it is also most appropriate on a substantive level. According to the *Schutzgebietgesetz*, Prussian law served as the “default” law of the colonies.<sup>51</sup> In other words, the legal areas in which individual German states as opposed to the federal government had jurisdiction would be governed in the colonies by Prussian laws. The legitimacy of right to discipline in Prussian law was therefore relevant to colonial law since the applicable law of domestics there would have been Prussian Law of Domestics. Further, both the StGB and the German Civil Code [*Bürgerliches Gesetzbuch*, hereafter BGB] derived in large part from the earlier Prussian criminal and civil codes. In a sense, the development of right to discipline in the modern period began in Prussian law and culminated in the codification of German law after 1871. And last, in the development of right to discipline, the other German states seemed to

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51. See SCHUTZGEBIETSGESETZ § 3. The Schutzgebietsgesetz was the legal code applicable in the German colonies. It is published in its entirety in, among other places, WILHELM HÖPFNER, DAS SCHUTZGEBIETSGESETZ UND SEINE ERGÄNZENDEN RECHTLICHEN BESTIMMUNGEN (1907); ERNST RADLAUER, ÜBER DEN UMFANG DER GELTUNG DES PREUBISCHEN RECHTS IN DEN DEUTSCHEN SCHUTZGEBIETEN *passim* (1911).

have followed a path similar to Prussia's. Excepting local peculiarities, the history of right to discipline and law of domestics in Prussia can be seen as representative for all of Germany.

Nineteenth-century German law recognized right to discipline in a number of areas, which can be broken into two subsets.<sup>52</sup> The first of these involved the use of discipline as tool for a child's formation and education [*Bildung* and *Erziehung*] and was possessed by teachers, fathers, and their proxies. (Mothers, for example, could exercise discipline in the father's absence.) At the turn of the century, this pedagogical use of discipline derived for parents from the BGB and, as we have seen, for teachers from various state laws. The second category of discipline was corporal discipline as punishment more strictly speaking. This type of discipline became limited over the course of the nineteenth century and, with the exception of the death penalty, eventually disappeared. This category included the right of police authorities to punish minor delicts with clearly defined physical punishment without recourse to criminal process.<sup>53</sup> Physical discipline also constituted a criminal punishment in Prussia until 1851, when it was written out of the criminal code and the criminal code for all of Germany that followed it in 1871.<sup>54</sup>

A master's right to discipline servants fell between these two categories. The historian Reinhart Koselleck, writing about the early nineteenth century, placed it squarely alongside a father's right to discipline, but at the latest with the publication of the BGB, the now disputed right to discipline servants became distinct from the paternal right to discipline. The legal inclusion of servants and workers on estates in the households of their employers may have been appropriate in a society ordered by social groups [*Stände*], but it became increasingly out of date over the course of the nineteenth century as these workers became citizens, in theory considered equals under the

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52. See KOSELLECK, *supra* note 40, at 641-59. Viewing the right to discipline from the end of the 19th century, my categorization differs somewhat from Koselleck's. He described three (and a half) levels of discipline at the beginning of the century. The right to "hausherrlichen Gewalt," the use of corporal discipline by police and in the military as punishment for minor offenses, corporal discipline as a criminal penalty, and (the half) the technically illegal but continuing use of discipline to coerce confession. *Id.* The first category included fathers' and teachers' right to discipline children, as well as masters' right to discipline servants, legally considered part of the household broadly conceived. *Id.*

53. *Id.* at 653-55. Koselleck points out the difficulty of distinguishing in some rural areas this police authority from "hausherrlichen Gewalt," since estate-owners often also acted as police and judges. *Id.*

54. *Id.* at 655-56. The Prussian military no longer legally sanctioned corporal punishment after 1808, but some officers continued to physically discipline soldiers nonetheless. *Id.*

law. A legal position for servants unequal with and subordinate to their employers grew ever more incongruous with the law's declining recognition of status and eventually became untenable. With the BGB's voiding of employers' and codification of fathers' right to discipline, these rights were clearly separated.<sup>55</sup> An employer's right to discipline continued to be justified in paternalistic (educative) terms, but such arguments grew increasingly cynical. Even for the period discussed by Koselleck, employers' right to discipline concerned order [*Ordnung*] at least as much as education [*Erziehung*], punishment as much as discipline. In South West Africa, though arguments about right to discipline were often couched in terms of *Erziehung*, customary practice included few paternal or reciprocal obligations of settlers toward their native workers. In fact, even contractual obligations seemed to have been widely ignored in the colony. The ambiguity of an employer's *Zuchtigungsrecht*, its datedness, and its deliberately murky legality all made it peculiarly suited to application to indigenous colonial subjects who had uncertain legal standing. A brief sketch of the Prussian Law of Domestics' disposition of right to discipline shows how this legal confusion developed around the right and its standing at the time of German colonialism.

The Prussian General Law of 1794 [*Allgemeines Landrecht*, hereafter ALR] provided the basis for Prussian Law of Domestics (1810), which was seen as granting the right to discipline in two ways: the so-called "direct" and "indirect" right to discipline. Although the exact scope of the law of domestics was not entirely clear, servants basically included servants both inside and outside of the house and indentured agricultural workers, as opposed to day laborers [*Tagelöhner*].<sup>56</sup> Section 227 of the ALR [Section] II granted the so-called "direct right to discipline." This paragraph gave employers the right "to hold lazy, disorderly, and rebellious servants to their duty through moderate discipline."<sup>57</sup>

Section 227 proved controversial from its promulgation in 1791 and particularly after the emancipation of peasants in [*Bauernbefreiung*] 1807, the spirit of which it directly contradicted. Law was moving in the direction of representing all (adult male) members of society as equals and citizens, while § 227 clearly belonged to a law that ordered society

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55. I will explain below why an employer's right to discipline continued to exist despite its nullification by the BGB.

56. THOMAS VORMBAUM, POLITIK UND GESINDERECHT IM 19 JAHRHUNDERT 26-34 (1980).

57. *Id.* at 86 ("[F]aules, unordentliches und widerspenstiges Gesinde . . . durch mäßige Züchtigungen zu seiner Pflicht anzuhalten").

by status groups [*Stände*]. Section 227 owed its continued existence to an apparent compromise between reformist bureaucrats and conservative estate owners. Representatives of these interests agreed that right to discipline contradicted the spirit of the *Rechtsstaat* [state under the rule of law] and the new civil society, but it remained necessary since servants were still unable to participate as equals in civil society.<sup>58</sup> This view held corporal discipline doubly necessary: in the absence of a society of equals and as a means of educating servants to such a society. One hundred years later, such reasons for delaying servants' achievement of legal equality had much less credibility; a different law for servants and "masters" violated the notion of legal equality central to the *Rechtsstaat*. Consequently, the recognition of right to discipline in the colonies reestablished within the *Rechtsstaat*, but on a new footing, the *ständisch* "master and servant" relationship.

Despite local rulings against it, for instance in Westphalia in 1825, § 227 remained in effect until 1860 when the Prussian Upper Court [*Obertribunal*] nullified it.<sup>59</sup> In 1899, Article 95 of the Introductory Act to the BGB definitively eradicated all "direct right to discipline": "A legitimate employer does not possess the right to discipline vis-à-vis servants." The primary concern of this article was to maintain the existing law of domestics. Such law often restricted the rights of servants as compared with other workers and granted the employers of servants rights unavailable to other employers.<sup>60</sup> This disposition of rights resulted in the restriction of servants' freedom to enter into contracts. Despite these conservative elements, Article 95 did unequivocally outlaw right to discipline. Nonetheless, an indirect right to discipline, while controversial, continued to be recognized by some courts until the end of Imperial Germany. Enough powerful conservative elements remained in German society at the turn of the century to keep alive privileges of rank, like right to discipline.<sup>61</sup>

The indirect right to discipline stemmed from II ALR § 77 (dating back to 1794). This paragraph stated:

If the servant by improper behavior provokes the master to anger and

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58. See KOSELLECK, *supra* note 40, at 641-59.

59. *Id.* at 88-89.

60. MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE 96* (1989) (discussing the approach to codification). For example, servants were denied the right to form coalitions, a right granted to other workers by the Industrial Code. *Id.*

61. For a discussion of the interplay between the *Rechtsstaat* and *Ständisch* relations in Prussia, see LÜDTKE, *supra* note 19.

as a result is upbraided or handled a little violently, [the servant] can demand no legal redress for this [treatment].

The inclusion of this paragraph in the ALR and in the Prussian Law of Domesticity represented another compromise between conservative and reformist impulses. With § 227 and the direct right to discipline under attack and likely to be repealed, § 77 was meant to reassure “masters” that they had not lost all control over servants. For the legal reformer Carl Gottlieb Svarez,

[This] clause is prudently written so that it takes the correct middle way between both extremes and leaves enough room to *arbitrio iudicis*, which will always incline toward the masters [*Herrschaft*] anyway, to maintain the necessary respect owed [the masters].<sup>62</sup>

While legal equals, the “necessary respect” owed to “masters” by their servants needed to be vouchsafed. Of course the whole notion of legal equality became weakened and hierarchical legal relations reinforced when law tried to assure one status group the respect of another, but not vice versa. In any case, rather than having the intended moderating effect, § 77 was construed as another basis for right to discipline. Article 95 of the Introductory Act to the BGB did not directly address this indirect right, so § 77, though controversial, remained in force until the beginning of the Weimar Republic when all laws of domesticity were repealed. Progressive politicians, especially Social Democrats, believed indirect right to discipline to have ended with the promulgation of the BGB and its Article 95. Others, including the Prussian interior ministry, believed the opposite. Using convoluted reasoning, the courts agreed with the latter:

Courts have regularly decided that § 77 of the Prussian Law of Domesticity, like comparable provisions from other [states'] laws of domesticity, cannot be abrogated by the Introductory Law to the BGB. The aforementioned clause does not recognize the right to discipline and, therefore, such a [right] cannot be set aside.<sup>63</sup>

Article 95's purpose, or at least effect, became particularly clear here: the law of domesticity and the perquisites it accorded to “masters” were to be protected even if it meant a narrow construction of servants' putatively equal civil and criminal status. The effect of such a ruling would be to again delay servants' assumption of full equality under the law of the *Rechtsstaat*.

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62. VORMBAUM, *supra* note 56, at 90.

63. *Id.* at 356-57.

What is especially relevant to the colonial situation is the way in which § 77, and other aspects of the law of domestics, doubly bound criminal law with civil station. “Masters” civil standing offered them freedom from prosecution for certain crimes, while servants assumed a lesser status as victim with regard to those same crimes. It appears to have been a short step between the negative freedom from prosecution and the positive right to discipline. Other aspects of the law of domestics shared this quality of modifying status under criminal law. The most relevant to colonial history being the restrictions on servants’ right to self-defense [*Notwehr*]. The law of domestics forbade servants from “actively resisting” attack except when “the life and health of the servant is placed in present and unavoidable danger.”<sup>64</sup> This regulation reduced servants’ capacity for legitimate self-defense provided under the StGB, which allowed self-defense against any “unlawful attack” without regard to its (potential) consequences. The seemingly redundant qualification that the threat of injury had to be “present and unavoidable” to justify resistance compounded the law’s prejudice against servants. Taken with § 77, the restrictions on *Notwehr* meant that “masters” could exercise discipline without fear of prosecution or retaliation. In fact, since they could not argue that they were acting in self-defense, servants who attempted to ward off their employers’ blows might now themselves be charged with criminal assault. As understood and applied in the colony, these legal precepts represented more than a simple bias in law. Rather, they accorded with perceptions of relative social status: employers in the colony seemed to consider it a genuine affront that they could be tried under criminal law for assault against Africans.

#### IV. THE COLONIAL DEBATE OVER THE RIGHT TO DISCIPLINE

The law of domestics clearly provided the background for the colonial practice of paternal discipline. Although, to my knowledge, colonial jurists never grounded this practice in Prussian or any other state’s *Gesindeordnungen*, the Colonial Office explicitly recognized this source. In 1907, a confidential report written by Bernhard Dernburg, Colonial Secretary, alluded to the pedigree of colonial employers’ right to discipline. Commenting on the habit of “every white” in Dar-es-Salam (in German East Africa) to “walk around with a whip,” Dernburg stated, “the legal basis for this is found in the right to discipline servants,

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64. § 79 Allgemeines Landrecht für die preußischen Staaten [A.L.R.] II 5 (Prussia).

according to which every employer is supposedly entitled to moderately discipline his servants.”<sup>65</sup> Not only were his doubts about a colonial right to discipline warranted, Dernburg recognized that the BGB had invalidated all right to discipline permitted under the law of domestics. Later (1909) instructions from the Colonial Office to the East African governor attempted to grapple with this problem. At issue was “if settlers [*Pflanzern*] have a right, based in custom, to discipline their colored workers as was earlier recognized by the German [*heimischen*] law of domestics.” Article 95 of the Introduction to the BGB would not counter this right because “according to § 4 of the Colonial Law it has no application to the legal relations between natives and non-natives.”<sup>66</sup> According to § 4, “natives are covered by the jurisdiction fixed by § 2 and the regulations indicated in § 3 only if determined by an Imperial order.”<sup>67</sup> This clause made the laws governing the rest of the colonies’ inhabitants, namely those outlined in §§ 2 and 3, inapplicable to natives, excepting special cases defined by Imperial Order. Section 4 presented African legal standing negatively, excluding them from legal equality with German settlers without presenting an alternative legal status for them under German law. The Colonial Office’s opinion used § 4 to translate native’s lack of any clear legal status into a *carte blanche* to define that status on an *ad hoc* basis. In this case, § 4 functioned to deny natives the protections potentially offered by the BGB. At the same time, it remained unclear why German law of domestics applied to natives if the Civil Code did not. Perhaps this problem kept colonial jurists from explicitly grounding colonial right to discipline in specific provisions of the law of domestics.

The relation of African labor to white employers, especially on farms but also in mining concerns, did in fact markedly resemble the master-servant relations that faded in Germany over the course of the nineteenth century. Restrictions on the freedom to enter into contracts and the mobility of labor, ordinances against “vagabondage,” and the quasi-police powers of settlers *vis à vis* natives all recalled an earlier *ständisch* [ordered by status] society in Germany. African farm workers seemed to be genuinely part of their employers’ “household,” although in the colony a system of debt peonage often replaced any sense of paternal obligation. In other words, colonial law was out of phase with colonial society. Whereas the notion of *Rechtsstaat* and law, especially

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65. FRITZ FERDINAND MÜLLER, *KOLONIEN UNTER DER PEITSCHKE: EINE DOKUMENTATION* 75 (1962).

66. *Id.* at 79-80.

67. HÖPFNER, *supra* note 51, at 53-54.

criminal law, blind to status suffused the legal system and most of the laws brought to the colony by Germany, a rigid status system—indicated by the Colonial Office’s references to master-servant relationships—rather than a civil society of equals or potential equals organized colonial society. The issue of right to discipline became salient in the colony, then, because it required the reconciliation of modern law with relationships of status.

This attempt to differentiate the legal disposition of status in the colony from that in Germany creates an immediate problem. Contemporary German law could hardly be said to have ignored status, despite the trend just described. Women and children, socialists and Catholics all faced legal discrimination.<sup>68</sup> Or even more to the point, servants continued to be recognized in German law as occupying a unique, albeit increasingly untenable, legal position. Natives’ treatment under German law, then, might appear to be simply an extension of its treatment of other so-called minorities. How was the status position of natives in the colony different from that of groups subject to legal and social discrimination in Germany?

Several distinctions must be made here. First of all, Imperial Germany’s outgroups hardly held parallel positions in society or even in law. Many contemporaries viewed legal discrimination against servants or Catholics as anachronistic. They felt it contradicted the spirit and perhaps the letter of the law in the *Rechtsstaat* [state under the rule of law].<sup>69</sup> The legal status of women, by contrast, seemed more natural. As one recent scholar of Wilhelminian civil law points out, anti-Catholic and anti-socialist laws were considered exceptional, that is, as *prima facie* deviations from the normal rule of law.<sup>70</sup> Legal discrimination against women and children, in contrast, did not appear exceptional to the mainstream, but rather in accord with the essential nature of these groups. Also grounded in their putative (racial) nature, the legal position of natives in this respect more closely resembled that of women than servants in Germany.

Claims that colonial corporal discipline furthered natives’ education [*Erziehung*] closely tied the issue to the status of children in the metropole. As we saw above, legal discussions of discipline in Imperial Germany usually concerned its use in education. In the colonies too, natives were frequently compared to children, and justifications of

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68. See, e.g., DAVID BLACKBOURN & GEOFF ELEY, *THE PECULIARITIES OF GERMAN HISTORY* 243 (1984).

69. JOHN, *supra* note 60, at 2.

70. *Id.*

corporal discipline often invoked its pedagogical usefulness. As Ferdinand Müller notes, the term “paternal” discipline is more than an incidentally hypocritical euphemism. It perfectly suits colonial “*theory’s image of the African as a dependent child,*” who must be placed under the dominion of white “fathers,” in order to be well brought-up.<sup>71</sup>

However, the justification of right to discipline by reference to education did not translate well into the colonial situation for two reasons, one having to do with local political issues and the other with the nature of colonial racial ideology. The political issue concerned the position of religious missions in colonial society. Most missionaries advocated the spiritual education of natives, a position which implied a measure of equality between whites and natives. As a result, colonial missions were viewed as soft on the “native question,” and the promotion of education for natives became associated with the widely disparaged “humanistic” approach to “native policy.”<sup>72</sup> Therefore the legitimation of corporal discipline as a pedagogical tool fit uneasily with other aspects of colonial policy. Presenting discipline as educative was also out of step with contemporary, pseudo-Darwinian racial ideology, central to which was the belief that natives as a group lagged behind whites developmentally. In this respect, the comparisons of natives to children alluded to the belief that “ontogeny recapitulates phylogeny”; that is, they were like children, but they were stuck there, that is, not individually educable.<sup>73</sup> This ideology deferred treatment of natives as equals until the distant future, when they as a whole would have attained a cultural level commensurate with whites. Discipline’s representation as a means to education, for these reasons, turned out to be little more than a way to justify corporal discipline in terms of labor relations. Natives were seen as naturally lazy, and “education” became acclimation to work; it was as laborer that the native assumed the social position appropriate to his cultural development according to colonial ideology.<sup>74</sup>

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71. MÜLLER, *supra* note 65, at 65 (emphasis in original).

72. To paint a critic a “humanist” was a common strategy of colonialists. Not only socialists who opposed the colonial project entirely, but any advocate of colonial reform were labelled thus. According to colonial hardliners, “humanists” were those who derived colonial policy from beliefs in a universal human nature—belief in educability, for example—and a minimal set of natural rights for all stemming therefrom. In contrast, hardliners took the position that only first-hand experience with natives could produce an appropriate “native policy,” which consequently assumed a much harsher, “realistic,” means-ends form. Of course the first-hand knowledge invoked by hardliners was no less an ideological construct than the “humanistic” view—what “experience” gave was a knowledge of the fundamental inequality of “natives.”

73. For an example of this view, see *infra* note 87 and accompanying text.

74. *Id.*

In terms of political culture, discrimination against natives was closer to the treatment of “*reichsfeindlich*” groups like socialists.<sup>75</sup> In these terms, the treatment of natives under law markedly contrasted with that of women and children, or of servants for that matter. The latter groups played undeniably crucial roles in social reproduction. Natives, even more so than other “enemies of the Reich,” were seen as apart from rather than a part of German society, and at times even as socially expendable.<sup>76</sup> Legal discrimination against natives in the colonies represented, then, an amalgam of the types of discrimination present in contemporary German law. Their *socio-economic* position most nearly paralleled that of servants, but this position was not seen as an archaic remnant of a fading social structure. Colonial law, in this regard, served to organize and discipline native labor for the benefit of German economic interests. The *legal* position of natives was nearest to that of women or children because rather than exceptional, it was based in a perceived essential nature. Here, colonial law placed natives in a permanent position of racially grounded legal subordination. Finally, *politically*, the relevant comparison is to so-called “enemies of the Reich,” who were subject to exceptional laws. Colonial law and native policy associated with this third position, in part, functioned to secure white colonial society against the real or perceived threat of native violence.

This combination of legal bases for discrimination involved more than a simple application of existing German laws, like the law of domestics, to the colonies. Although the control of labor remained a central interest of right to discipline in the colony as it had under the law of domestics, colonial law arguably also represented a new departure. Just as turn-of-the-century populist movements in the Reich transformed politics by mobilizing nationalist and racialist ideas,<sup>77</sup> a less noticeable legal transformation, employing the same tools, was underway in the colonies. Whether or not this legal culture influenced later unions of race and law, colonial legal communities strove to reconcile modern law with racially-based social status. The discourse surrounding the problem

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75. A *Reichsfeind* is an enemy of the Reich (Empire); “*reichsfeindlich*” is the adjectival form of this word.

76. Germany’s genocidal military policy during the Herero and Nama uprisings, of course, provides the most obvious example of this view. This view persisted despite the total dependence of the colonial economy on African labor.

77. See, e.g., GEOFF ELEY, *RESHAPING THE GERMAN RIGHT: RADICAL NATIONALISM AND POLITICAL CHANGE AFTER BISMARCK* (1980) (discussing the evolution of the German Right); PETER PULZER, *THE RISE OF POLITICAL ANTI-SEMITISM IN GERMANY & AUSTRIA* (1988) (providing an account of the period of increased anti-semitism in the two countries).

of right to discipline presents a microcosm of this legal transformation. It reflected attempts to define a unique legal position for natives as victims of criminal violence.

There were two legal realms of corporal discipline in the colony, police discipline [*Prügelstrafe*] and employers' (paternal) right to discipline. Colonial law explicitly regulated the former, limiting the extent and nature of the punishment, listing all who held this authority, and laying out the protocol for carrying out and recording such punishment. Of course, in the colony police could not discipline white settlers but only natives. Police discipline had been made illegal in Prussia in 1848, so members of German civil society could no longer receive corporal punishment.<sup>78</sup> This type of discipline matched that formerly held by police authorities in Germany, which punished minor delicts outside the notice of criminal law and had more to do with social discipline than criminal punishment. It functioned as the official form of employers' right to discipline; employers were to bring offending workers to the police for discipline. "In most cases corporal punishment was imposed, in accord with its primary function, against so called labor delicts . . . 'laziness,' 'continual indolence,' 'negligent work,' 'disobedience,'" and so on.<sup>79</sup> Police discipline warrants attention because it showed the deliberate extension to natives of a type of corporal discipline seen as outdated in Germany. But it does not fit into the framework of the present discussion, since it concerns administrative rather than criminal law, that is, this type of discipline never seemed to result in charges of criminal assault. This chapter focuses on the second sort of discipline, that of the employer, since it was here that the threshold between right to discipline and criminal abuse was established.

It bears repeating that the colonial right to discipline of employers in South West Africa had no clear basis in positive law. This fact became especially clear in an exchange between a reform-minded local official and deputy governor Oskar Hintrager in 1912.<sup>80</sup> The local official, a von Roebern, strongly objected to the customary practice of discipline, blaming it for the strained "native relations." Apparently suspicious of discipline's legal basis, Roebern asked for clarification and offered his own argument for the illegitimacy of the current practice. Reasoning from the term "right to paternal discipline," Roebern ventured

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78. LÜDTKE, *supra* note 19, at 123.

79. MÜLLER, *supra* note 65, at 81-82.

80. Hintrager was a hard line official with a long tenure in South West Africa. OSKAR HINTRAGER, *SÜDWESTAFRIKA IN DER DEUTSCHEN ZEIT* (1956) (recounting his memory of this period).

that the BGB paragraph (§ 1631) describing a father's right to discipline over his children provided the source of the colonial right to discipline. He then caviled against this paragraph's application in the colony. He argued that this paternal authority could be delegated to wives or mothers only under strictly defined circumstances (BGB § 1684), and that it could not be granted to white supervisors or foremen at all. But in the colony all these people regularly exercised discipline, complained Roeborn, and "if the miserable Hottentot so much as raises his arm in defense, this is taken as 'attempted assault' and the native is hauled before the judge for violently threatening a white." Noting that the BGB protected children against abusive fathers, Roeborn asserted that the validity of one paragraph meant the validity of the other. "[For] practical [reasons], the loss of the paternal authority to punish ought to be made known publicly in the official gazette [*Amtsblatt*]." <sup>81</sup>

In response, Hintrager denied the need for clarification of the right to discipline. Colonial courts had ruled, he said, "that according to common law the master [*Dienstherr*], his family, and [his] white employees, under whom natives work, possess the *right to mild discipline* vis-à-vis natives."<sup>82</sup> This right, he continued, did not stem from BGB § 1631 as Roeborn supposed, but rather merely resembled it in many respects. The existing practice of the right to discipline did not present a danger to natives or native relations because its transgression constituted assault [*Körperverletzung*]<sup>83</sup>—an act that would elicit both criminal prosecution and administrative measures to prevent the offending businesses from receiving more workers from government procurers.<sup>83</sup>

A second letter from Roeborn repeated his original points and objected to Hintrager's complacency. Colonial courts did not provide enough protection, and administrative restrictions on workers were easily circumvented. According to Roeborn's estimation as police officer, native commissioner and head of administration, "[e]very conflict with natives leads to excessive paternal discipline. . . . If the colony is again guided to a shipwreck in the native question, then we will have the paternal right to discipline to thank."<sup>84</sup>

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81. *Strafbefugnisse weißer Dienstherrn gegen ihre farbigen Angestellten, Generalia* [Authority of white supervisors to punish their colored laborers], ZENTRALBUREAU DES KAISERLICHEN GOUVERNEMENTS [ZBU] 717, FV q.1, 3r-3v (on file with National Archives of Namibia).

82. *Id.* at 2r-2v (emphasis in original).

83. *Id.*

84. *Id.* at 3r-3v.

Ignoring Roeborn's concerns, another deputy governor named Kornmayer responded that the colony had not yet reached a position in which it could set aside the right to discipline; in the absence of extensive police authority, farmers could not manage without this right.<sup>85</sup> Roeborn's concerns found a more receptive ear with yet a third official, native Commissioner Streitwolf. Streitwolf agreed that colonial disciplinary practices could lead to a "shipwreck." Lacking any statutory grounding, he reasoned, the right to discipline was "therefore clearly illegal [*direkt ungesetzlich*]." This illegal situation, perpetuated by colonial courts, ought to be abolished by explicit order.<sup>86</sup>

I have described this exchange in some detail because it introduces many of the issues relating to colonial right to discipline. The first thing that ought to be said about the right to discipline, namely, that it was "clearly illegal," came almost last in this exchange. No statute granted employers the right to discipline their workers physically. In fact, the explicit delegation of this authority to police officials might seem to contradict settlers' claims to possess this right. However, as Hintrager asserted, the colonial courts recognized discipline as a "customary right" adhering to any white in a position of authority over a native. In a decision from 1911 sometimes cited as having established the right to discipline, the colonial upper court reasoned thus:

White employers [*Dienstherr*] in the colony cannot entirely be denied a right to mild [*gelindes*] discipline separate from official criminal authority. The upper court has heretofore always held this view and it has no occasion to deviate from it. The white employer has not only the bodily needs of his natives to care for, but, if he takes seriously his task as conveyor of *heimischer* culture and morality [*Gesittung*] to the natives, also works toward their development into orderly and useful people. Among other things, this development involves that they become accustomed to structured labor, feelings of obligation, and obedience. The character of the native, however, does not always allow him to attain these [goals] without a certain amount of coercion, and therefore, a mild right to discipline cannot be completely dispensed with. Because in respect to morals and intellect [*Geist*] on the average natives are no more highly developed than a child in need of education at home. For each offense, for each case of disobedience or insubordination, the employer cannot easily go to the official criminal authority . . . Here he must have the authority, if remonstrance and admonition do not suffice, to apply discipline, as an energetic

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85. *Id.* at 3v.

86. *Id.* at 4r.

means of education. A strong box on the ears or a fitting blow with a crop to the back or the bottom often works better than all talk.<sup>87</sup>

The definition of this right as “*gelindes*” staked out a moderate administrative position in this debate. Defenders of the right to discipline would typically describe the act of discipline as “a few boxes on the ears,” a description which cast critics’ concerns as exaggerated. But while the debate about the right to discipline often focused on such “mild” forms of discipline, the cases reaching the courts made clear that in actual custom discipline was usually administered with a sjambok, stick, or the like. In the case just quoted, for example, the victim was tied between the front and back wheels of a wagon and beaten on the back with an Ox whip.

The various participants in abusive acts also spoke very little of discipline as an educative tool. More often, defendants justified excessive discipline as a response to disobedience or crimes allegedly committed by the victim or natives in general. These crimes then provided the context in which to understand a violent act far exceeding the limits of discipline set by the court. In other words, abusive settlers became angry and mistreated Africans rather than consciously applying discipline in the service of education. Settlers seemed to beat Africans as a means of “frontier justice.” Colonial courts firmly rejected the view that settlers had the general authority to take criminal justice into their own hands, insisting instead that discipline was a pedagogical tool. In doing so, the courts ignored discipline as it was actually practiced in the colony while at the same time providing it with a legitimating argument.

There was a gap between the reality of discipline and its definition by newspapers, administrators, and courts. This fact meant that Roeborn and Hintrager were talking at cross purposes. Roeborn expressed the potential danger in the actual practice of discipline, while Hintrager dismissed his anxiety by reference to the presumptive practice. The latter’s reassurance that colonial courts acted as an effective sanction against transgressions of the right to discipline extended this reasoning according to an ideal practice. One ought to be skeptical of such a claim, not necessarily because of bad faith on the part of colonial judges, but rather because it assumed that the courts served as an adequate counter to excessive discipline. Given the limits to administrative authority in the colony and the difficulty Africans had in making complaints against whites, the threat of penalty for going beyond “a few

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87. Kaiserliches Bezirksgericht Keetmanshoop [Imperial District Court Keetmanshoop] [GKE], Akte 295, D 4a/10, 82r (on file with the National Archives of Namibia).

boxes on the ears” must have seemed very slight. Hintrager was being disingenuous; he knew of the colonial realities intimated by Roeborn. It is not so clear, however, why he maintained this willful ignorance.

In fact, the central colonial administration had strongly expressed its concern about the mistreatment of natives under the guise of corporal discipline on at least two separate occasions prior to the current exchange. In 1908, colonial governor Schuckmann noted “various recent cases in which settlers” had severely mistreated “their natives” and asked local officials to report on such cases in their districts. Schuckmann viewed the issue as a labor problem and the lack of adequate legal protection for natives as a danger to efficient organization of the colonial work force.

If the native first had been convinced that he not only would be regarded as a man, but also that his justified complaints [*berechtigte Aussprache*] would be taken into account and that he was protected by the law, then he would not have as much inclination to run away from his employers [*Dienstherrn*].<sup>88</sup>

While narrowly defining the problem as one of labor, Schuckmann’s association of legal protection with being “viewed as a man” implicitly broached the broadest problem of law’s social meaning. In a letter to the Colonial Office, Schuckmann described the issue in more general legal terms:

[I]t has proved to be a great disadvantage, that the native’s respect for our administration of justice [*Rechtspflege*] has doubtlessly been severely harmed. Because of the great distance to our courts and their excessive workload [*Überlastung*], grave abuses of natives that have taken place on remote farms do not first reach the courts until the native has gotten the feeling that the perpetrator will be released [*ausgehen*] unpunished.<sup>89</sup>

Here, the problem became less one of labor than of native respect for the German legal system. This system’s failure to punish white abusers of natives represented not only a threat to labor relations, but also a blow to the integrity of German law itself.

In 1912, current Governor Seitz expressed even stronger concern about the legal disposition of discipline/abuse cases. In a secret circular to local officials, Seitz lamented the “despairing mood” among natives

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88. *Mißhandlung von Eingeborenen durch Weiße, Generalia* [Abuse of natives by whites], ZENTRAL BUREAU DES KAISERLICHEN GOUVERNEMENTS [ZBU] 2054, W III r.1, Bd.1, 1r-2r (on file with the National Archives of Namibia).

89. *Id.* at 3r-3v.

arising from the failure of courts to punish “brutal outrages [*rohe Ausschreitungen*]” of whites against them. Seitz viewed this situation as a severe danger to the German presence in the colony itself:

Natives, who doubt the impartiality of our judicial decisions, would be driven thereby to a blind hate of everything that is white and ultimately to self-defence, i.e., revolt. It is obvious that these feelings of hatred among the natives, if not energetically redressed, must lead sooner or later to a renewed, desperate, native uprising and consequently the colony's [*Land*] economic ruin. It is also in the interest of the entire white population that elements who rage against the natives with senseless ferocity and consider their white skin as a license to commit brutal crimes be neutralized in every way. A people that makes a claim to be considered a ruling people [*Herrenvolk*] must above all else keep its own house in order. If the crimes of whites against natives occasion no or inadequate penalty, it is impossible in the long run to respond to the crimes of natives against whites with the severity required by the general interest.<sup>90</sup>

Seitz's memo addressed the three primary justifications of corporal discipline—labor, security, and race—and used each of them to advocate stronger prosecution of abuse cases. Continued injustice would produce hatred and violence causing “the economic ruin” of the colony. Mistreatment of natives belied German claims to the title of *Herrenvolk*. Whether from conviction or for rhetorical reasons, Seitz's jeremiad invoked only German interests rather than, for example, concern for native welfare. In other words, in the contemporary context the same ideology used to legitimate white discipline of natives was also deployed in arguments against abuse.

Seitz's memo also located itself at the intersection of race, violence, and the law. At the same time that he implicitly congratulated German law for its impartiality, he also associated it with all things white. For Seitz, not only the principles of justice but also the obligations of the master race demanded punishment of settlers who mistreated natives. By claiming that native crimes against whites could only be adequately punished if white crimes against native were too, Seitz was advocating legal reciprocity rather than legal equality for natives. This sentiment reflected the *noblesse oblige* a master owed his household in a society structured according to status, but in German South West Africa race determined status.

Seitz's invocation of the colonial economy spoke to those who felt

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90. *Id.* at 7r-7v.

that the native had to be acclimated to work through physical discipline or at least justified abuse in this way. Settlers with a more global interest in the colonial “common good,” defined in economic terms, would probably have included established farmers and traders and the larger businesses, such as mining. Seitz’s memo would have appealed to their sense of social superiority not only to natives but also to the less wealthy or prominent white settlers whom they employed. By citing “those elements of the white population, who rage against natives with senseless brutality,” Seitz strengthened his case vis-à-vis those who defined themselves against such elements. Such elements, finally, would have come from among settler-laborers who often worked as foremen over native workers. For them, the discipline of natives likely expressed their *ressentiment* against their social “betters” as much as it did their sense of racial superiority over natives.<sup>91</sup>

As a deputy governor, Hintrager must have been aware of these memos and the concerns behind them, and yet continued to frustrate Roeborn’s attempt to deal with the issue. The murkiness of Hintrager’s motivations may have arisen out of the mixed legal and cultural basis of colonial right to discipline with which this section began. Colonial right to discipline’s most obvious purpose was to discipline labor. Writing on this issue, colonial historian Fritz Müller argued that the inability of German colonizers to deprive natives of the means of subsistence entirely—through war, confiscation, and so on—necessitated the use of extra-economic coercion to create a work force useful to German economic interests. The various violent means used to compel labor, Müller argued, carried over into the workplace itself. “In order to break the resistance of the oppressed worker against a truly murderous exploitation, almost all of the employers in the German colonies reach for the lash.”<sup>92</sup> However, this argument falters precisely in this last step. While the various forms of impressment served colonizers’ economic interests, violence toward Africans in the workplace—sometimes so severe that the worker could no longer work—did not. As Schuckmann and Seitz among others argued, excessive violence undermined the colonizer’s ability to fashion and maintain a productive native labor force. It was, in fact, the prescribed extent of discipline—a few boxes on the ears—that was widely seen as best suited to the colony’s economic ends. Hintrager’s stance, in other words, did not accord with

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91. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* Essays I & II (Walter Kaufmann ed. & R. J. Hollingdale trans., Random House, 1967) (discussing the concept of *ressentiment*).

92. MÜLLER, *supra* note 65, at 33.

the most apparent and perhaps primary function of colonial right to discipline: labor discipline. He turned a blind eye to the negative effects—to German interests—of the actual practice of corporal punishment.

The reason for Hintrager's position and discipline's other "purposes" prove harder to determine because they may not have been economically instrumental. Kornmayer's brief interpolation in the exchange hints at another possible purpose behind the refusal to perceive the practice of discipline as other than the ideal. He viewed the right to discipline as an alternative to extensive police authority and a safeguard to white security, rather than as a way to control labor. This sort of thinking suffused debates about the right to discipline, but the logic behind it was not clearly articulated. Whether or not they were correct, settlers, especially in outlying areas, often saw themselves as threatened by "natives," including those whom they employed. Stories of native workers poisoning settlers occasionally appeared in colonial newspapers, but they were invariably unsubstantiated and often turned out to be untrue. In the prominent trial of Elisabeth Ohlsen, a "farmer's wife," for manslaughter [*Totschlag*], white witnesses repeatedly alleged a conspiracy to poison the Ohlsen's and their livestock.<sup>93</sup> Such assertions did not clearly fit in with the logic of the defense's argument because it claimed that Ohlsen had not struck the decisive blows, and her exercise of the right to discipline never exceeded a slap or a box on the ears. Further, no one claimed that killing of the victim, Deubib, came in response to the poisonings. Still the tenor of the argument was that an amorphous threat from natives justified an excessive beating, in this case to death. The court accepted this argument and acquitted Ohlsen. The juxtaposition of poisoning, discipline, and violent assault implied that Ohlsen had attacked Deubib in self-defense, although clearly something else was going on in this case.

A contemporary article about the Ohlsen case shared this confusion about the discipline/abuse issue. The article, "Lessons of the Ohlsen Trial," perfunctorily denied Ohlsen's guilt but devoted much more energy to expressions of outrage over the fact of the trial itself. In its view the problem with discipline was not the tendency for it to become abuse, but that this abuse could be prosecuted in colonial courts. Since such cases invariably required assessing the relative merits of white and

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93. *Farmerfrau Elisabeth Ohlsen wegen Totschlags* [Trial of farmer's wife Elizabeth Ohlsen for manslaughter], Gericht Windhoek [Windhoek Court] 728, 3K9/11 (on file with the National Archives of Namibia).

native testimony, the article complained about the assumption of “legal equality [*Gleichgerechtigkeit*]” between the races in colonial law. Arising from the State’s Attorney’s Office’s exaggerated desire to keep natives from feeling “rightless,” such legal equality insulted white honor more than it endangered settlers:

Inasmuch as one is willing to take the feelings of the natives into consideration, then surely no white, e.g., who knocks down a native in self-defense ought to go unpunished! We would think that the feeling of rightlessness among the natives would not be lessened but perhaps increased if they believed themselves to have full *legal equality* with whites. If natives are allowed to think that they are legally equal to whites, then it is all over with the preservation of the distance between white and black that is the precondition for a useful employment [*Verwendung*] of natives.<sup>94</sup>

Here we have Seitz’s reasoning in reverse; legal protection for natives ran counter to colonial interests. Of course the concerns about native legal equality with settlers were hyperbolic given the explicit exclusion of natives from the jurisdiction of regular German law, but they still gleaned an element of truth. For, if settlers were to be held responsible for crimes against natives, then criminal law did provide the latter with a measure of protection qualitatively the same as it provided for the former. Although the passage includes reference both to security and economic issues—self-defense and “useful employment of natives”—its deeper concern seemed to be the maintenance of a certain relative racial status. Like Hintrager, the article denied the actual practice of discipline while espousing administrative practices that would allow it to continue unhindered.

Arguments about security, in fact, seem more like ideological justifications of the practice of discipline than accurate descriptions of colonial reality, which is not to say settlers did not sincerely believe themselves in peril. For instance, rather than feeling immediately threatened by Deubib, Ohlsen most likely went too far in administering “discipline,” and it was courtroom exigencies that elicited the link with the alleged poisoning conspiracy. In this case, again, we are left wondering why the practice of discipline differed from the stated norm, and why the court, in turn, cooperated in the restatement of the illusory ideal as reality. The practice of discipline may have stemmed as much from beliefs about the status and nature of natives as from rational

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94. *Lehren des Ohlsen-Prozesses* [Lessons of the Ohlsen Case], SÜD-WESTBÖTE, December 23, 1911 (emphasis in the German original).

impulses to control labor or secure life and property. This possibility makes the most sense of Hintrager's position, which now can be seen as mediating between the ideal protection of natives under modern criminal law and their actual social and cultural position as essentially inferior. The material issue of physical discipline or abuse was subordinated to a discursive cycle of legal argument and evasiveness that deferred the problem's resolution. This discourse described discipline that deviated from the norm as something else, on the one hand, as self-defense in Ohlsen's case or, on the other, abuse. Neither alternative addressed the difficulties of grounding the real practice of discipline in modern law. Rather than seeking a new basis for a sort of discipline that contradicted current German law, Hintrager and others could simply deny its nature. By doing so, settlers could continue to employ physical abuse to express and maintain their "superior" racial status.

Corporal discipline, then, was many things. It can first be defined as the actions that accompanied the intent to discipline, actions that generally ranged from a few boxes on the ears to a beating with a sjambok. Specific instances of such discipline largely remained beyond the notice of colonial officials, courts, and publicists; it stemmed from the right possessed by white "masters" according to a custom derived from racialist "truisms" rather than tradition. The courts sanctioned this violence by calling it "mild discipline." Only in the very general ways—like in Schuckmann or Seitz's memos—was this discipline cast as violence. Next, corporal discipline constituted a trope in a legal strategy on two levels. In specific cases, the placement of an abusive act on a continuum of discipline altered and mitigated the nature of the crime. As we see in the Ohlsen case, the story of Deubib's death turned on issues like discipline or self-defense, which provided the best possible construction of Ohlsen's intentions. As a more general legal strategy, the figure of corporal discipline legitimated a certain level of white violence against natives by placing it outside of the concern of criminal law. The exclusion of disciplinary acts from criminal prosecution meant that the minimal level of violence against Africans visible to the colonial judicial system was greater, that is more violent, than the minimal level of violence against whites. Corporal discipline provided a means to control labor and a way to reinforce relative racial status. Alternatively, it might be spoken of as a safeguard to settler security or as a tool for the cultural education of "natives." These different meanings of corporal discipline each informed the right to discipline debate in varying degrees.

## V. DISCIPLINE IN THE MINES

The labor issue constituted the most immediate, and perhaps determining, context for the right to discipline debate as a whole. It was toward the end of the German colonial period, when diamonds were finally discovered and mining became an important enterprise, that the issue of the right to discipline first came into prominence. The widespread use of corporal punishment on farms was carried over into the mines. A number of differences between mine and farm labor most likely now forced the issue of discipline into the forefront. First of all, the labor forces differed in the two types of undertaking. Farmers tended to employ local Africans, who lived permanently in the vicinity and were expected to renew their contracts indefinitely. The mines, in contrast, employed chiefly migrant workers, who returned home upon the expiration of their relatively brief contracts. The greater mobility and turnover of miners brought the issue of discipline/abuse into greater relief. More people became aware of the practice of discipline, they traveled throughout the colony with this knowledge, and stories of abuse became an impediment to the recruitment of new contract workers. A second difference in the circumstances of farm laborers and miners lay in the location of their work. Mining took place in the relatively large population concentrations created by the mines themselves, whereas farms were remotely located. This fact made discipline/abuse more visible in mines, and the existence of a proximate police authority around them allowed acts of abuse to be prosecuted more easily. Also with the mines and the resulting intensive labor practices, the colonial government created the post of "Native Commissioner," a local official among whose tasks was the representation of natives in legal matters.

Exchanges between mining interests, local officials, and central administrators laid out the issues and positions concerning the right to discipline most clearly and in the greatest detail. Although specific instances of discipline/abuse provided the context for these exchanges, they dealt mostly in generalities and thus illustrate the strains between the central administration's interest in preventing abuse, local administrators' concern with protecting their own positions, and mining concerns' desire for free rein in conducting their business. The particular abuse cases, in turn, supply an indispensable template for understanding these exchanges—only through them we can understand how the abstractions of this relatively rarefied exchange translated into colonial labor practices. These exchanges and cases not only allow a glimpse into colonial reality, but also offer a window onto the interplay

between sociocultural practice and law. The exchange described below shared a familiar quality with other conflicts over “native policy.” The various participants all claimed to agree on the basic issue, so the dispute seems to be about details, the best way to achieve a common goal. But when the superficial agreement to limit abuse is examined more closely, one finds that it conceals widely divergent positions. This fact becomes especially clear when the rhetoric is placed next to labor and judicial practices.

All parties in the discussion of discipline in the mines shared an ostensible concern with South West Africa’s economic well-being. This fact ought to allow one to understand the issue in terms of conflicting economic interests, but this does not prove to be the case. Rather, as with discipline on farms, discipline in the mines cannot be understood simply in terms of economic instrumentality. The various participants in the exchanges concerning such discipline had differing motivations. Certain local and central administrators came closest to sincerely wishing to provide physical security to natives. They justified this aim by pointing to its beneficial effect on the colonial economy. However, such arguments may have displaced humanitarian or paternalist ones, which had become untenable in the colony after the uprisings. Other officials, again both local and central, while also invoking the danger to the economic good posed by the abuse of natives, showed themselves to be in fact resistant to any government interventions that strove to minimize instances of abuse. The central administrators who fell into this category claimed to be helpless before the letter of the law.<sup>95</sup> It may be that these high-ranking officials, like Deputy Governor Oskar Hintrager, who in contrast to the governor served for long periods of time, resented the intervention of those officials, including the governor, more politically motivated and more closely associated with the Colonial Office in Berlin. Resistant local officials may have felt similarly about interference from Windhoek into matters close at hand, which they felt they knew best. Business interests, who also lamented the abuse of natives, sought to portray the discipline/abuse problem as a private matter between employer and employee.

Left out of these discussions, except for their participation in court cases, were the abusers themselves and their victims. The former hardly seemed interested in the economic efficacy of their violent acts. Mine foremen, rather, used abuse to position themselves socially. Their

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95. On “helplessness” as a means to legitimate unjust uses of law, see ROSS, *supra* note 3, ch.3.

willingness and ability to act violently toward natives without repercussion expressed their sense of racial superiority to natives. Racial domination compensated for their otherwise weak social position among whites. The courts viewed such violence as a natural response to the colonial situation and cooperated in establishing an exculpatory context for it, often by invoking racial difference in their rulings in abuse cases.

In 1911 a local official in Lüderitz, the center of the diamond mining industry, wrote to the local mining chamber, a private organization, to complain about the frequent employment of previously abusive whites as foremen over natives. Citing the mines' own interests, the official, Assessor Heiligbrunner, requested that such whites be fired or moved to jobs without oversight of "natives." The Imperial Mining Office, the Native Commissioner, and he agreed, Heiligbrunner concluded, to use "police orders" to assure that "unsuitable people are not used in such positions (e.g., as foremen or *sortierer*) in which they have direct oversight over natives."<sup>96</sup> The chairmen of the mining chamber professed ready agreement with Heiligbrunner's central point: whites who had mistreated natives should not occupy supervisory positions. But, they hastened to add, labor discipline had been "noticeably" deteriorating and "cases of disobedience and brazen impudence on the part of natives are becoming ever more numerous." The chairmen attributed this state of affairs to recent efforts of the native Commissioner, who, through his solicitation of complaints, "appears to have given rise to the opinion among the natives that the white supervisors cannot tell them what to do, and whether or not any work gets done simply depends on their good will."<sup>97</sup> The chairmen reserved their strongest objections for Heiligbrunner's claim of police authority in the matter, calling it "a serious encroachment on private rights."<sup>98</sup> They would "gladly" voluntarily follow the practice Heiligbrunner suggested, but the members of the mining chamber would not allow administrators to determine whom they hired and fired. "Criminal law alone suffices to render harmless people who groundlessly mistreat natives. Everything else must be left to the discretion of the employer, who can judge best if an employee is more useful or harmful to their business."<sup>99</sup>

On the surface, this conflict seems only to have concerned a

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96. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 66 (on file with the National Archives of Namibia).

97. *Id.* at 67.

98. *Id.* at 68.

99. *Id.* at 68.

somewhat abstract question of legal principle, namely, the limits posed to police power by private rights. As for the substantive problem, local officials and mining interests appear to have agreed completely that abusive whites should be fired or transferred to another job. However, the chairmen's digression about "disobedience and insolence" among native workers points to another reading and belies their claim that criminal law adequately protected natives from mistreatment. On the one hand, they criticized the native Commissioner's pursuit of native complaints against abusive whites as undermining employers' authority, while on the other, they invoked the very same practice as a sufficient safeguard of "natives." Beneath the mining chamber's ostensible shared concern for native life lay a strenuous call for a laissez-faire policy on the part of the colonial government. Ideally, the chamber chairmen seemed to imply, not only would civil law prevent state interference into employment policies, but also administrators of criminal law would not look too deeply at criminal abuses in the mines.

A year later the mining chamber made this position more explicit. Responding to renewed complaints by Lüderitz Native Commissioner Tönjes about labor practices, the chamber reaffirmed and even hardened its previous position by dismissing the criticism of the police and courts. In a letter written on June 18, the chairmen again acknowledged the danger presented to the general good by abusive mine foremen, but now implied that alleged incidents of abuse were more a product of overzealous colonial officials than unsound labor conditions. The chamber's letter began, "the assertion of the Native Commissioner that numerous instances of abuse occurred upon the establishment of the Colonial Mining Association is not true." In fact, the chairmen maintained, there was less abuse than one would expect in an operation with 1,200 employees, "a large proportion of which are insolent and unwilling to work." If Tönjes "was not led by impractical, excessive idealism," he would realize the soundness of the company's labor practices, particularly given "natives' characteristic inclination toward laziness." The chairmen cited the mines' practice of black-listing white employees deemed "unsuitable" for working in the mines, one criterion of suitability being "*groundless* mistreatment of natives" (emphasis mine). However, the letter continued, it would be unjust to fire and blacklist an employee for a single abusive act. Rather, "if in other respects [such employees] possess a good character and are proficient at their jobs," the mine ought simply "to warn them against further

excesses.”<sup>100</sup>

The mining chamber’s letter ceded little to local officials’ concerns. It implied that instances of abuse in the mines were a reasonable response to the intractability of native workers. The chairmen’s use of the word “groundless” indicated that the mines, not the courts or local administration, ought to bear responsibility for determining when abuse had occurred. The previous year the mining chamber claimed merely to be guarding mines’ legal prerogatives under civil law, while avowing commitment to the spirit of administrators’ suggestion that foremen found guilty of criminal assault be transferred or fired. Now the chairmen not only would reserve punishment for repeat offenders, but also would replace the criminal code’s construction of abuse with their own. A report by the Colonial Mining Association [*Koloniale Bergbau Gesellschaft*) to the mining chamber attached to the latter’s letter confirms this impression. This report explains away instances of abuse confirmed in colonial courts, even going so far as to express regret for dismissing the only employee it did fire, an employee twice tried and once convicted for mistreating Ovambo workers. Citing the “great deceitfulness of the Ovambo”, the report derogated another guilty verdict by crediting the defendant’s professions of innocence over the conflicting claims of the Ovambo witnesses. Generally, the report rejected the manner in which colonial courts weighed testimony, stating “that the testimony of a white witness, who realizes the significance of an oath, is worth ten times as much as an Ovambo’s.”<sup>101</sup> This report as well as the mining chamber’s letter rejected the authority of criminal law to set the limits of acceptable violence.

One might expect the central administration to support the local officials in this matter; presumably, they would share a view of the relation between the public good and the private interests of the mining companies. Instead, Heiligbrunner’s solicitation of the colonial government’s opinion elicited a brusque, strident defense of private rights. Heiligbrunner wrote that police intrusion into private rights would be unnecessary if the mines followed the policy they allegedly espoused, but that criminal law did not provide sufficient protection against mistreatment as long as the mines persisted in returning abusive whites to supervisory positions. Oskar Hintrager, employing the same sort of myopic legal formalism we encountered above, summarily rejected Heiligbrunner’s view. Hintrager called a police decree

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100. *Id.* at 116r-117r.

101. *Id.* at 118r-122r.

mandating the universally preferred policy “legally impermissible.” In support of this claim, he cited a law that limited the use of administrative penalties to acts not already punishable under criminal law.<sup>102</sup> Although here silent on the issue, we can assume Hintrager would have contended that criminal law afforded not only adequate but also the only legitimate protection to native workers.

A year later, in the spring of 1913, Hintrager still maintained this position. A Lüderitz district official at that time renewed the complaints about the mining concerns’ labor practices. The official, a certain Böhmer, described a recent increase in instances of abuse, ascribing it to a surfeit of native laborers: “when there are enough workers, they [mine administrators] no longer believe that they have to pay as much attention [to mistreatment of natives].”<sup>103</sup> Böhmer laid out a detailed argument against Hintrager’s finding of the previous year, which, Böhmer objected, “tied the hands” of local officials. Beside dismissing mining interests’ tactical misrepresentations of the proposed ordinance to restrict the employment of abusive foremen,<sup>104</sup> Böhmer’s argument can be broken into three parts. First, he explained why criminal process in itself could not end mistreatment of native workers in diamond mines, detailing the course of a typical abuse case. “The courts completely fail to work,” he wrote. When the evidence was damning, the lower court in most cases imposed a fine, but even this penalty was often overturned on appeal. Unfamiliar with the diamond mines, the upper court judge could not understand the conditions that obtained there. Native witnesses, Böhmer continued, had usually returned home in the “long” interim between the initial trial and the appeal, so the upper court had to rely on “the inadequate transcripts of the first trial.” In addition, the defendants could now shape their arguments to rebut the lesser courts’ findings, an especially effective strategy given colonial courts’ tendency to give little credit to native testimony when opposed by the testimony of whites under oath. “Thus, the case ends with a *glänzenden* acquittal,” Böhmer concluded.<sup>105</sup>

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102. Kaiserliche Verordnung, betreffend Zwangs- und Strafbefugnisse der Verwaltungsbehörden in den Schutzgebieten Afrikas und der Südsee. Vom 14. Juli 1905 [Imperial order concerning authority of colonial administrators to punish, July 14, 1905] 9 DIE DEUTSCHE KOLONIAL-GESETZGEBUNG 171 (1906).

103. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 156r (on file with the National Archives of Namibia).

104. The Lüderitz mining chamber routinely represented the suggested ordinance as mandating the dismissal of abusive whites, for example, while the Lüderitz officials merely called for them to be transferred to other jobs. *Id.*

105. *Id.* at 156v.

Having discredited the assertion that criminal law and process afforded native labor ample protection, Böhmer went on to suggest a legal basis for an ordinance barring the re-employment of abusive whites in supervisory positions over “natives.” Böhmer would base such a law in the “today still fully valid” description of police duties in the ALR, which obliged the police “to take the necessary measures to prevent imminent dangers to the public or individual members thereof.”<sup>106</sup> In a gloss on this law, the Prussian upper court in a decision on October 15, 1894, had granted police authorities considerable discretion in deciding when a danger to the “public or its individual members” existed. This danger could not be an “entirely distant possibility,” but nor did the police have to wait “until the matter has reached such a point that the feared occurrence has become imminent.” Quoting this decision at length, Böhmer argued that a threat to “members of the public and the common good [*Allgemeinheit*]” was more than a “distant possibility” when a known abuser of natives worked as a supervisor. The danger inherent in such circumstance was “bodily damage” to workers, resulting in “agitation [*Erregung*]” among them and endangering the smooth working of the diamond mines—“thereby causing the greatest harm to the common good.” To Böhmer’s mind, these conditions justified the promulgation of a police ordinance.<sup>107</sup>

In the third stage of his argument, Böhmer tried to refute Hintrager’s contention that the law (hereafter § 14) forbidding administrative penalties for criminal acts prohibited a police statute in the matter. This paragraph simply meant, he contended, “that it is not the job of the police to protect every *individual* from the *effect* of a punishable actions, but not that the police ought not to protect the *public* by preventing the punishable acts of individuals” [emphasis in original]. If § 14 meant as much, continued Böhmer, prevention, the police’s “most important” function, would become impossible.<sup>108</sup> Böhmer’s repeated references to the common good distinguished his letter from Heiligbrunner’s of a year before. It is clear that Böhmer included natives in his definition of the public, since he considered them under police protection and referred to them several times as among the “individuals [*einzelnen*]” who compose the “public [*Allgemeinheit*].” Nonetheless, Böhmer seemed reluctant to describe native safety as a

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106. *Id.* at 9 quoting § 10 Allgemeines Landrecht [A.L.R.] II 17 (Prussia), § 10 II. 17 ALR. The ALR was the “default” law in the colonies when no specific colonial law applied.

107. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 157v-158r (on file with the National Archives of Namibia).

108. *Id.* at 158v.

good in itself. Rather, the insecure position of indigenous labor represented a danger to the colonial economy, harm to which caused the “greatest damage to the public.” This position may not have reflected Böhmer’s true beliefs, but rather enabled him to make an argument for native safety, which would have been rejected out of hand if grounded in native interests or a humanitarian appeal.

In response to Böhmer, Hintrager acceded to his representation of the problem: instances of abuse had increased, and the courts were failing in their prosecution of such cases. Hintrager, in other words, here contradicted his earlier argument to Roebern that criminal law and the courts sufficed to protect natives from abuse—the claim also made by the mining chamber. However, Hintrager still insisted that § 14 allowed only “direct force in the protection of the population’s life and health,” which would exclude an ordinance like the one Böhmer proposed. Instead, in order to redress the worker mistreatment problem, Hintrager suggested that labor recruiters should no longer place Ovambo workers at negligent mining companies with the determination of negligence made by the local *Bezirksrat*.<sup>109</sup> Hintrager avoided answering Böhmer in terms of the common good, referring instead to the “population [*Bevölkerung*],” a group which may or may not have included Africans.

Hintrager’s opinion elicited strong protest from Böhmer. Hintrager’s suggested solution would not improve the situation, Böhmer objected. While such a plan might be effective for sanctioning abusive farmers, it would have little effect on mining concerns. Ovambos were recruited for all mines as a group, not for individual companies; the recruiter had no say in how the workers were divided among the mines. Putting aside the impossibility of impartial judgment by a body largely composed of “diamond interests,” the *Bezirksrat* simply was not up to the administrative task of assessing how each of about 300 white foremen treated native workers. Expecting the *Bezirksrat* to perform this function delegated “a pure police” responsibility onto a “body formed for entirely other ends”—a body not answerable in terms of civil, criminal, or administrative law as the police were. Absent a law barring abusive whites from supervisory positions, the police were “completely powerless and the district office is then no longer in the position to assume responsibility for the proper treatment of natives in the field.”<sup>110</sup>

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109. The *Bezirksrat* was the local organ of South West African system of self-rule. Like their central counterpart, the *Landesrat*, it could pass resolutions, but these did not possess the authority of law.

110. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 169r-170v (on file with the National Archives of Namibia).

In rejecting Böhmer's further protestations, the central administration, this time in the form of *Regierungsassessor* Kornmayer, again called upon the restriction on administrative penalties for criminal acts (§ 14). According to a ruling of the Prussian Upper Administrative Court [*Oberverwaltungsgericht*], the police could not impose penalties for acts already punishable under criminal law. A later decision by the same court authorized the police to assess fines, not in cases of individual crimes, but when necessary for "the elimination of the illegal or unauthorized [*polizeiwidrigen*] state of affairs caused by them [the individual cases]." Kornmayer judged, however, that this decision had not yet been accepted "in the literature," and besides it was "doubtful" if this decision included the circumstances at the mines about which Böhmer and others complained.

Besides, the decisions of the Upper Administrative Court are not based in . . . a specific law, but rather simply in the belief [*Erwägung*] that the police ought not increase through police regulations the psychological pressure arising from threat of lawful punishment.

A police decree barring abusive foremen from positions overseeing native laborers would violate § 14 by replicating the StGB paragraphs concerning physical assault.<sup>111</sup>

In legal terms, Kornmayer's opinion returned to the initial defense of the status quo: native labor was adequately protected by criminal law. In the eyes of the central administration, criminal law provided not only sufficient, but also the only protection of natives from abuse allowed under law. Hintrager and Kornmayer, therefore, represented their position as deriving from a strict attention to positive law, regardless of colonial ideologies concerning native social status. But as we have seen, other interpretations of positive law—namely those of Heiligbrunner and Böhmer—left ample room for the issue to be decided either way. Legal formalism functioned here to prevent the problem from being stated openly, namely the respective value to the common good of native safety or the relative freedom of whites to mistreat natives. The central administration steadfastly refused to address the problem in these terms even when Böhmer's letters invited it to do so. By refusing to acknowledge any of the legal precedents proffered by the local officials and repeatedly invoking § 14, the central administration avoided having to make, and perhaps recognize, the explicit argument that continued mistreatment of native labor was preferable to effective sanction against

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111. *Id.* at 171r-172r.

abusive whites. In fact, it did just the opposite and joined all the interested parties in lamenting the ongoing mistreatment of native labor. How do we explain this contradiction?

Again, if we simply look at material or economic conditions of the colony, neither the mines nor the government gained by acquiescence to abusive treatment of African labor. Rather, as Böhmer argued cogently, mishandling of workers would ultimately prove harmful to the mines and, by extension, the colonial economy. Acknowledgment of this point accounted for the mining chamber and the central administration's blandishments against abuse. For administrators, devotion to the law itself also may have served as a counterweight to the tuggings of racial ideology. That is, violating the law, no matter its racial or ideological valence, transgressed the social order. On the other hand, there seems little to explain administrators' and mining interests' countenancing of violence toward Africans except as an embrace of a putative racial order which paired native inferiority with ambivalence about settlers' violence against natives. In this ideology's context, rejection of violence against natives by those in powerful positions, whether in government or business, may have represented more distaste at the excesses of (white) social inferiors than outrage at injustice. Such violence, like the mistreatment of animals, warranted legal redress only in the most abhorrent cases.

In the foregoing exchanges, the central administration seemed to occupy an extreme position virtually identical to that of mining interests. However, if we take stock of the ideological positioning occurring alongside this legal and policy debate, we will find that the central administration actually occupied a moderate position between colonial reformers and hard-liners. This fact becomes clear in a close examination of a particular abuse case. The investigation and trials of August Günther, a mine foreman, prove doubly revealing: they lay bare the violent reality that underlay the somewhat abstract legal debates and suggest why the colonial criminal justice system failed to protect Africans from abuse at the hands of settlers.

The file for the Günther case began with a most unusual telegram from colonial governor Theodor Seitz. Dated May 28, 1912, and contemporary to the debates described above, this note demanded an explanation for the Lüderitz district office's failure to appeal a previous abuse case against one Rudolf Stangenberg and ordered it to appeal the pending case against Günther in the event of acquittal. While it was not uncommon for the colonial governor to weigh in with an opinion about judicial administration generally, it was odd for him to offer his views of

individual cases, all the more so in the Günther case since it had not yet reached court. Rather than simply expressing himself on a administrative matter, the practice of appeal as a whole, Seitz implicitly imputed guilt to Stangenberg and Günther. Seitz's action presents an image of a colonial administration actively seeking to curb abusive treatment of native labor—an image far different from the one elicited by the bureaucratic stonewalling described above. Still, Seitz's stance accorded in a way with Kornmayer and Hintrager's views: if the criminal justice system alone was to protect natives from mistreatment, it must pursue such cases aggressively, even if after the sort of aggressive prodding that Seitz did here.

Seitz's interest in the Günther case prompted revealing attempts by local officials, now thrown on the defensive, to define their own roles in the administration of justice and protection of native safety. These efforts show how the various officials responsible for the realization of native policy viewed and carried out their roles, and why the colonial administration and courts ultimately failed to protect Africans from abuse. Both Heiligbrunner, a Lüderitz official, and *Regierungsassessor* Zorn, who acted as state's attorney in the Stangenberg and Günther cases, responded to Seitz's extraordinary intercession. As representative of the state and the party responsible for pursuing appeals, Zorn's report of June 3 revealed a man strenuously defending himself against Seitz's implicit criticism of his performance.<sup>112</sup> There seemed to be two errors made by local officials in the handling of the Stangenberg case: the failure to enter a formal petition to the court [*Antrag*] in a first instance of abuse, which also ruled out an appeal, and the lackluster attempt to prove Stangenberg's guilt in another instance. Zorn more or less explicitly placed the blame for these missteps on Native Commissioner Tönjes, the man who initially complained to Windhoek about the case's handling.

Zorn began by arguing that the lack of evidence in one count of abuse forced him to request a fine rather than imprisonment as punishment, despite his own conviction that a crime had occurred. The weakness of the case against Stangenberg resulted from lapses in the preparation of the case, the responsibility of investigating officials, namely, the police, the Native Commissioner, and so on. The state's attorney, on the other hand, first became active in the case during the main proceedings [*Hauptverhandlung*], which included the questioning

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112. For the role of the state's attorney [*Staatsanwalt*] see WLADIMIR LINDENBERG, RICHTER STAATSANWÄLTE RECHTSBRECHER: BETRACHTUNGEN EINES SACHVERSTÄNDIGEN 42-25 (1965).

of witnesses under oath and the judge's decision. Zorn went on to explain that he assumed his position in Lüderitz a few months after the crimes had occurred and had only learned of the case, "apart from, perhaps, a couple of casual conversations," seven days before the main proceedings. He was, therefore, not responsible for the failure to enter a petition to the court.<sup>113</sup> While Zorn was accurate in asserting that the State's Attorney was excluded from the pretrial investigation, this fact did not mean that he had no responsibility for presenting the petition. The StGB gave anyone over the age of eighteen the right to enter a complaint, and the author of the handbooks on colonial legal process asserted that this right extended even to natives.<sup>114</sup>

Zorn attributed the failure to present sufficient evidence against Stangenberg to the Native Commissioner's negligence. Although Tönjes testified that the defendant had beaten one victim with a "thick stick," Zorn said, he did not present this stick as evidence before the court, so that the court not only disbelieved that the victim had been struck with a thick stick, but also did not even consider it proven that the Ovambo had been struck with the thin stick Stangenberg himself showed to the court. Zorn chided Tönjes for taking the word of the Ovambo witnesses at face value, noting that in another case they had "lied badly." Whereas Zorn had previously cited his ignorance of the case to explain his failure to file a complaint, now he attributed this failure to the obligation of the State's Attorney not to enter a complaint lacking definitive proof.

Once again in the Stangenberg case, the central evidentiary issue was the credibility of native witnesses. Zorn criticized Tönjes for basing his case on such testimony, which in the colonial context amounted to legal incompetence. However, Tönjes had taken great pains to establish the credibility of the Ovambo witnesses and, presumably, to make their testimony acceptable to a skeptical court. These witnesses had been reluctant to testify when Tönjes first questioned them and denied that any abuse had occurred. Only after the Native Commissioner asked

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113. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 87r-87v (on file with the National Archives of Namibia).

114. See FRIEDRICH DOERR, *DEUTSCHES KOLONIALSTRAFPROZESSRECHT* 110-11 (1913). The South West African situation, at least, was not this clear cut. One criticism of the colonial legal system often made by settlers' was that Africans could too easily bring complaints against whites. Since the Native Commissioner was to assume the responsibility of making legal complaints on behalf of Africans, the creation of this office can be seen as offering something to both settlers and "natives." However, it is doubtful that before the appointment of these commissioners that Africans could very easily or did very often bring complaints against whites, nor is it clear that afterwards this right was denied them entirely.

Stangenberg to leave the area did they become more cooperative. Even then, Tönjes divided the Ovambo workers into two groups and questioned them separately, testing the honesty of each group against the other.<sup>115</sup> Still, the court summarily dismissed the Ovambo's story, underscoring the difficulty in having such testimony considered a component in the "facts of the case" as construed by the court. For his part, Zorn could cite the dishonesty of natives and the resultant lack of evidence because these conditions were axiomatic in the colonial context.

Coming to the crux of the matter—the implication of incompetence, Zorn complained that during several discussions Tönjes had given him no indication of his displeasure with the verdict in the Stangenberg case before writing to Windhoek. Zorn wrote that he assumed from Seitz's telegram that "the Native Commissioner gave an account [of the situation] that really deviated substantially from the actual development of the case, although it should not be said that the Native Commissioner consciously spoke falsely." As for the Günther case, which was still in the pre-trial phase, Zorn objected most strongly to the suggestion that he had been negligent in the Stangenberg case, and he would also prove so in the Günther case. The Native Commissioner must not be allowed to trespass on the authority of the State's Attorney's Office, an office which in the performance of any of its duties, Zorn vowed, always considered natives' well-being.

In his cover to Zorn's letter, local administrator Heiligbrunner seconded the State's Attorney. Heiligbrunner, who acted as an associate judge [*Beisitzer*] during the case, believed there was no definitive proof that Stangenberg had even once overstepped the limits of the right to discipline, although Heiligbrunner personally was convinced that he had done so and that the presentation of more testimony would have brought about his conviction. He did not place much faith in legal appeals, as it had been his experience that appeals by the State's Attorney's Office usually brought lighter, not heavier penalties, an effect of the upper courts' lay judges' misunderstanding of the relationship between natives and whites and the lag time between the first trial and appeal. As for Günther, Heiligbrunner had asked the Colonial Mining Association to remove him from his position overseeing native workers, but the mine had refused to do so unless the court convicted him. In taking this

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115. Betriebsführer R. Stangenberg wegen gefährlicher Körperverletzung [Foreman R. Stangenberg for aggravated assault], Gericht Lüderitz [Lüderitz Court], 3D 23/12, 1r-2r (on file with the National Archives of Namibia).

position, the mine pointed to Hintrager's finding on the matter, which the mine now interpreted, without demurral by Heiligbrunner, as forbidding the termination of workers as punishment for "physical discipline of natives."

How was the Günther case finally decided? The Lüderitz district court's decision on August 7 contained two accounts of the case, the first based on the testimony of native witnesses and the second on white testimony. According to the former, Kambali, Gunther's victim, was bringing lunch to his fellow Ovambo mine-workers when Günther called out to him "Wambo, Wambo." Kambali moved quickly to Günther, who gave him "four strong boxes on the ear." Kambali turned to run from his attacker, but Günther kicked him in the back of the knee and then twice in the seat of the pants. The Ovambo fell to the ground and then rose and resumed his flight, whereupon Günther set his dog after him. Catching up to Kambali, Günther threatened him with a stick but did not strike him. When he returned to the other Ovambos, Kambali could not eat, complained of severe pain, and was bleeding from his genitals. Kambali started on his way to the clinic, but collapsed and a "black cook" had to help him the rest of the way. All the native witnesses, of which there were five including the victim, testified that Kambali had taken no action that could be construed as an attack on the defendant.<sup>116</sup>

Needless to say, the tale told by Günther and a white witness differed substantially from this account of the crime. Both described Kambali as "lazy and rebellious," citing the complaints made by Supervisor Smith, the second white witness, against him for "insubordination and indolence." Smith had complained to Günther about Kambali shortly before the incident in question. Smith recounted that when Günther boxed Kambali's ears for failing to respond to his calls quickly enough, Kambali raised his arms in an attempted attack. (At this point in the testimony, the court cautioned Smith to be truthful; the decision related that "the witness Smith stood by his story in spite of the judge's stern warnings against perjury.") Another witness standing about 60 meters away corroborated Smith's story, claiming "that Kambali sprang at the accused with raised arms, and that he [the other witness] understood this as a hostile attack." Then Günther grabbed Kambali, spun him around, and kicked him only once in the seat of the pants. Smith and Günther denied that the latter had kicked Kambali on

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116. *Mißhandlung von Eingeborenen durch Weiße, Specialia*, ZBU 2054, WIIr2, Bd.1, 96v-97r (on file with the National Archives of Namibia).

the knee.<sup>117</sup>

“Despite considerable misgivings,” the court accepted Smith and Günther’s account of the event. The court’s open suspicion that the white witnesses had perjured themselves—indicated by “stern warnings against perjury” and “considerable misgivings”—was unusual in such a case. The fact that the court still chose this testimony over the conflicting account to construct the “facts of the case” again highlights just how reluctant colonial courts were to believe Africans when their stories contradicted whites’. This preference for white testimony was not simply the result of bias, but a product of the very structure of a colonial legal system that would not allow natives to testify under oath.<sup>118</sup> In the Günther case, the court avoided this issue by reasoning that Günther’s belief that he was under attack was genuine even if the attack itself was not. The court, in fact, stated that “a black laborer’s attack of a white supervisor [*Dienstherren*] is very unlikely.” The court’s reasoning rested on two assumptions: that Günther’s boxing of Kambali’s ears was a legitimate act of discipline (an assumption made explicit in the decision) and that, therefore, any subsequent attempt by Kambali to stop Günther was not an act of self-defense but itself an assault. Through this reasoning, the court tacitly acceded to an aspect of the Prussian Law of Domesticity that we have encountered above, which considered resistance to discipline to be criminal assault inexcusable by an appeal to self-defense.<sup>119</sup>

Still, the court refused to accept Günther’s kicking of Kambali as an act of self defense, since he turned the victim prior to kicking him and thereby had already “quite deliberately” removed the danger to himself. Given the severity of the injury to Kambali, damage to the urethra and an adjacent artery, the court deemed Günther guilty of deliberate physical assault [*vorsätzlich Körperverletzung*]. The court set aside the mandatory prison sentence and instead found a fine of 400 marks sufficient punishment, finding, as usual, a number of mitigating circumstances. The defendant worked with “a difficult and inept

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117. *Id.* at 97r-97v.

118. STENOGRAPHISCHE BERICHTE ÜBER DIE VERHANDLUNGEN DES REICHSTAG, 12. Legislatur-Periode, I. Session (1907/1909) 7257. Sitzung, March 2, 1909, 7271. Colonial Secretary Bernhard Dernburg proposed to the *Reichstag* that Africans be allowed to testify under oath, but his suggestion was rejected. For settlers’ reactions see *Der Negereid* [The Black Man’s Oath], WINDHUKER NACHRICHTEN, July 14, 1909 and *Der Negereid nach Dernburgs Anschauung* [Dernberg’s View on The Black Man’s Oath], WINDHUKER NACHRICHTEN, April 17, 1909.

119. *Der Negereid* [The Black Man’s Oath], WINDHUKER NACHRICHTEN, July 14, 1909, at 56, and *Der Negereid nach Dernburgs Anschauung* [Dernberg’s View on the Black Man’s Oath], WINDHUKER NACHRICHTEN, April 17, 1909, at 31.

workforce” and was “badly angered by the least imagined attack on the part of Kambali.” And although the assault might have “easily endangered” Kambali’s life, the attack did not result in permanent injury to the victim.<sup>120</sup> Under pressure from the colonial administration and itself skeptical of the white witnesses’ credibility, the court might have been expected here to impose a prison term. Instead it fell back on a set of extenuating circumstances—the “natives” putative nature and the defendant’s anger—that could and were easily seen as applicable to many colonial situations.

Just as Governor Seitz had demanded, the state’s attorney, as well as Günther’s lawyer, appealed the case. And just as Heiligbrunner predicted, the Upper Court overturned the original verdict and acquitted Günther. This court’s narrative of the case began with Kambali’s alleged attack on Günther; it deemed the defendant’s initial attack on Kambali, the “four strong boxes on the ears,” irrelevant. Now the court simply had to judge Günther actions “as the result of an unforeseen and, coming from a native, particularly astonishing attack.” Günther may have over-reacted, the upper court ruled, but his anger at the time excused this response. While this account diminished the story’s coherence, making it seem as if Kambali attacked Günther without cause, legally it made perfect sense. Because the boxes on the ear were legitimate corporal discipline, they became transparent to the court. Superficially, the initial act of discipline was irrelevant to the Lüderitz court’s decision as well. The court had found it so unlikely that a native would attack a white that it doubted the witnesses who claimed this had happened. This approach skirted the corporal discipline issue. Was Günther’s initial attack on Kambali legitimate discipline? Was Kambali’s response, then, self-defense or criminal assault? Instead the Lüderitz court asserted that no matter what the circumstances or Günther’s understanding of them, his response to the alleged assault was excessive. The Upper Court, in direct contrast, found the unprovoked attack of a native on a white so inflammatory as to justify an excessive response. Although corporal discipline was not explicitly central to either court’s decision, ultimately both decisions revolved around this issue. In convicting Günther, the lower court endeavored to establish the enforceable limits of discipline, while the Upper Court’s decision blurred such limits.

As a whole and within each of its parts, the colonial administration may have sincerely desired to protect Africans from violence at white

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120. *Id.* at 99v-100r.

hands. Administrators and representatives of mining interests again and again expressed the belief that the colonial common good and economic well-being depended on the fair treatment of native workers, and we have no reason to doubt their sincerity. These arguments also represented the limited degree to which administrators could advocate native interests for their own sake. It would have made perfect sense for colonial actors to sacrifice the jobs of a few abusive white foremen for the sake of healthier “native relations.” However, administrators and entrepreneurs seemed unable to make this sacrifice. Given the reluctance of officials and employers to believe Africans and the hindrances to the latter making complaints to colonial courts, one reason certainly was that abuse occurred much more frequently than indicated by administrative and court records. There were more than “a few” abusive whites working in the mines. Moreover, even if this were not the case, structural impediments made it unlikely that any individual case could be decided in an African’s favor. Individual racial prejudice certainly played a part, but more important was relative criminal and civil status of white and Africans under colonial law.

The colony’s civil law as set out by the *Schutzgebietgesetz* did not define the civil status of natives. As we have seen above, § 4 of this law explicitly excluded natives from legal provisions obtaining for whites, reserving to the Kaiser the authority to make laws for natives. Since most such laws were restrictive in nature.<sup>121</sup> Natives were rightless under German law. Criminal law might have been a potential exception to this rightless condition. While as suspected criminals natives did not have the same protections as whites, e.g., from arbitrary imprisonment, German criminal law made no explicit distinction between white and native victims. If one central purpose of criminal law is protection of life and property, then the criminal law in South West Africa as written seemed to include native life and property within its scope. However in practice African lack of civil status undermined their protection under criminal law and vice versa. One somewhat indirect example, alluded to above, is the matter of oaths. The prohibition on natives testifying under oath meant that courts had to grant more credibility to white testimony even apart from the common characterization of natives as congenital liars. As a result, in cases with African victims there was no

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121. Such laws were exemplified by and culminated in the Native Regulations of 1907, which, among other things, denied Africans the right to hold property, subjected them to vagrancy and pass laws, and limited their ability to freely enter into labor contracts. See *Verordnung betreffend Maßregeln zur Kontrolle der Eingeborenen, Vom 18. August 1907*, in 11 DIE DEUTSCHE KOLONIAL-GESETZGEBUNG (Köbner and Schmidt-Dargitz eds., 1907).

counterweight to the procedural rights of whites. More directly, courts and administrators explicitly favored the private rights of entrepreneurs and white workers over African's tenuous claim to safety under criminal law, as became clear in the debate about police measures to protect natives in the mines. Of course, the right to discipline stands as the most obvious instance of a white civil right weakening the protection of Africans under criminal law; it redefined a range of criminal activity as a civil right of white adults vis-à-vis natives. In so doing, the right to discipline cleared a space in which much mistreatment of Africans could take place without social or legal sanction.

In colonial Namibia, legal institutions both responded to and helped shape violence toward Africans by settlers. Many settlers and officials did not view corporal discipline of Africans as a form violence. By countenancing this discipline and some of its excesses, legal institutions effectively distributed the ability to effect legitimate violence while obscuring its violent nature. In hindsight, we clearly recognize the violence inherent in the so-called "right to paternal discipline." However, our own legal culture may help to obscure and legitimate acts of violence that are not widely recognized as such. For example, criminal law constructs violence as an individual's intentional acts. This construction disguises the arguably violent nature of preventable harms people suffer as workers or consumers or of voluntary acts that contribute to or indirectly cause these harms.<sup>122</sup> A detailed, contextually sensitive analysis of such harms and their treatment by law and legal institutions is one way to begin to uncover such violence.

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122. See John Harris, *The Marxist Conception of Violence*, 3 PHIL. PUB. AFF. 192, 194-98 (1974) (defining as violent the harms that stem, for example, from "conditions of [persons'] lives that [ones] work or lack of work forces upon them").