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CONFRONTING MEDICAL MASS MURDER:
THE U.S. AND WEST GERMAN EUTHANASIA TRIALS,
1945-1965

Volume I

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree of Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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* * * *

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ABSTRACT

The dissertation examines how health care officials involved in the Nazi euthanasia program during World War II were judged by U.S. and western German criminal courts in the 20 years following the war. The study is about the limits of the criminal law, about the way law in the postwar period was coopted and overrun by non-legal factors like politics, international events, and the psychological needs of the postwar generation in West Germany. Ultimately, the dissertation reveals the fragility of the law as a refuge for justice. The primary focus is on judicial conceptions of the Nazi euthanasia program: how these conceptions were formed, what they were, and how they affected the administration of justice in U.S. and West German courtrooms. The dissertation draws upon a variety of methods in its analysis of the euthanasia trials, including political, legal, cultural, and psychological history. Ultimately, the study finds that “non-legal” factors (e.g., politics, international events, and psychological needs), rather than neutral legal science, structured both the American and West German verdicts in the euthanasia cases. Analysis of the trial records reveals the profound impact of such forces on the outcome of the trials.

A second focus of the dissertation concerns two issues—the modernity of Nazi genocide and the perpetrators’ awareness of wrongdoing. The dissertation
considers whether Nazi genocide was driven primarily by “modern” concerns or by a hierarchy of biological value, arguing that the creed of racial and biological worth was the motive force behind Nazi killing projects. It goes on, however, to affirm a connection between modernity and Nazi genocide, consisting in the ends–means rationality of the middle-tier bureaucratic killers. Although Nazi leaders were not motivated by modern concerns, their efforts to create an identity through the destruction of human life was a response to an unstable sense of self, a hallmark of the modern experience. Hence, the dissertation concludes that the events chronicled in the postwar euthanasia trials are relevant to the post-modern age. Finally, the study argues that many perpetrators prosecuted after the war were conscious that the mass killing of patients was both morally and legally wrong, but they nonetheless collaborated in the program. It is suggested that the division of the Nazi state into two domains of authority, the normative and the extranormative, may have contributed to their collaboration.
To my son Reed

For whom I wish a world free from the events described in this volume.
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This study is the child of a gestation period that stretches back into the late 1980’s, when I encountered the bizarre phenomenon of Nazi euthanasia for the first time as an exchange student at Göttingen University. Ernst Klee’s *Euthanasie im NS-Staat* was my cicerone through the apocalyptic landscape of Nazi violence against the mentally handicapped. After a five-year career as an attorney, I returned to this grim subject out of a conviction in its importance for all of us today, dedicating much of my academic career to documenting its representation in postwar trials.

Many people have been constructively involved in one way or another with the project, both within the United States and abroad. I would like to thank my loving wife Patty for her steadfast support throughout the war of attrition that dissertations tend to be. She provided not only encouragement and astute readings of the manuscript, but bore up under periods of separation that lasted for several months as I conducted research in foreign archives. Thanks go also to my mother, Elizabeth Bryant, who provided invaluable child care for our infant son Reed that enabled me to finish the manuscript.

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I

"Poor wanderer," said the leaden sky,
"I fain would lighten thee,
But there are laws in force on high
Which say it must not be."

II

—I would not freeze thee, shorn one," cried
The North, "knew I but how
To warm my breath, to slack my stride;
But I am ruled as thou."

III

— "To-morrow I attack thee, wight."
Said Sickness. "Yet I swear
I bear thy little ark no spite,
But am bid enter there."

IV

— "Come hither, Son," I heard Death say;
"I did not will a grave
Should end thy pilgrimage to-day,
But I, too, am a slave!"

V

We smiled upon each other then.
And life to me had less
Of that fell look it wore ere when
They owned their passiveness.

Thomas Hardy,
"The Subalterns" (1902)
INTRODUCTION

It appears certain to me that nothing belongs to the past, everything is still present and can again become the future.

Fritz Bauer, *Kriminologie des Völkermordes*

In Western consciousness, the phenomenon of National Socialist mass murder has become permanently associated with the Jewish Holocaust, Adolf Hitler’s maniacal continent-wide project to destroy the European Jews. The Nazi regime’s murderous libido was fixed, balefully and inexorably, on Jewish men, women, and children. From the earliest days of the Party, it had striven to exclude Jews from the “people’s community” (*Volksgemeinschaft*) that formed the substance of Hitler’s vision of a future German nation. The Party Program of 1920 had defined German citizenship in purely racial terms: only a person “who is of German blood” could be German, a definition that forthrightly denied German citizenship to Jews. The bristling animus toward German Jews revealed in the Party Platform became official policy when the Nazis came to power in January 1933. Thereafter, the regime gradually drove Jews from their jobs in the civil service, law, and medicine, restricted their access to public accommodations, and confiscated their property. During the Night of Broken Glass in November 1938, the Nazis’ assault on German Jewry veered from legal disemancipation to
violent physical attack as bands of Nazi thugs, egged on by the regime, set fire to Jewish shops and homes, beating and sometimes killing Jews in the streets throughout Germany. Ghettoization, starvation, and exposure to epidemic disease were soon to follow. With the invasion of the USSR in June 1941, the Nazis unleashed a new and unthinkable phase in their war on Jews: the mass shooting of eastern European Jews in the Baltic states, the Ukraine, and Russia. By late 1941-early 1942, the first in a series of extermination camps had been erected in Poland to destroy Europe’s Jewish population with poison gas. When the war ended in May 1945, nearly 6 million had been killed.

The account described above is well-known and generally accepted. Yet, two years before the unthinkable had become reality, the Nazis were killing another disfavored minority by the tens of thousands within the Reich’s own borders. In the fall of 1939, the German government initiated a program unique among modern states before or since: the systematic, centrally planned murder of mentally ill patients. Launched with the signing of a “Hitler decree” in October 1939 (backdated to September 1), the program targeted so-called “incurable” patients, whose lives were to be abbreviated by a doctor-administered “mercy death.” The name “euthanasia” was attached to this campaign against the disabled. Humanitarian justifications were supplemented with cost-based rationales that legitimized euthanasia as a way to transfer needed medical resources to more “valuable” Germans. Over time, the formal restriction of euthanasia to incurable patients was nullified and the program extended to healthier patients, sick concentration camp inmates, Jewish patients, and a variety
of “asocials” (juvenile delinquents, beggars, tramps, prostitutes). The technology of murder developed in the euthanasia program—carbon monoxide asphyxiation in gas chambers camouflaged as shower rooms—would eventually be transposed to the first death camps in Poland. Many of the euthanasia personnel would likewise be transferred to the Polish death camps, where they applied to the murder of the European Jews the techniques of mass death originated in the euthanasia program. By the end of the war, some 270,000 disabled patients had been annihilated in this fashion.

The present study examines how Nazi health care officials involved in the euthanasia program were judged by U.S. and western German criminal courts in the 20 years following the war. The study is about the limits of the criminal law, about the way law in the postwar period was coopted and overrun by non-legal factors like politics, international events, and the psychological needs of the postwar generation in West Germany. The primary focus is on judicial conceptions of the Nazi euthanasia program: how these conceptions were formed, what they were, and how they affected the administration of justice in U.S. and West German courtrooms. The reader will discern a variety of methods in this study. It draws upon political, legal, cultural, and psychological history in its analysis of the euthanasia trials. Where prior studies of Nazi war crimes trials have focused on the political climate in which the trials arose, the present study seeks to fill a gap in war crimes trial research by exploring how and why euthanasia doctors were judged as they were, and how courts’ judgments of their criminality changed over time. The investigation of these questions is situated
within a comparative framework dealing with U.S. and West German proceedings against German medical professionals implicated in the Nazi euthanasia program. Ultimately, the study finds that "non-legal" forces, rather than neutral legal science, structured both the American and West German verdicts in the euthanasia cases. Analysis of the trial records reveals the profound impact of such forces on the outcome of the trials.

A second focus of the study concerns two issues—the modernity of Nazi genocide and the perpetrators’ awareness of wrongdoing. The euthanasia trials raise each of these issues. However, the answers to such questions do not belong solely to the domain of legal esoterica. Rather, they are crucial to any historical investigation of how the educated professionals of a civilized Western nation could become mass murderers. By studying the courts’ approaches to these important issues, we will gain insight into the continuing relevance of Nazi criminality to our own age. We will also obtain access to a personalized source of information on the killers’ motives, on how they understood the wrongfulness of their complicity in genocide. The subjective dimension of the trial records is a valuable corrective to the depersonalized approach of contemporary historical method.

* * * * * * * * * *

The word "euthanasia," the Greek roots of which translate as "good death," may be interpreted on at least two separate levels. On the first level, euthanasia is the election by a morally autonomous being to end his or her life in the face of an excruciatingly painful and terminal illness. Recent manifestations
of euthanasia in Western culture, such as the controversial practices of Dr. Jack Kevorkian and the adoption of a voluntary euthanasia law in the Netherlands, belong to this first level. Since deference to the overriding choice of the individual underlies it, it may be called the "libertarian" theory of euthanasia. On the second level, euthanasia emerges as a means to eliminate "useless" or "valueless" life from society for racial, economic, or aesthetic motives. Because its animating force is the alleged welfare of the collective over and above that of the individual, we may call this second level "eugenic" euthanasia.

Eugenic euthanasia is the extreme possibility of the pseudoscience of eugenics, a socio-political movement that was nearly ubiquitous from the late 19th century until the end of World War II. Coined by its founder, Francis Galton, "eugenics" derives from the Greek, meaning "well born." In both theory and practice eugenics movements can be diverse, but they have in common the aim to improve the genetic timbre of the individual members of a social order through government intervention. In the United States, Germany, and Great Britain, eugenics was based on Mendelian genetics (rediscovered at the turn of the century) and the "germ plasm" theory of the German geneticist, August Weissmann. These two theoretical orientations opposed the role of environment in heredity, stressing instead the brute factuality of genetic fitness. Mendelian/Weissmannian eugenics lent itself to a "hardnosed" theory of heritability; it was pessimistic about improving the human potential through social means, and thus tended to be politically conservative. The hardnosed approach favored a "negative" eugenics that sought to prevent genetic inferiors from
reproducing, either by forbidding them to marry, imposing birth control on them, sterilizing them, or, in the most extreme case, killing them. In Great Britain and the U.S., eugenics initiatives never went beyond sterilization. The eugenicists of the Third Reich, however, ran the gamut from forced sterilization to the centrally planned destruction of human beings branded as "worthless" by the Nazi regime.1

Clearly, accomplices were needed at all levels of the German mental health care system to bring the killing program to fruition. The plan to eliminate human beings considered strange and disturbing beckoned to one of the most Nazified professions in Germany—German medicine. As compared with other professional groups, doctors were overrepresented in the Nazi Party: in 1933, 33 percent of German doctors were Party members, constituting just under 25 percent of Nazi academic professionals, or one-fifteenth of the social elite within the NSDAP. By 1937 (a year when the membership rolls of the NSDAP were open to all Germans over the age of 17), almost 44 percent were Party members, or one-third of Nazi academic professionals and one-tenth of the Nazi social elite. These figures far exceed statistics from other German professions: neither lawyers nor teachers with Party membership ever rose above 25 percent, while other civil servants lagged considerably behind doctors. Significant percentages of physicians also belonged to the ideological bastions of Nazism, the SA (26 percent between 1935-45) and the SS (nine percent between 1933-39, and possibly more from 1939-45). Again, we can better appreciate these figures when compared with other professions, such as teachers (among whom only 0.4 percent were SS members). As Canadian historian Michael Kater points out, by
1937 1.3 percent of all SS men were doctors—a figure indicating that physicians were overrepresented in the SS by a factor of seven relative to their percentage within the population. Kater further notes that only lawyers, with a ratio of twenty-five to one, were more overrepresented in the SS than doctors.²

Various explanations have been advanced to explain this overrepresentation. The worldwide Depression in 1929 had reduced the annual average income of German doctors by more than 4,000 Reichsmarks. Simultaneously, employment opportunities for young physicians dried up, leaving many of them unemployed. The period of economic recovery in the years following Hitler’s accession to power reversed these downward trends: by 1937, the apogee of Party membership among doctors, the income of German physicians was at an all-time high. In addition, the Nazis’ dismissal of Jewish doctors from universities and clinics in 1934 opened the door wider to career opportunities for non-Jewish physicians.³ These opportunities were not inconsiderable, inasmuch as 13 percent of German doctors in 1933 were Jewish. Furthermore, the apparent successes of the Party likely convinced many doctors (as it did other professionals) that career, economic, and social advancement could be secured by riding the Nazis’ coattails. These are all materialistic rationales for joining the Party; other factors, however, may have influenced physicians’ decisions to become SS members. Kater suggests that doctors may have been lured by the power over life and death wielded by the SS—a power similar to their own. In contrast with the norms of the Hippocratic oath, the SS reserved the right to inflict death on others—that is, to destroy (and not merely to
promote) the lives of those deemed unfit to live. In an organization—and, indeed, a culture—that insisted on the right to deal death to whomever it chose, the skills of the physician were indispensable, and the doctor a respected figure. Implicit in Kater's remark is the disconcerting idea that German doctors joined the SS to expand their own powers beyond those delimited by their professional code of conduct: within the SS they could dance the Dance of Shiva, granting life and inflicting death.⁴

Of the 90,000 doctors practicing in Germany during the era of the Third Reich, how many were involved in the crimes of the Nazi regime? In a lecture delivered at the 51st German Doctors' Day (Ärztetag) in 1948, Fred Mielke, at the time a German medical student, estimated that between 300 and 400 doctors were implicated in Nazi criminality. Alexander Mitscherlich, Mielke's co-author in one of the first studies of medical crimes under Hitler,⁵ subsequently revised this estimate, stating that Mielke's figure represented only the "direct" perpetrators who committed crimes with their own hands. Standing behind them was an elaborate bureaucratic structure that had facilitated their wrongdoing. When we consider the vast program of institutionalized destruction, ranging from euthanasia killing facilities, transit centers, federal and local health ministries, research institutions, and the concentration/death camp system, Mitscherlich's more capacious approach seems closer to the mark.⁶

After the war, the Allies were faced with the task of sorting out personal responsibility for Nazi crimes and prosecuting the offenders in formal proceedings. In addition to the International Military Tribunal (IMT) conducted
by the Big Four (the U.S., Great Britain, France, and the U.S.S.R.) and trials held by Military Commissions, numerous “national” trials prosecuted Germans involved in Nazi criminality, including so-called “euthanasia” killings. In twelve separate trials between 1946-49, U.S. authorities indicted and tried 184 representatives of Nazi organizations deemed criminal by the IMT. Of these, 142 were convicted; sentences varied from 18 months to death. Among the most important of the U.S. trials was the “Medical Case” held in Nuremberg between October 1946 and August 1947. It involved 23 defendants (primarily physicians) charged with heinous concentration camp experiments on human subjects and the mass killing of mental patients pursuant to the government’s euthanasia program. Only four of the 23 defendants were charged with euthanasia killings: Karl Brandt, Viktor Brack, Waldemar Hoven, and Kurt Blome. All save Blome were convicted and executed. In the aftermath, the Americans prosecuted the remaining 11 cases, e.g. the Milch Case (exploitation of slave labor), the Justice Case (perversion of justice by Nazi judges, especially in connection with charges of “racial defilement”), the Pohl Case (concentration camp administration and extermination through labor), the Businessmen Case (“Aryanization” of Jewish property), the Farben Case (sale of Zyklon B to the SS), and the Einsatzgruppen Case (mass shootings of Jews in the eastern territories).

As the IMT and national trials were moving forward, the Germans prosecuted their own Nazi criminals. Between 1945 and 1992, West German authorities investigated 103,823 West Germans under suspicion of committing crimes during the war. Although more than 61,000 of these suspects were
prosecuted, only six percent of them, or 6,487, were convicted in West German courts. A surprisingly small number were charged with and convicted of homicide during the war (974); the vast majority (5,513, or 85 percent) were convicted either of non-lethal crimes or of crimes occurring before the war, such as the murder of SA men in the 1934 "Night of Long Knives" or of Jews during the Reich Night of Broken Glass in 1938. In fact, of all the defendants tried in West German courts from 1945-92, only 1,793 were charged with Nazi homicidal offenses during the war: 974 were convicted, 819 were either acquitted or the proceedings against them were terminated.

These statistics reveal that only 15 percent of convictions for Nazi crimes in West German courts involved wartime homicide. When we inquire about the percentage of convictions related to the Final Solution, the figure dwindles even further. Many of the homicide convictions were so-called "last stage" crimes (Endphaseverbrechen, summary and/or vigilante executions by local authorities of Germans who had admitted to military defeat) or political denunciations (the "grudge informers" working for the Gestapo or police, whose betrayals of their neighbors often resulted in political murder). Abhorrent though such cases were, they were not connected with the systematic programs of extermination and mass murder that have become the historical signature of Nazism. Subtracting these cases from the 15 percent of wartime homicide cases, we arrive at a figure of 755 defendants prosecuted for genocidal crimes against the Jews. 283 of them enjoyed either acquittal, dismissal of charges, or the refusal to impose punishment, while 472 were convicted. Of those convicted, one was put to death,
113 received lifetime imprisonment, and 358 were given jail terms up to 15 years. As the Dutch historian of postwar German trials, Dick de Mildt, has concluded from the data, around seven percent of all convictions by West German courts in Nazi-related trials between 1945-92 were connected to the Holocaust. De Mildt points out a sobering statistic: only seven out of every 1,000 perpetrators of genocide were tried, and not even five out of 1,000 were punished.8

The lion's share of investigations and trials of Nazi crimes took place in the 5 year period following the end of the war. By late 1950 West German courts had convicted 5,228 Nazi defendants (roughly 81 percent of Nazi crimes successfully prosecuted from 1945-1992). If we examine the West German trials by category, we find that they embraced six distinct categories of crime: (1) political denunciations; (2) deportations of Jews and Gypsies; (3) euthanasia; (4) "last phase" killings; (5) killings of prisoners of war, concentration camp prisoners, foreign workers (Ostarbeiter), and Jews; and (6) a miscellaneous category of homicide. Among these six categories, euthanasia cases amounted to just under 13 percent of Nazi crimes tried between 1945-1950 (37 out of 288 cases). Beginning in 1951, the numbers of convictions plummeted. Where in 1950 West German courts had convicted 809 Nazi defendants, that figure fell to 259 in 1951 and a paltry 21 by 1955.9

How can we account for the precipitous decline in Nazi criminal prosecution? Several factors may explain what was happening. First, the structure of German criminal investigation in the postwar years impeded efficient location and prosecution of Nazi war criminals. German state prosecutors
(Staatsanwaltschaften) were required by law to investigate a crime only if it was committed within their jurisdiction, or the perpetrator either resided or was arrested within it. Since the crimes of the Final Solution had been committed on foreign soil, they had no geographical linkage with West German jurisdiction, nor could the bare possibility that a perpetrator might reside within the prosecutor’s jurisdiction create a prima facie reason for investigation. In theory, a prosecutor could know of the existence of a mass shooting in the Soviet Union by Germans, and even the identity of the killers, yet still be legally hamstrung from setting an inquiry in motion. The absence in Germany of a federal investigative body like the American FBI contributed to the judiciary’s paralysis. Second, the Allied Control Council (the occupational government formed by the Allies as a successor to the defunct Nazi state) deprived the German judiciary, at least technically, of jurisdiction over any crimes perpetrated by Germans on foreign nationals. This ban was rescinded in August 1951, but until that time it was a stumbling block to efforts by German prosecutors in the crucial 5 years after the war to investigate, arrest, and prosecute the suspected murderers of Jews and others. Third, efforts to prosecute Nazi offenders sometimes ran afoul of the statute of limitations, which barred prosecution of certain offenses after a

* The absence of a federal authority capable of coordinating nationwide investigations of Nazi war crimes suspects was to a degree alleviated by the establishment in December 1958 of the Central Office of the State Justice Administrations for the Clarification of National Socialist Crimes in Ludwigsburg. The Office was charged with investigating Nazi war crimes, collecting records about them, and ascertaining the whereabouts of suspected perpetrators. Although the Office was vested with no indictment authority, it forwarded its evidence to state prosecutors who could issue indictments based on the documentation. See Adalbert Rückerl, The Investigation of Nazi Crimes 1945-1978: A Documentation (Hamden, CT: Archon Books, 1980), p. 49; Erwin Schüle, "Die Zentrale der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen in Ludwigsburg," Juristenzeitung, 1962, p. 241.
specified period of time had elapsed. In May 1950 the first statute of limitations expired, immunizing from prosecution all offenses of a relatively minor criminal nature (crimes punishable with a sentence of up to five years). In 1954, an Amnesty Law decreed by the Bundestag immunized a second category of offense—manslaughter punishable with a prison sentence up to three years. The following year, the statute expired for all crimes subject to a maximum jail term of 10 years. Five years later, offenses punishable with 15 years or less (i.e., manslaughter, infliction of grievous bodily harm, deprivation of liberty resulting in death, and robbery) were beyond the reach of the judicial authorities. Thus, by 1960 only perpetrators of murder were susceptible to prosecution.10

The structure of West German criminal investigation, restrictions imposed by the Allied Control Council on German jurisdiction over Nazi crimes, and the statute of limitations are systemic factors that obstructed a thorough judicial reckoning with National Socialist crimes by West German courts. They do not fully explain the dramatic dropoff in prosecutions after 1950, nor do they address the socio-cultural forces that poured sand into the gears of the German justice system. Between the end of the war and 1950, the IMT proceedings at Nuremberg and its numerous successor trials in all zones of occupation had exposed to the harsh light of publicity the horrific projects of Nazi genocide, committed on an unimaginable scale in the name of the German people. For Germans eking out a precarious existence amid the rubble of their bombed-out homes, these revelations could only deepen an already grievous state of depression. Refusal to confront Germany’s recent “brown” past became
characteristic of broad segments of the population. Scholars have cited several explanations to account for this attitude. For the late German scholar (and prosecutor) of National Socialist criminality, Adalbert Rückler, the Germans' aversion to revisiting their Nazi past was due to a number of factors. First, the reportage on the IMT proceedings blended the defendants' military, political, and genocidal offenses into a promiscuous whole, thereby blurring the differences between political or military-related crimes and the racially-inspired crimes of the Third Reich. The result was to plant the idea in the minds of many Germans that the regime's murderous treatment of Jews, Soviet POWs, Gypsies, and the mentally ill occupied a lower niche on the reprehensibility scale. Political or war crimes were a recognizable and not uncommon species of offense, committed by both the victors and the vanquished in the heat of armed conflict. On this view, the Nazis' crimes were acts carried out in the course of service to the Fatherland; in no sense could they be equated with the destructive practices of "real" criminals. From this set of dubious premises, some drew the conclusion that the Allied trials of "war criminals" were little more than Siegerjustiz (victor’s justice), punishing German defendants for crimes the Allies had also perpetrated.11

Second, according to Rückler many Germans perceived the Allied trials as flagrant violations of a traditional cornerstone of German criminal jurisprudence, the Roman law maxim nullum crimen sine lege (no crime may be charged without a preexisting law that defines it). Because neither the London Charter (the legal basis of the IMT) nor Control Council Law #10 (the legal basis for the subsequent trials and for German prosecution of Nazi defendants until August 1951) was in
existence prior to 1945, they were regarded as ex post facto laws. German courts were not persuaded by this argument; they indicted, tried, and convicted defendants in the postwar years for infringing the German law of murder, or for committing crimes against humanity in violation of Control Council Law #10—the latter often justified on natural law grounds.12

Third, the monumental failures of de-Nazification framed the task of judicial reckoning in a notorious light. On the orders of the occupying powers, the German Länder issued laws requiring local authorities to comb the records of all adult Germans for evidence of involvement in the Nazi movement. Germans were obliged to complete a substantial questionnaire (131 questions in the American zone) on their prior political and social engagements. These forms were reviewed by de-Nazification courts, which classified the subjects of the questionnaires into one of five categories: exonerated, follower only, lesser offender, offender, and major offender. The de-Nazification bodies could impose penalties based upon this classification, ranging from fines to confinement in a labor camp for no more than 10 years. They could also ban an individual from his profession for a period of time. Mere membership in certain Nazi organizations (e.g., the SS or the SD) created a prima facie case against the subject of the questionnaire; once this affiliation was proven, the burden shifted to the subject to rebut the presumption of guilt.

Although the program’s aim of scouring German society of the Nazi taint may have been high-minded, its implementation was farcical, as major criminals neglected to mention on the forms their involvement in mass killings in the East,
thus escaping with trivial sentences, while easily-documented but minor Party memberships became the occasion for draconian punishment. The laughable spectacle of mass murderers receiving “detergent certificates” (Persilscheine) cleansing them of egregious wrongdoing discredited the process in the eyes of many. Rückerl theorizes that the bad odor surrounding the de-Nazification proceedings clung by association to Allied and German trials of Nazi defendants, viewed by the public as “a continuation of de-Nazification under another name.”

The factors Rückerl cites no doubt played a role in the German public’s unwillingness to conduct its own autopsy on Nazi crimes. He fails to mention, however, an even more fundamental force militating against an honest confrontation with the past—an incapacity to “work through” the traumas of recent German history, a process Sigmund Freud called Trauerarbeit, or “the work of mourning.” In their justly famous study The Inability to Mourn, the psychologists Alexander and Margarete Mitscherlich argued that the vast amplitude of National Socialist criminality precluded the German people from coming to terms with a history that was still cancerously alive. To expect an entire nation to stand face-to-face with the murders of millions of innocent people killed in their name was unrealistic. An urge for psychic self-preservation drove the Germans to repress their Nazi past. The alternative—openly confronting the Nazis’ crimes, in which so many Germans at all levels of society and vocation were implicated—risked plunging the German people into a society-wide psychosis that would have jeopardized all efforts at postwar reconstruction and renewal. The fiction, concocted by Julius Streicher at Nuremberg and
propagated by many Germans ever since, that Hitler and his cronies were criminal pied pipers whose demonic flutes had bewitched the German people, was deployed less to justify the Germans in the eyes of the world community than to justify themselves in their own. The irony should not be lost on us that the tendency among Nazi perpetrators to conceal from themselves the abhorrent quality of their crimes resurfaces among the German public after the war—a tendency toward self-deception, instrumentalized to preserve psychic health.¹⁵

Other forces in West German society complicated the Germans’ confrontation with Nazi genocide. In 1946, three million Germans from the east streamed into the western zone, among them civilians fleeing the Red Army and 500,000 prisoners of war released from the Soviet zone of occupation. By 1950, nearly eight million eastern German fugitives had found refuge in the West. They consisted of homeless women, the elderly, veterans and war cripples, and orphaned youngsters aimlessly roaming the desolate streets of Germany. Suffering high unemployment (34.7 percent, as compared with a western German average of 16.2 percent), these displaced people, in their visibly destitute circumstances, were regarded as threadbare outsiders by the western Germans. They became a fermenting ground of support for incipient nationalist parties like the German Party of the Right (Deutsche Rechtspartei, or DRP) and the National Democratic Party (Nationale Demokratische Partei, or NDP), which championed extremist ideas like the reconstitution of Germany’s 1914 borders and the restoration of all Nazi officials to their former jobs. Such a platform was obviously quixotic; yet, it resonated with the hopes of the legions of the displaced,
embittered, and unemployed throughout Germany. In the years after the war, these parties managed some impressive electoral victories: the DRP received 75 percent of the local vote in Wolfsburg, the NDP a hefty ten percent in the national elections of 1948. They typically polled the best in areas heavily populated by eastern German fugitives (e.g., Wiesbaden in Hessen-Nassau, where the NDP won 24 percent of the vote) and in regions that had supported nationalist and anti-Semitic candidates during the Weimar Republic.¹⁶

Parties like the DRP and NDP—the leaders of which often had ties to the SS and other National Socialist organizations—lambasted the de-Nazification authorities and clamored for an end to all de-Nazification proceedings. They also fulminated against the trials of Nazi war crimes suspects. When, in his Final Report to the Secretary of the Army, the American Chief of Counsel for War Crimes, General Telford Taylor, refers to “ultra-nationalist attacks” on the American successor trials and to “an alarming resurgence of authoritarianism in Germany” in the late 1940’s, there can be little doubt that he had such groups in mind.¹⁷

Further, we must not underestimate the impact of international events on the trials of suspected Nazi war criminals. As the crimes of National Socialism faded in the glare of a perceived threat from the USSR, the need to reconstitute western Germany as a bulwark against Communism in central Europe asserted itself, brawling and insistent. A German national identity securely moored to the West was required to stave off the clear and present danger posed by the Russians. Not old Nazis, but Soviet Red Army soldiers were the enemy. Such
attitudes increasingly permeated both American and German approaches to the subject of Nazi criminality in the late 1940's. On the American side, they are reflected in Project Paperclip (1945-1955), a top-secret U.S. program to bring into the United States German scientists, some of them with checkered war-time careers (including involvement in experiments on human guinea pigs),\textsuperscript{18} as well as in the headline-grabbing defense by Senator Joseph McCarthy in 1949 of SS men implicated in the Malmedy massacre.\textsuperscript{19} On the German side, attitudes hostile toward a full judicial reckoning with Nazi crimes gathered increasing momentum in the immediate postwar years, giving rise to an atmosphere of "general sabotage" of the de-Nazification proceedings. They culminated in late 1949 in the decree of the West German Bundestag's first law, an amnesty granted to National Socialist crimes entailing a maximum punishment of six months or less.\textsuperscript{20}

Finally, the attitudes of the West German judiciary in the postwar years assuredly played an adverse role in the trial and punishment of Nazi offenders. The late 1940's witnessed a reintegration into the western German judiciary of former Nazi judges and prosecutors, many of whom had served on the infamous "special courts" (Sondergerichte) and "People's Court" (Volksgerichtshof). In the British zone of occupation, by 1948 between 80-90 percent of state court (Landgericht) judges were former members of the Nazi party. By 1949, 81 percent of all judges and prosecutors in Bavaria had belonged to the Party—a percentage, asserts Nazi war crimes trial expert Willi Dressen, that corresponds to the proportion of Nazi jurists in the judiciary prior to 1945.\textsuperscript{21} Moreover, even in
the cases of uncompromised jurists, it would be erroneous to assume they were
shielded from the currents that swept through German society at the end of the
decade. Judges are not impassible robots removed from the influences of their
environment, but human beings vulnerable to public pressure. In the case of
German judges in the late 1940's, we may presume that all of them—including
those unburdened with a Nazi past—had experienced the tumults of the war as
professional adults. Although de-Nazification had initially purged many
compromised jurists from the public justice system, we ought not assume that the
remaining judges had all weathered the traumas of the war and the immediate
postwar years without some degree of personal injury—be it physical,
psychological, or emotional. Of one thing we can be reasonably certain: all of
them must have known at least one colleague sacked from his job by the de-
Nazification authorities, or under investigation or indictment for Nazi-era crimes.

The focus of the present study is on U.S. and West German trials of
defendants charged with participation in the Nazi government's euthanasia
program. The American euthanasia trials comprise two separate proceedings: the
prosecution by military commission of the medical staff at the Hadamar killing
center in Hesse-Nassau (where both foreign nationals and mentally ill Germans
were killed) and the Medical Case (Case #1) against some of the high-ranking
designers and implementers of the euthanasia program, tried before the U.S.
National Military Tribunal at Nuremberg. The U.S. euthanasia trials were
premised on violations of international law. In the Hadamar case, the defendants
were charged with violating the "Laws of Armed Conflict," a body of customs
and rules set forth in various treaties, international agreements, and the decisions of international and domestic courts, designed to temper the brutality with which modern war is waged. Offenses proscribed by the Laws of Armed Conflict are generally called "war crimes." In the 1946 Medical Case, on the other hand, the four defendants indicted for their roles in the Nazi euthanasia program were charged with committing "crimes against humanity," a species of offense related to war crimes but conceptually distinct from them. Whereas war crimes were derived from the treaties, accords, and court opinions that made up the Laws of Armed Conflict, crimes against humanity were not defined in an international instrument until the London Charter (August 1945) that became the basis for the International Military Tribunal at Nuremberg. Article 6(c) of the Charter defined crimes against humanity for the first time in international legal history. They consisted of "murder, extermination, enslavement, deportation, and other inhumane acts" against a civilian population, as well as "political, racial, or religious" persecution "whether or not in violation of domestic law of the country where perpetrated." Although the U.S. prosecution teams at the IMT and the National Military Tribunal (NMT) often treated war crimes and crimes against humanity synonymously, they were—and continue to be—separate and distinct crimes under international law.

By contrast, the West German euthanasia trials were for the most part based upon alleged violations of the German law of homicide (sections 211 and 212 of the German Penal Code). Until August 31, 1951, the Germans could charge euthanasia defendants with committing either a crime against humanity as
defined under the IMT Charter (and incorporated into Control Council Law #10) or homicide under their own Penal Code. Beginning in September 1951, Control Council Law #10 became null and void, and Nazi defendants could only be charged with infringing German law. Until that time German prosecutors sometimes charged defendants with both offenses, but the prevailing practice was to indict them for violating domestic law. The Germans' aversion to ex post facto prosecution may explain their preference for trying their accused under their own laws of homicide.

The aim of the present study is to explore postwar U.S. and West German judicial conceptions of the Nazi euthanasia program, and how these conceptions affected the administration of justice by American and West German courts in the years following World War II. Since other scholars have devoted considerable attention to the socio-economic and political forces that shaped the prosecution of Nazi defendants, the study does not focus primarily on the context of the trials. Rather, it seeks to chart how social, geopolitical, and cultural forces shaped the actual verdicts in the euthanasia trials. The focus is on the texts of the trials themselves, in which are registered the skewing influence of power relations in western Germany in the twenty years following the war. Toward this end, the study undertakes close readings of U.S. and West German trial documents. Such readings disclose the extraordinary impact of non-legal factors on the trials of the Nazi euthanasia doctors. These factors interacted with the trial procedures in a manner not unlike the effect of an “event horizon” (black hole) on light—bending, distorting, and sometimes engulfing the disinterested administration of
justice. Our examination of the court records will reveal that the influence of these non-legal factors was determinative of the verdicts. The trial documents will prove that the realm of non-legal forces—geopolitics, culture, psychology, in a word, power—was not an uninvited interloper playing havoc with pure legal science, but an ingredient of the very process of adjudication. In locating relations of power squarely within legal process, the study suggests that so-called “extra-legal” factors were in reality an intrinsic, ineradicable, and predestinating force in the postwar trials of the euthanasia doctors, a force so irresistible, so pervasive, and so seminal that it altered the legal concepts of burden of proof in both the American and German cases. It led the Americans to assume the guilt of their defendants contrary to the principle of “innocent until proven guilty,” and the Germans to assume innocence despite the time-honored tendency of Continental jurisprudence to impose the burden of proving innocence upon the defendant.

In the historiography of the postwar Nazi war crimes trials, few scholars have explored how the courts constructed their ideas about the euthanasia program, or what the similarities and differences in their respective conceptions reveal about their attitudes concerning Nazi genocide. The earliest attempt to document the Medical Case at Nuremberg was made by Alexander Mitscherlich and Fred Mielke in Das Diktat der Menschenverachtung (The Dictate of Contempt for Humanity, 1947). Their study centered on the American prosecution of German doctors for conducting painful, disfiguring, and sometimes lethal medical experiments on concentration camp prisoners. They only briefly
discussed the portion of the trial dealing with Nazi euthanasia. Two decades later, the German jurist Herbert Jäger published a remarkable treatise on Nazi criminality as revealed in the postwar trials, entitled *Verbrechen unter Totalitärer Herrschaft: Studien zur nationalsozialistischen Gewaltkriminalität* (Crimes under Totalitarian Government: Studies on National Socialist Violent Criminality, published in 1967). Drawing on the (at the time) unpublished court decisions of the local, appellate, and Supreme courts in Germany, Jäger developed typologies of Nazi criminality that included degrees of individual participation, the role of superior orders, the awareness of illegality, and the relationship between war and genocide. In its phenomenological inquiry into the types of killing and the motives of the killers as reflected in German court documents, Jäger’s study is without peer before or since its publication in 1967.²⁵

A decade later, Adalbert Rückerl’s *The Investigation of Nazi War Crimes 1945-1978* (German edition, 1978; English translation, 1980) became one of the first texts to summarize thirty-three years of criminal investigation and prosecution of Nazi war criminals in different countries. Rückerl served as a prosecutor in the German Auschwitz trial (1964) before assuming the directorship of the Central Office of the State Administrations for the Investigation of Nazi Crimes, headquartered in Ludwigsburg. Concisely anatomizing the distinctions in German law between perpetrators (*Täter*) and accomplices (*Gehilfe*) and between murder and manslaughter, as well as the impact of the statute of limitations on war crimes prosecution, Rückerl defended the German judicial authorities from charges of half-heartedness in the pursuit of Nazi mass murderers.²⁶
As a counterpoint to Rückerl, an article by Holocaust historian Henry Friedlander published in the *Simon Wiesenthal Center Annual* in the early 1980's examined why the German courts after 1950 applied the "newer" version of the German homicide laws (emphasizing the "reprehensibility" of the offense rather than premeditation) when adjudicating Nazi war crimes. While Friedlander's article contrasted Continental and Anglo-American approaches to criminal liability, the point of the essay was to criticize the failures of the *Bundestag* to close important loopholes in the law that allowed Nazi defendants to evade justice.* The present study, by contrast, undertakes a micro-analysis of a specific category of Nazi criminality (euthanasia crimes) to explore how U.S. and German jurists in the twenty years after the war constructed their knowledge about the euthanasia program, and how their conceptions were influenced by "non-legal" factors.

An even more trenchant critique of the West Germans' reluctance to bring Nazi offenders to justice appeared four years later in an exhaustive monograph on postwar German attitudes toward Nazi crimes, *Die kalte Amnestie: NS-Täter in der Bundesrepublik* (*The Cold Amnesty: Nazi Perpetrators in the Federal Republic*, 1984). The author, a West German journalist who used the *nom de plume* Jörg Friedrich, decried the lenient treatment of proven Nazi killers by West German courts from the late 1940's until the early 1980's. Friedrich's massive indictment of postwar West German society at virtually all levels, from the police *One of Dr. Friedlander's main examples is the alteration in sec. 50 of the German Penal Code in 1968, which required courts to reduce the sentence of an accused found to be an accomplice to no
to the Bundestag, from the medical profession to the judiciary, was fired with an incandescent anger. He mocked the grounds for decision in cases like the Einsatzgruppen trial of 1963, which acquitted the shooters of Jews near Mogilev (a city in eastern Byelorussia) of murder on the theory that they had sought to spare the Jews unnecessary suffering. Friedrich retorted that the spontaneous confessions of the defendants during their pre-trial interrogations revealed a different story—damning evidence that the court had largely ignored. He attributed such lenience to the "brown" past of the German judiciary, which compromised its willingness to investigate, prosecute, and punish Nazi war criminals.

An equally caustic treatment of West Germany's ambivalent encounter with the ghost of Nazi criminality was Ernst Klee's Was sie taten—Was sie wurden: Ärzte, Juristen und andere Beteiligte am Kranken- oder Judenmord (What They Did, What They Became: Doctors, Jurists, and Other Participants in the Murder of Jews and the Mentally Ill, published in 1986). A theologian, journalist, and self-taught expert on the Nazis' euthanasia program, Klee described how German professionals involved in the Third Reich's murderous projects eluded justice in the decades after 1945. He identified the cozy German medical fraternity as a leading saboteur of postwar attempts to hold euthanasia doctors accountable for their crimes. Bent on saving face and helping old friends, German doctors acted duplicitously in several high-profile cases to provide euthanasia defendants with fabricated medical attestations of their incapacity for more than 15 years. The practical effect of this change was to immunize from prosecution all
trial. The connivance of the medical community with mass murderers, along with the dilatory investigation of Nazi suspects by local police and prosecutorial authorities, ensured a favorable outcome for many of these defendants.28

Years after the works of Mitscherlich/Mielke, Jäger, Rückerl, Friedlander, Friedrich, and Klee, the Dutch scholar Dick de Mildt published In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany (1996), a book that broke new ground by examining a wide cross-section of Nazi war crimes trials administered by American, British, and German courts. Focusing on the "euthanasia" and Holocaust trials in West German courts, de Mildt found that the West German judiciary's evaluation of the defendants' actions varied significantly from court to court, defendant to defendant, and over the course of time. De Mildt ascribed the trend toward leniency and acquittal in German courts to a general Zeitgeist within the Federal Republic averse to a thorough judicial reckoning with Nazi crimes. The reason, he speculates, is that an unblinking confrontation with Nazi criminality would have opened the Pandora's box of German society's wide-ranging complicity in the genocidal projects of the Third Reich at a moment when most Germans wished to bury their frightful past. "Crucifying these executioners for their obedience to an authority 'wished' by all," de Mildt observes, "would have compelled post-war German society to scrutinize its profound co-responsibility for their crimes. And . . . from a people—any people—'judging its own case' this could hardly be expected."29

accomplices unless they could be shown to have shared the "base motives" of the perpetrator.
None of the authors mentioned above addresses the question of what different judicial approaches at different times, and among different national groups conducting Nazi war crimes trials, tell us about the assumptions of the judges and lawyers who grappled with Nazi crimes in the postwar era. Nor do their studies focus on how these assumptions shaped the courts’ conceptions about the nature of National Socialist criminality, or how such conceptions affected the outcome of individual cases. The present volume is intended to fill this gap in our understanding of how and why certain groups of defendants charged with Nazi crimes were judged as they were.

The study places its investigation in a comparative framework involving the U.S. and West German court proceedings against German medical professionals—especially doctors—implicated in the Nazi euthanasia program. The time-frame is the critical 20-year period following the end of the war, when all of the U.S. and most of the German trials were conducted. Chapters 1-3 provide the reader with historical background to the trials. Chapter 1 sketches the history of the idea of “life unworthy of life” with specific reference to Western societies. The chapter examines how ancient notions of “inferiority” were incarnated in a 19th century avatar, eugenics, and suggests that the fusion of eugenics with racial hygiene in Germany became a potent cocktail for many Germans in the traumatic aftermath of World War I. The primary aim of the chapter is not only to show the remarkable continuity between Classical ideas of “unworthy life” and the Nazis’ appropriation of them, but also to demonstrate how voices advocating negative eugenic solutions to the problem of “worthless”
life, relegated to the fringe in the prewar years, had moved to the center by the 1930's. Chapters 2 and 3 discuss the evolution of euthanasia killing from 1933 to 1945 and the expansion of its genocidal logic to other targeted minority groups (e.g., the Jews, the Sinti and Roma) by late 1941. Chapter 2 speculates about the motives behind the killing program, arguing that an aesthetic distaste for human beings considered strange or disturbing as measured by the Nazi elites’ artistic values was a major factor in the decision to “euthanize” the mentally ill. Chapter 3 takes up the question of the “radicalization” of Nazi mass killing as it spread from the disabled to Soviet POWs, the European Jews, and other groups in the summer and fall of 1941. The chapter offers a different way to think about Nazi genocide, one I have chosen to call “violentization.” The term seeks to capture the way in which proposals for solving “problems” through violence moved from the periphery of socio-political discourse to the center of government policy from 1933 onward. “Violentization” is offered as a corrective to the vagueness of “radicalization.” particularly the latter’s tendency to ignore both the latent and actual violence of the Nazi regime prior to 1939.

Chapters 4, 5, 7, and 8 seek to excavate from the trial records American and German judicial conceptions of the primary reasons for the mass killing of the disabled. Chapter 4 shows that U.S. prosecutors and judges regarded euthanasia as an auxiliary to the Nazis’ efforts to wage aggressive war against their European neighbors. The Americans’ “conspiracy” theory was driven by a predisposition to

*The word “violentization” was coined by the American criminologist Lonnie Athens to describe the process by which human beings can be transformed into violent criminals. My use of the term.
interpret Nazi crimes in terms of the regime's ambitions to subjugate by force of arms the peoples of Europe. Without this link with the conduct of the war, American policymakers feared the euthanasia program would be deemed a domestic program; in their eyes, interfering in the purely domestic policies of a sovereign state might set a dangerous precedent in international law. Consistent with their war-connected theory of euthanasia, the Americans portrayed the killing of the mentally ill as a war measure to strengthen the German army by enriching it with booty plundered from "useless eaters" (chiefly medical supplies and hospital space). Chapters 5, 7, and 8 demonstrate that German courts adopted a similar view, representing euthanasia as arising from a "crass utilitarian" style of thought that reapportioned resources from "valueless life" to "valuable" Germans. I call the interpretation that sees euthanasia chiefly as a function of economics the "economistic" (or modernity) theory of euthanasia.

Additionally, these three chapters explore the motives imputed by the courts to the middle-level technocrats and functionaries entrusted with implementing the euthanasia program. Chapter 4 examines the first American encounter with Nazi euthanasia, the U.S. Hadamar trial held before a military commission in October 1945. In this proceeding, American prosecutors and judges theorized that the accused committed their acts out of careerist ambitions. The U.S. Doctors' Trial two years later presided over the guilt of four high-

while influenced by Athens' neologism, is not meant as a strict application of his theories to the phenomenon of Nazi genocide.
ranking members of the German health service,* finding that the defendants were
impelled to criminality by a blend of economistic and ideological factors. In both
the Hadamar and Doctors’ trials, the defendants were treated as perpetrators and
co-conspirators—meaning that all the conspiracy members, no matter how large
or small a function they discharged, were equally liable for all acts carried out on
behalf of the conspiracy. Chapters 5, 7, and 8 contrast the American approach
with that of the Germans, who generally depicted their defendants as
“accomplices” (Gehilfe) rather than perpetrators (Täter), a distinction that in
German law hinges upon the degree of a defendant’s self-interest in the crime.
Portraying Nazi physicians, nurses, and health service bureaucrats as accomplices
driven less by ideology than characterological shortcomings (vanity, careerism,
“inertia of the will,” etc.), German courts virtually assured lenient treatment of
their defendants. The trend toward leniency and acquittal began in the late 1940’s
and grew in intensity as political and psychological factors (the Cold War, the
mounting resentment by the German population of trials viewed as “Victor’s
Justice,” and other “nonlegal” factors) increasingly affected the adjudication
process. Although the march toward clemency and, finally, exoneration occurred
through the adoption of different exculpatory theories at different times, there can
be little doubt that they all combined to short-circuit an adequate punishment of
euthanasia offenders.30

Chapter 6 departs from the approach of these other chapters to take up an
important—and often neglected—subject in the history of the euthanasia trials:

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* In fact, 23 defendants were indicted, but only four (Karl Brandt, Viktor Brack, Waldemar Hoven,
American and West German conceptions of their jurisdiction over these crimes. The U.S. authorities premised their jurisdiction over euthanasia defendants on the basis of traditional laws of armed conflict, including the Geneva and Hague Conventions. Because Nazi euthanasia, in the Americans’ view, was designed to promote the German war effort, it was legally and conceptually related to war crimes codified in international documents. By asserting a nexus between war crimes and crimes against humanity (as the euthanasia crimes were charged), the Americans could argue they were not meddling in the Nazi state’s internal affairs, but prosecuting matters recognized as breaches of international law by the world community. For the American authorities, concerns about ex post facto prosecution were less significant than upholding the principle of sovereignty, under which no country was permitted to intervene in the domestic affairs of a sovereign state.

The Germans, by contrast, were deeply concerned about the ex post facto question, not least because the ban on retroactive prosecution was fundamental to the Continental legal tradition to which Germany belonged. They faced a vexing dilemma: how could they hold defendants accountable for crimes that were not regarded as illegal at the time they were committed? German courts and jurists solved the ex post facto problem by reviving the classical tradition of natural law theory to justify their prosecution. The revival lasted until the early 1950’s, when courts trying euthanasia cases began to question the capacity of their defendants and Kurt Blome) were specifically charged with euthanasia crimes.
to recognize natural law. By the 1960's, the influence of natural law theory had virtually disappeared from German euthanasia prosecutions.

There is a great deal more to this study than the significant issues outlined above. Modern Western governments, even brutal dictatorships, do not typically kill their people in order to solve resource allocation problems. This fact raises two additional issues. First, were the courts' economistic theories of National Socialist euthanasia correct? Did they adequately describe the reason for euthanasia and other killing projects of the Third Reich? Was Nazi criminality (of which euthanasia was a substantial component) an essentially modern phenomenon, caused not so much by ideological factors like racism as by modern forces like instrumental rationality, bureaucratization, and morally blind population policy? Holocaust scholarship of the 1980's and '90's often emphasized the modern dimensions of Nazi genocide, arguing for a historicization that would locate it within the turbulent stream of modern history. Rainer Zitelmann claimed that the Holocaust was not an anomaly in the Western world, but the product of a modernizing regime and of a dictator who saw himself as creating a sophisticated, technologically advanced society. Similarly, Götz Aly and Susanne Heim sought to prove that Nazi mass murder was the product of rational programs to modernize the east. For the sociologist Zygmunt Bauman, the Holocaust was made possible by the modern values of social engineering and ends-means rationality divorced from moral concerns. A similarity between these contemporary historical perspectives and the decades-old interpretations of
American and German courts is discernible. The question remains: were they true?

Second, in the trial records the issue is repeatedly raised of the defendants’ awareness of illegality at the time they participated in euthanasia crimes. The Americans were generally unfazed by this issue, inferring from their defendants’ purposive conduct on behalf of the euthanasia program the requisite intent to commit the offense. The Germans initially countered the problem of lack of consciousness of illegality (Unrechtsbewusstsein) with resort to natural law: all sane human beings were able to perceive the injustice of a course of action in the light of the “law of nature.” By the early 1950’s, however, natural law as a liability-producing device was on the wane as courts began to express doubts about their defendants’ awareness of wrongdoing. The issue was far from a technical legal point, insofar as it went to the heart of the perpetrators’ state of mind. If they did not understand their actions as in some sense wrongful, how could they be held morally or legally accountable for their actions? More ominously, had Nazi indoctrination been so successful that it had reordered the value systems of these people within a decade, such that they no longer perceived gross injustice? A provisional answer to these questions is proposed in the final section of the Conclusion. Drawing upon Hans Buchheim’s notion of the “double state” and criminologist Lonnie Athens’ theory of the “phantom community,” the study advances the hypothesis that many of the euthanasia killers, like Nazi killers in general, knew their actions were unlawful, but nonetheless committed their crimes in obedience to the commands of the Nazi state—a state that justified mass
murder as necessary to achieve the glorious ends of a pure community of the Volk (Volksgemeinschaft).

The Conclusion also reflects on the "lessons and legacy" of the euthanasia trials for us today. Obviously, for an instance of history to be relevant to questions facing us today, it must present significant elements that establish its continuity with our own time and place. If National Socialist genocide was a deviant break with modernity, then it will shed little light on contemporary issues we entertain in our (post)modern era (except, perhaps, the potential results of falling away from modernity!). If, however, Nazi genocide was somehow made possible by the very conditions of modernity, then it is a permanent possibility lurking within our contemporary world; in the words of historian Omer Bartov it would mean that, at least potentially, "murder is already in our midst." The Conclusion expresses reservations about the Aly-Heim thesis but agrees with Zygmunt Bauman, whose theory of the modern elements in Nazi genocide is primarily tailored to the technocratic bureaucracies and their efficiency-minded administrators within the government. Bauman's theory, however, has less relevance to the ideologues at the apex of the Nazi power structure, to men like Hitler, Himmler, and Heydrich, the brain trust and demonic genius behind the Third Reich. The Conclusion offers a theory to supplement Bauman's interpretation of the mid-level planners of mass death—a theory that identifies the genocidal motives of the Nazi elite with certain aspects of postmodernism. What makes Nazi genocide relevant to us today is the uncanny affinity of the upper echelon Nazis (chiefly Hitler) with our own postmodern world, particularly its
restless search for an identity in which our rootless selves can find grounding. The theory briefly advanced in the Conclusion has special application to the “main perpetrators” of Nazi genocide—to the visionary racist ideologues at the summit of the Nazi state. It offers an unusual way to think about the connections between post-modernity and Nazi mass murder without denying the primacy of racial ideology as a motivating force.

A NOTE ON SOURCES

Like all historical studies, this one employs primary and secondary sources to document the judicial encounter with Nazi euthanasia killing. These include the German court opinions collected in the 22-volume series, *Justiz und NS-Verbrechen (The Judiciary and Nazi Crimes)*. For the U.S. trials I have relied on trial transcripts, exhibits, and interrogation protocols located in the World War Two Records Division at the National Archives in College Park, Maryland. I have also drawn on essays about the euthanasia cases, German law, and related judicial themes (e.g., the distinction between perpetration and participation, consciousness of illegality, mistake of law, natural law, etc.) written by German jurists between the mid-1940’s and 1965, published in diverse German legal periodicals. Some of the primary source documents cited in this study are taken from two superb compendia, Ernst Klee’s *Dokumente zur “Euthanasie”* and Michael Marrus’ *The Nuremberg War Crimes Trial, 1945-46*. Finally, my study makes liberal use of excellent secondary sources by European and American scholars. The reader will note my heavy reliance on Henry Friedlander and Ernst Klee in chapters 2 and 3. The structure of chapters 5, 7,
and 8 on the German euthanasia trials was influenced to a considerable degree by Dick de Mildt's pioneering study on postwar Nazi trials by West German courts.\(^{37}\) The time period that brackets this study is roughly 1945-1965. (Reference is made to some euthanasia trials after 1965, but only to illuminate issues raised during the 20-year period after the war.) My reasons for focusing on this period are several. First, it was a determinative period in the formation of West German judicial attitudes toward euthanasia criminality. All of the primary legal theories and historical perceptions of Nazi euthanasia crystallized during these two decades. Second, a narrower focus enabled me to consider the seminal cases in the euthanasia trials at some length. I would have had to reduce discussion of them considerably to accommodate trials after 1965. Third, practical constraints imposed limits on my ability to obtain access to the verdicts in the post-1965 cases. Many of these verdicts were not yet "legally final" (rechtskräftig) under German law, and thus were unavailable during the period of my research. Since these cases did not affect my conclusions about the German euthanasia trials, I felt justified in restricting my study to its current time-frame.

Some scholars have objected that the use of trial records as historical sources is dubious, since court documents are "filtered" in accordance with the evidentiary rules peculiar to judicial proceedings. The thrust of this criticism is that the adjudication of Nazi crimes in trials is tendentious, because courts are primarily interested in the "subjective criminal acts of individual persons" and hence are "tied to the strict representation of the single case." On this view, courts streamline the evidentiary record in order to seize upon those aspects
relevant to the guilt or innocence of a defendant, thus screening out evidence
(interview protocols, witness statements) that may be significant for the
historian seeking a deeper, more synoptic understanding of the underlying event.
The historian intent on using trial records must accordingly study “the entire
investigative proceedings,” not merely the indictment and verdict.38

On its face, the objection is true enough but largely inapplicable to the
present study, which is not primarily concerned with mining the U.S. and German
trials for information about Nazi euthanasia. Rather, my chief purpose is to
examine how courts have constructed their knowledge about the history,
implementation of, and motives behind the killing program. To a significant
degree, to cite Marshall McLuhan, the medium is the message—that is, the trials
and their conceptions of the euthanasia program are at the foreground of my
concerns. At the same time, I take to heart the gravamen of the above critique,
observing when suitable the junctures in the trials where factors other than
adherence to the historical record have distorted a court’s portrayal of euthanasia
criminality. On the U.S. side, the insistence that euthanasia be forced into the
Procrustean bed of a conspiracy to wage aggressive war represents a serious
historical misrepresentation. As for the Germans, the universal assumption that
economistic concerns underpinned the euthanasia killings is equally flawed. I
offer my own criticism of these representations throughout the study, culminating
in an extended reflection on the nature of Nazi euthanasia in the conclusion. In
short, I am not only aware of the liabilities for the historian of using trial records
as sources, but actually seek to reveal these limitations in my discussion of them.
At this point, the reader may wonder what the value is of studying the texts of these trials. Part of my answer can be found in the first half of the conclusion to this study, in which some of the “lessons” the trial records teach us are discussed. I would supplement my discussion there with an additional observation. The euthanasia trial records address some of the central issues that have emerged in both Holocaust studies and in popular treatments of the subject, particularly those relating to the “legality” of euthanasia killing and the killers’ perception of wrongdoing. The legal status of the Hitler order of 1939 is a recurrent theme in all of the euthanasia cases, inasmuch as an acknowledgment of its binding effect would have supported the defendants’ claims that they acted without an objective awareness of illegality. Along the same lines, various forms of the defense of necessity—including the superior orders defense (Befehlsnotstand), extrastatutory necessity (übergesetzlicher Notstand), and the collision of duties defense (Pflichtenkollision)—were almost without exception raised in the German euthanasia trials. The answers to such questions are not restricted to the province of legal theory; they are central to any historical inquiry into Germany’s descent into genocide. The same might be said of the distinction German courts made between perpetrators (Täter) and accomplices (Gehilfe), a distinction foreign to the U.S. trials. For an American reader, it seems odd to consider defendants who killed patients with their own hands mere “accomplices,” rather than principals. This cognitive dissonance is due to the fact that conspiracy in Anglo-American jurisprudence has largely obviated the traditional differences between principals and accomplices/accessories: all
members of a criminal conspiracy are jointly liable as principals for all acts carried out on behalf of it.

German law, however, does not follow the Anglo-Americans here. Instead, it distinguishes between the perpetrators who conceive a criminal plan and the lower level accomplices charged with executing it. The *differentia* is the degree of self-interest with which a defendant has acted: if the actor has subjectively identified with the crime (i.e., willed it “as his own”), the actor is a perpetrator, if not, an accomplice. Obviously, this approach calls for a psychologized approach to the offender’s state of mind at the moment the crime was committed—one that carefully assesses the offender’s subjective intentions about the criminal object. The subjective emphasis of the German trials furnishes the historian an invaluable, personalized fund of information on the killers’ motives that can only enrich our historical understanding.

The subjective approach of the trial records offers a much-needed corrective to the abstraction of contemporary historical method. Because historians wished to establish their discipline on the “value free” ground of scientific inquiry, much of 20th-century history has (until recently) been dominated by structuralist paradigms that depreciate the role of individual action and intentionality in the historical process. Like any totalizing system, structuralist approaches have moments of insight and moments of falsehood; the wisdom of historians resides in their ability to discern the one from the other. Too often, structuralism submerges individual action into an acid vat of impersonal forces—social, political, and economic—that quickly dissolves all
human agency. "Man has now become a mere thing to the forces (of technology, of politics, of history) that bypass him, surpass him, possess him," the Czech novelist Milan Kundera, an astute observer of modernity, has written. "To those forces, man's concrete being ... has neither value nor interest: it is eclipsed, forgotten from the start." A primary value of studying trial records is their in-built resistance to the undertow of structuralist impersonalism. As Herbert Jäger noted more than 30 years ago, the trials counteract the "optical illusion" that these crimes were a "transpersonal occurrence." He wrote: "The microscopic analysis of individual action required by criminal law—because only the individual act is chargeable as a crime—has revealed a personal dimension of collective criminality, which a view of history as an anonymous process all too easily conceals." In the absence of such individualization, Nazi mass killing would be transformed, in the words of Jäger's favorite simile, into "natural disasters" like "earthquakes or volcanic eruptions," "symbols of a collective, transpersonal event in which many people were ensnared but which resist measurement with individual categories." This depersonalization of Nazi mass murder obscures our perception of a fundamental truth: history is still made by human beings. Human minds contrived the idea to kill Jews, the mentally disabled, and others. Human hands pulled the rifle triggers, constructed the killing centers, turned the gas valves, injected the lethal poison. Perhaps unwittingly, a purely structuralist approach confirms the claims of Nazi killers that they were "tiny wheels" in a vast, incomprehensible machine of destruction that effectively dispossessed them of the intention to take human lives. This was the argument of accomplished
murderers like Otto Ohlendorf and Franz Stangl. We accept their self-serving
denials of personal responsibility at our peril.

One further point should be made concerning trial records. The reader
will note that the U.S. proceedings are recorded in verbatim transcripts, a format
unknown in German trials (although used in pre-trial interrogations of the
accused). American law does not require a detailed written verdict by the court
"of first instance" (i.e., the court that first hears the case), in part because a
verbatim transcript of the proceedings exists, in part because the role of the judge
in a criminal case is restricted to that of umpire—it is the jury that typically
determines guilt or innocence. Appeals of guilty verdicts are reviewed by the
Court of Appeals with reference to this trial transcript. German trials, by contrast,
are dominated by the persons of the judges and lay assessors (Schwurgericht)
working in tandem. Verbatim transcripts and jurors are alien to German criminal
proceedings. Chiefly due to the judge's enhanced role as both investigator and
trier of fact, a detailed written justification of the verdict by the court is required,
setting forth the background of the case, findings of fact, applicable law, the
viability of defenses, verdict, extenuating grounds, and sentence.43 Although the
verdict of the U.S. Tribunal in the Doctors' case contains some explanatory
material, it is remarkably brief, even laconic, in comparison with the German
decisions. Thus my discussion of the U.S. Medical case in chapter 4 is based on
the transcript of the proceeding (nearly 11,000 pages), while my treatment of the
German euthanasia trials in chapters 5, 7, and 8 relate to the courts' sometimes
elaborate written opinions.
NOTES

1 As noted in the text, eugenics in the pre-World War II era was almost universal. In addition to
the Western industrial world, eugenics movements were active in Japan and throughout Latin
America. According to Nancy Stepan, Latin American scientists, politicians, and policymakers
did not embrace negative eugenics until fairly late (the 1930's) because they did not accept its
Mendelian/Weissmannian underpinnings. Rather, in countries like Brazil, Argentina, and Mexico,
Latin Americans subscribed to a "neo-Lamarckian" view that acquired traits could be transmitted
from one generation to the next. Stepan explains how an outmoded, scientifically discredited idea
like Lamarckism could achieve a renewed lease on life in terms of the social and political forces at
work in Latin American countries: the relatively high percentage of Latin American doctors
influenced by a Lamarckian, "continental" tradition of science; the role of the Catholic Church in
Latin American culture (Lamarckism was regarded as more consistent with Catholic theology,
e.g., the value placed on individual effort and spiritual self-improvement); the high mortality rates
and low fertility rates of the poor and working classes, which militated against a negative eugenic
effort to curb population growth of genetic "undesirables"; and the general revulsion Latin
American biologists felt toward the deterministic and anti-reformer tendencies of
Mendelism/Weissmannism—tendencies at variance with the "environmentalist-sanitary" tradition
that held sway among many Latin Americans (especially in Brazil). See Nancy Stepan. "The
Hour of Eugenics": Race, Gender, and Nation in Latin America (Ithaca: Cornell University Press,

2 Michael H. Kater, Doctors under Hitler (Chapel Hill: The University of North Carolina Press,
1989), pp. 54-74.

3 Robert N. Proctor, Racial Hygiene: Medicine under the Nazis (Cambridge: Harvard University

4 Kater, p. 55, pp. 70-71.

5 Alexander Mitscherlich and Fred Mielke, Das Diktat der Menschenverachtung (Heidelberg:
Lambert Schneider, 1947).

6 Alfred Möhrle, "Der Arzt im Nationalsozialismus: Der Weg zum Nürnberger Ärzteprozess und
actual number of German doctors involved, directly or tangentially, in Nazi criminality has never
to the best of my knowledge been ascertained with a reasonable degree of certainty. Based on the
work of Ernst Klee, a ballpark figure of a few thousand seems appropriate. Although this figure
represents only a fraction of the 90,000 doctors practicing in Germany during the war, it is far
greater than those claimed by the German medical establishment after the war, which estimated
that only a handful of doctors were complicitous in the Nazi regime's crimes. See Ernst Klee,
"Euthanasie" im NS-Staat: Die Vernichtung "lebensunwerten Lebens" (Frankfurt a.M.: Fischer
Taschenbuch, 1986); and Auschwitz, die NS-Medizin und ihre Opfer (Frankfurt a.M.: Fischer,
2001).

7 Dick de Mildt, In the Name of the People: Perpetrators of Genocide in the Reflection of their
Post-War Prosecution in West Germany (Martinus Nijhoff Publishers, 1996), p. 20 ff. The
statistics quoted pertain only to West German convictions, not to the total number of Nazi
defendants tried and convicted by the Allies in both the IMT and their own national trials. A
Federal Justice Ministry investigation in 1965 disclosed that 5,000 Nazi defendants were
convicted in the three Western occupation zones, more than 12,000 in the southern occupation
zone, more than 24,000 in the USSR, more than 16,000 in Poland and another 1,000 in other
foreign trials. The sum total was in excess of 80,000 Germans prosecuted and convicted between
The chilling effect that the German statute of limitations could have on the process of seeking justice for Nazi crimes is demonstrated in the acquittal by the German Supreme Court of defendants from the Reich Security Main Office (which inter alia liquidated Jews in the Warthegau and General Government). The defendants had been convicted of murder in the lower court proceeding, and had appealed their conviction to the German Supreme Court. In May 1969 the Supreme Court reversed the verdict and acquitted them, holding that, since the defendants were mere accomplices rather than perpetrators, they could at the most be sentenced to a 15 year jail term, and hence their prosecution was time-barred. On this lamentable case, see de Mildt, p. 35.

This misconception, widely embraced in the postwar years, must have been bolstered by the Allies' refusal to allow German defendants to raise the *tu quo que* defense at their trials. The *tu quo que* defense, literally translated as "you too," is designed to neutralize an offense by demonstrating that those presiding over the defendant's trial are guilty of the same conduct. Despite the bar against *tu quo que* defenses at Nuremberg, Admiral Doenitz's resourceful defense counsel, Otto von Kranzbühler, managed to admit into evidence an affidavit from Admiral Chester Nimitz, attesting that the U.S. navy had pursued a policy of naval warfare in the Pacific theater analogous to German U-Boot strategy. This extraordinary coup for the defense, it is generally believed, significantly influenced Doenitz's sentence in his favor. We can only speculate about the effects such a disclosure had on the German public.

See infra, chapter 6.


De Mildt notes that the phenomenon of collective repression is not confined to the Germans, but appears wherever a national group is involved in murderous violence. De Mildt writes: "France has its 'Vichy-regime' and its 'Algerian War,' while the Dutch have their 'Indonesian past' and the Americans their 'Vietnam' to cope with and in each case the tendency to 'keep the skeletons inside the closet' has substantially influenced the national representation of these historical episodes." De Mildt, p. 24. De Mildt might also have mentioned the Soviet experience in Afghanistan and Turkey's current policy of denial regarding its treatment of Armenians during the First World War.


Statutory expressions of the Law of Armed Conflict included the Hague Conventions (1907) and the Geneva Conventions (1929). Among the notable postwar elaborations of these earlier accords are the Geneva Conventions of 1949, the Genocide Convention of 1948, and the International Covenant on Civil and Political Rights of 1976. All of the above impose on their signatories an obligation to observe certain principles in their conduct of war: (1) military necessity, the idea that violence may be used only against targets related to an enemy’s war-making capability; (2) proportionality, restricting the degree of force applied to the minimum necessary to achieve a military objective; (3) humanity, requiring belligerents to minimize harm done to civilians, civilian property, and natural resources; and (4) chivalry, prohibiting dishonorable or treacherous acts contrary to the customs of war (e.g., the deceptive abuse of a flag of truce). On this topic, see Charles A. Shanor and Timothy P. Terrell, *Military Law* (St. Paul, Minn.: West Publishing Co., 1980), pp. 196-213.


Herbert Jäger, *Verbrechen unter totalitärer Herrschaft: Studien zur nationalsozialistischen Gewaltverbrenchen* (Freiburg i.B.: Walter-Verlag, 1967). It is to be regretted that an English translation of this unique book has never been undertaken.

See Rückler, *The Investigation of Nazi Crimes*.

See J. Friedrich, *Die kalte Amnestie*.


De Milt. *In the Name of the People*, p. 325.

The primary theories of exculpation were extrastatutory necessity, collision of duties, and exertion of conscience/mistake of law. See infra, chapters 7 and 8, for discussions of each of these legal theories.


Omer Bartov, *Murder in our Midst: The Holocaust, Industrial Killing, and Representation* (New York: Oxford University Press, 1996), p. 113. Bartov writes glumly that “no member of Western civilization may study his or her history without knowing that one of its potentials was, indeed, Auschwitz.” (p. 136)


These include *Süddeutsche Juristische Zeitung, Neue Juristische Wochenschrift, Monatschrift für Deutsches Recht, and Juristische Schulung*.


37 De Mildt, *In the Name of the People*.

38 De Mildt, *In the Name of the People*, p. 45.

39 I would direct the interested reader to de Mildt’s perspicacious defense of the value of trial records in Nazi-era research, pp. 44-48.

40 See de Mildt, *In the Name of the People*, p. 47.


42 Herbert Jäger, “Strafrecht und nationalsozialistische Gewaltverbrechen,” *Kritische Justiz* I (1968), pp. 143-157; and *Verbrechen unter totalitärer Herrschaft* ((Freiburg i.B.: Walter-Verlag, 1967), p. 14. Jäger’s caveat about equating the Holocaust with natural disasters has often fallen on deaf ears. Jean-Francois Lyotard invoked the metaphor of an earthquake to describe Auschwitz, an earthquake of such destructive intensity that it shatters every device capable of recording it. The implication, of course, is that language is insufficient as a vehicle for conveying the reality of Nazi genocide, doomed historical accounts of the event to perpetual and irremediable falsification. Jean-Francois Lyotard, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988), pp. 55-57. In Lyotard’s “natural disaster” account, human agency virtually disappears, and we are left with a gaping, translinguistic hole in Western history about which we can say very little.

Nor was it in the power of the father to dispose of the child as he thought fit; he was obliged to carry it before certain officials at a place called Lesche; these were some of the elders of a tribe to which the child belonged: their business it was carefully to view the infant, and, if they found it strong and well formed, they gave order for its rearing, and allowed it one of the nine thousand shares of land above mentioned for its maintenance, but if they found it puny and ill-shaped, ordered it to be taken to... a sort of chasm [and exposed to the elements]; as thinking it neither for the good of the child itself, nor for the public interest, that it should be brought up, if it did not, from the very outset, appear... healthy and vigorous.

Plutarch on the Spartans' treatment of handicapped newborns

It is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind stays with mankind as a potentiality long after its actuality has become a thing of the past.

Hannah Arendt

... although history may not repeat itself, it is rare that anything introduced to human history is not used again. Whether the Holocaust was unique or not in terms of its precedents is one question; whether it will remain so is quite another.

Omer Bartov

I. Precedents

For those acquainted with the plight of so-called “defective” persons in world history, it is no surprise that the first victims of the Nazis’ programmatic killing were mentally handicapped children. Today, the intentional killing of a child evokes our
sharpest opprobrium, and is legally equated with criminal homicide. Such has not always been the case. "Nowadays," writes Maria Piers, "we universally condemn practices such as infanticide, incidental and specific abuse, ... and, most importantly, today there is universal agreement that every child born has the right to live. This is a new idea. A true achievement of this century." In fact, infanticide has been, if not actively sanctioned, then at least condoned by states and societies throughout the world and in virtually every historical period. On the most obvious level, this is so because children are physically and mentally vulnerable to violent assaults upon them by adults. Thus, in families mired in poverty or societies wracked by resource scarcity, young children—especially those described by Plutarch as "puny and ill-shaped," and especially females—have suffered the lethal interventions of parents and government alike. When the state has not itself been a perpetrator of infanticide, it has often been ambivalent toward the practice of child killing by private persons. A brief survey of the historical record reveals that governments have been either indifferent toward the murder of children or were themselves actively involved in performing it. These precedents, as we will later see, would be reincarnated in a far more virulent form in the Third Reich's program to annihilate mentally handicapped children and adults.

Traditional societies have killed children for millenia. The story of Abraham and Isaac in Genesis 22 indicates that the Hebrews may once have offered their firstborns as a religious sacrifice to Yahweh. Infanticide occurred among them as late as the sixth century B.C.E., judging by the declamations of Isaiah against his fellow Israelites for "sacrificing children in the gorges, under the rocky clefts." We find additional evidence of child killing in the book of Leviticus, which forbids the Israelites to worship Moloch.
the tribal god of the Ammonites—a god venerated with the sacrifice of children. The Bedouins of Arabia committed infanticide of baby girls by burying them in the desert sand. The Qu’ran (Surah 16:58-59) condemns this practice, yet it continued unofficially in Bedouin society long after the time of Muhammed. Until modern times, the Inuit peoples exposed infants on ice floes if tribal leaders determined that resources would be strapped in supporting them. Some Polynesian peoples controlled their population size by killing children after the third or fourth child in a family, while Australian aborigines once put to death infants who could not be carried on long marches.

Female infants have frequently been the objects of infanticide. In ancient China, the destruction of young girls served to curb population growth, reduce family size, and perpetuate the culture’s devaluation of females generally. The Chinese proverb that “the most excellent daughter is not worth a splay-footed son” helped sanction the practice of killing female babies, particularly in poorer areas where an ideal ratio of five sons to two daughters prevailed. Like the Chinese, Indians traditionally destroyed female infants as a means of population control, but in addition as sacrifices to the gods—a practice which persisted until the 19th century. The belief that a daughter’s birth was a punishment for transgressions done in an earlier life further devalued females in Hindu society.

According to Robert Weir, Indian baby girls “were often drowned, sometimes smothered in milk, and occasionally killed by means of opium smeared upon the mother’s breasts.”

The destruction of life perceived to be without value is not restricted to the Far and Near East. In Europe, too, so-called “valueless” life has been killed in almost every period, from classical times until the modern era. In ancient and classical Greece, child
killing was legally permitted and widely practiced. The distinctive feature of Greek infanticide, however, is the eugenic rationale underlying it. Greek culture devised a norm of mental and physical health and applied it strenuously to its children. When Greek children—chiefly females and those regarded as defective—failed to meet this norm, they were “regularly strangled, drowned, buried in dunghills, ‘potted’ in jars to starve to death, or exposed to the elements....”12 The eugenic concern of the Greeks was that “defective” children would grow into adults who would then pass on their handicap to their progeny. Such concerns mark the ancient Greeks as the first civilization to rank people within its society in terms of their social value and to make extermination of “inferiors” an integral part of public health policy. Two thousand years later, National Socialist eugenicists would invoke the Greek example as a model to guide the German health care system under Adolf Hitler.13

The Greeks enforced their ideals of normality with vigor and deadly earnestness. Even if a child looked normal, it was subject to being killed if its parents were regarded as “inferior.” Gynecological manuals from the 2nd century B.C.E. encoded the Greek attitude toward “valueless” life. In the following passage from one such manual by Soranus of Ephesus, called “How to Recognize the Newborn that is Worth Rearing,” the writer’s emphasis on normality as a criterion of worth is emphatic:

The infant which is suited by nature for rearing will be distinguished by the fact that its mother has spent the period of pregnancy in good health.... Second, by the fact that it has been born at the due time, best at the end of nine months.... Furthermore by the fact that when put on the earth it immediately cries with proper vigor; for one that lives for some length of time without crying, or cries but weakly, is suspected of behaving so on account
As in Greece, so in Rome female and handicapped newborns were often put to death. Patriarchal authority (*patria potestas*, or the father’s unconditional legal power over his own family) invested a father with the right to destroy his own child if he so desired, which no doubt conduced to infanticide. His reasons for choosing such a course of action resembled those of the Greeks: to eliminate children who deviated from the Roman norm for what constituted valuable life. The Romans supported the destruction of “valueless” life with analogies to the treatment of sick animals. The first-century philosopher Seneca upheld the rationality of child killing on the grounds that, since society protects itself by killing “mad dogs,” “the fierce and savage ox,” and “the sickly sheep,” it should likewise “drown even children who at birth are weak and abnormal.” He portrays such action as an exercise of dispassionate reason, for “it is not anger, but reason that separates the harmful from the sound.”

The turning point in classical Western attitudes toward destroying “valueless” life was the introduction of Christianity into the Roman Empire. Christian apologists like Tertullian and the author of the *Didache* (a 2nd century manual of Christian behavior) condemned infanticide, arguing that all human beings, including handicapped children, were inherently valuable in the eyes of their creator. Perhaps owing to the influence of this view, the Roman laws on child killing underwent revision during the reign of the Emperor Constantine, who in 318 C.E. reduced the *patria potestas* by criminalizing a father’s action in killing his son or daughter. By 374 C.E., Roman law had subsumed infanticide under the criminal law of homicide whether or not the killer was the child’s
father; henceforth, anyone found guilty of the crime was liable to capital punishment. Curiously, however, Roman law continued to tolerate the exposure of children on the theory that such abandonment was distinguishable from direct violence inflicted on the child (like drowning or strangulation), inasmuch as an abandoned child might be rescued by a third party. A social stigma nonetheless attached to abandoned children who survived the ordeal: they were not infrequently raised for slavery or prostitution.

The Roman law’s dichotomy of direct killing of a child (punishable as criminal homicide) and abandonment set the tone for Medieval European attitudes toward infanticide. Abandonment of children, according to W.E.H. Lecky, “was practiced on a gigantic scale with absolute impunity . . . and, at least in the case of destitute parents, considered a very venial offense.” In Italy, the murder of illegitimate and handicapped children continued to be a grave and widespread socio-criminal problem. The Italian authorities addressed this issue in the 8th century by establishing foundling hospitals to care for children in danger of being killed by their parents. At the same time, some “defective” and female babies (including legitimate ones) were sometimes given to a wet nurse called a balia, who departed with her charge to the countryside where she murdered it. In the history of violence directed at “valueless” life, the balie emerge as contract killers: they pocketed a fee for their services or, after disposing of the child entrusted to them, sold their milk to affluent parents. The system of the balie enabled parents desirous of ridding themselves of an unwanted child to accomplish their aim without
offending either the law or the Church's teachings on infanticide, since everywhere in

Medieval Europe wetnurses were not punished for the deaths of their charges. Maria W.

Piers writes about the *balie*:

They played the role of the executioner, whose deeds were difficult to prove and were
silently condoned. An execution of a wet nurse is never mentioned in the pertinent
literature. And the only mention of any punishment at all concerns a 1415 law that
forbade *balie* to "relinquished their charges before they were thirty months old." The
punishment inflicted on the guilty *balia* was a fine or a public whipping. Not, however.
the death penalty.*19*

By contrast with the lenient attitude toward the *balie*, Medieval European criminal
law dealt harshly with unmarried women suspected of killing their children. Due
possibly to the evidentiary challenge of proving that a mother had deliberately destroyed
her child, the law developed a presumption of guilt whenever a child died mysteriously.
This "burden of proof" was imposed on the mother or older childcare provider (unwed
mothers and older women were the objects of heightened scrutiny in such cases).20
which the defendant had to rebut with evidence that the child died accidentally. If they
were unable to refute the charge, they were convicted and sentenced to drowning, burial
alive, impalement, or decapitation—if they were lucky. In other cases, the state meted
out a horrific punishment called "sacking," in which the convict was placed in a sack
along with a dog, a cat, and a rooster or poisonous snake and flung into the water for
several hours as onlookers sang Psalm 130, "Out of the depths I cry to Thee."21

The deterrent effect of such measures was not, however, sufficient to prevent
infanticide entirely. On the contrary, a new theory developed during the Middle Ages to
reinvigorate the practice of child killing—i.e., the view that mentally and physically
handicapped children were "changelings," or demonic infants substituted for real children
by hostile supernatural powers. The folk belief that parents could only counter this

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devilish gambit by literally “beating the devil out” of the child led to predictable results. Sometimes infants suspected of being changelings were roasted over an open fire or submerged in water, on the theory that such violence would induce the Devil to return the abducted child.22

The legal machinery in France and Germany duly prosecuted, convicted, and executed infanticidal mothers well into the 18th century—overwhelmingly single women (in France the father was exempt from legal or moral accountability, even if he had colluded in the infant’s death). In England, where the civil and ecclesiastical authorities rarely prosecuted these cases, handicapped or deformed infants were also regarded as changelings who had to be quickly eradicated lest the parents be accused of having truck with the devil. The English introduced a variation on the theme of unworthy life by additionally branding them as parasitic vampires that preyed on their mother’s “whitened blood” (i.e. milk) during breast feeding.23 England in the Middle Ages codified the inferior status of illegitimate and handicapped children in its laws. We read in the following excerpt from a contemporary legal commentary that such children were not considered “freemen” in the eyes of the law:

Among freemen there may not be reckoned those who are born of unlawful intercourse. such as adultery and the like . . . and others begotten of unlawful intercourse, nor those who are procreated pervertedly, against the way of human kind, as for example, if a woman bring forth a monster or prodigy. Nevertheless, the offspring in whom nature has in some small measure, though not extravagantly, added members or diminished them—as if he should have six fingers or only four—he should certainly be included among freemen.24
Against this backdrop of legal disenfranchisement, the sociopathic fury of King Richard III and Gloucester’s illegitimate son Edmund—a bastard and a physically deformed man, respectively—becomes more understandable.\textsuperscript{25}

Despite later 17\textsuperscript{th} century efforts to curb infanticide by unwed mothers through legislation,\textsuperscript{26} child killing persisted without abatement in England, causing Parliament to repeal its earlier infanticide law and replace it with the Ellenborough Act, a law that permitted juries in prosecutions for child killing to choose the lesser included offense of concealment of birth when evidence was insufficient to convict the defendant of infanticide. Parliament passed subsequent infanticide laws to address this widespread crime in 1872, 1922, and 1938. At least in the 19\textsuperscript{th} century, however, infanticide continued, chiefly because society “regarded it as a lesser offence than murder, in part because less value was placed on an infant’s life and in part because women committing this crime were seen as acting under the pressures of poverty and social stigma.”\textsuperscript{27} In a bizarre reprise of the Medieval Italian balie system, so-called “baby farms” were formed and offered to parents as locales where unwanted babies could be killed and disposed of for a price. The English authorities eventually arrested, tried, and executed the baby farm administrators, but not until mortality rates at the “farms” had risen to 90 percent.\textsuperscript{28}

Three motivational complexes arise from this overview of historical attitudes toward child killing: the economic, the customary, and the normative. The economic motive typically asserts itself in periods of hectic population expansion, high unemployment, resource scarcity, and inadequate contraception. The pressure of having to care for an actual or potential drain on family income and resources has often driven
parents to infanticide. The motive of conformity to custom, as exemplified in the cases of China and India, emerges in traditional societies that prescribe the appropriate marital status of mothers, the ideal number of children per family, and the desired ratio of boys to girls in a family. Thus, when a child violated one or more of these prescriptions (as, for example, when the child was illegitimate, exceeded the maximum number of children, or ruptured the delicate gender ratio), it was at risk of being killed by its parents. Finally, the motive of enforcing conformity to a norm of physical or mental value underlies the destruction of children with birth defects. The Greek practice of killing weak or malformed babies is illustrative. In later historical eras, as we have seen, deformities at birth were interpreted as insignia of diabolical sorcery (*mallifice*), inflicted on parents by witches if not by the Devil himself. In some instances, Medieval and early modern Europeans regarded handicapped children as changelings.

Our modern sensibilities recoil at the cruelty exhibited in such behavior. Yet, the tragic history of attacks on “valueless” life teaches us that those who urge the destruction of the handicapped and deformed often justify their arguments with appeals to the humanity of the killing. Dr. Charles Mercier, an English physician, adduced the following argument in defense of child killing in 1911:

> In comparison with other cases of murder, a minimum of harm is done by it . . . The victim’s mind is not sufficiently developed to enable it to suffer from the contemplation of approaching suffering or death. It is incapable of feeling fear or terror. Nor is its consciousness sufficiently developed to enable it to suffer pain in any appreciable degree. Its loss leaves no gap in any family circle, deprives no children of their breadwinner or their mother, no human being of a friend, helper or companion. The crime diffuses no sense of insecurity. No one feels a whit less safe because the crime has been committed. 29

Dr. Mercier was not referring specifically to deformed or handicapped children in the above passage, but to all newborns. Nonetheless, implicit in his argument is a
supposition we will encounter among the theoreticians of National Socialist
“euthanasia” killing, the assumption that some ostensibly human creatures are not truly
human: they “suffer” little or no pain, feel “no fear or terror,” and have no intimate
connections with others. The logical inference to be drawn is that the destruction of
such creatures is neither murder nor homicide, since they are not truly human. Instead,
they form a mass of expendible existence that history’s most efficient child murderers
would later call “life unworthy of life”—subhumans vulnerable to destruction by a
eugenic state.

In the Western history we have considered, most infanticide was committed by
private individuals like unwed mothers and parties working on their behalf (e.g. balie
and “baby farms).” The city-states of ancient and classical Greece are an exception.
Here the agencies of the state assumed an active role in procuring the deaths of life
deemed unworthy of existence. After the Christianization of the Roman Empire,
systematic, government-sponsored destruction of the “defective” receded into the
sedimentary layers of Western culture. It took a series of intellectual, political, and
socio-economic upheavals between the mid-19th century and 1933 to dislodge the
ideology of statist eugenic killing from the seabed of Western history. What had been
introduced to history by the Greeks was rediscovered and implemented with unrivalled
ferocity by the National Socialists. It is to this fecund and frightful period in the history
of governmental mass-murder that we now turn.
II. Social Darwinism and the Rise of Eugenic Population Policy

Many scholars investigating the intellectual roots of National Socialist criminality begin their historical explorations in the mid-19th century with the publication of Darwin's *The Origin of Species* and the reception—and elaboration—of Darwinian thought by a disparate group of European and Anglo-American interpreters called "Social Darwinists." The school of Social Darwinism, in turn, was related to the rise of late 19th-century eugenics, a movement that produced theoreticians who would later inspire the Nazis' campaigns of destruction waged against "inferior" groups. As we have seen, the idea of biological inferiority predates Darwin and his interpreters by two millenia. This being said, there is no question that the Darwinian revolution in scientific thought was a milestone of immense importance along the road to National Socialist criminality. It was a necessary—but not a sufficient—condition for that criminality. Other forces that occurred between the mid-19th century and 1933, socio-economic, psycho-historical, and political in character, would converge with the intellectual legacy of Social Darwinism to produce the Nazi killers.

Charles Darwin, of course, was not German but English, yet his theories of evolution through natural selection profoundly influenced the intellectual life of all Western nations. His thesis that animal and plant species able to adapt most efficiently to their environment over time were selected for survival while those that failed to do so died out became a fertile breeding ground for social and racial prejudice. Popular spin-offs of his evolutionary theory like "survival of the fittest" and the "struggle for existence" began to permeate the minds of the literate public throughout the Western world in the years following publication of his book. Although Darwin would not
extend his theory to human society until *The Descent of Man* in 1871, his popularizers seized on Darwin's work as objective evidence to support their nationalist and racist schemas. The inventor of the phrase “survival of the fittest,” Herbert Spencer, was a champion of laissez-faire capitalism who believed he had found in Darwin scientific evidence to prove a thesis he had advocated long before *The Origin of Species* was published—namely, that the state must not interfere with the “natural” growth of society by aiding the poor. To do so would violate the order of nature, in which the unfit were put to the wall and the fittest thrived. In nature, organisms that “are sufficiently complete to live . . . do live, and it is well they should live. If they are not sufficiently complete to live, they die, and it is best they should die.”

If nature evolved toward higher and more complete life forms through natural selection, then the same logic should govern human society. On this basis, Spencer (anticipating developments in Germany after World War One) rejected state intervention to improve the lives of the weak and infirm, castigating poor laws, public education, sanitary regulation (with the exception of abating nuisances), public housing initiatives, and consumer protection (chiefly state policies to defend the public from medical charlatans). In effect, Spencer argued for a “biologization” of society; his regnant metaphor was that of an animal or plant in a state of nature whose survival depended on adaptation to its environment. By weeding out the weak and promoting the strong, nature experienced a net gain, the very soul of progress. A similar metaphor would dominate the thought of German intellectuals prior to the Nazi seizure of power.
Significantly, Spencer found himself an object of attack for his social Darwinist teachings. Historian Richard Hofstadter writes: "Accused of brutality in his application of biological concepts to social principles, Spencer was compelled to insist over and over again that he was not opposed to voluntary private charity to the unfit, since it had an elevating effect on the character of the donors and hastened the development of altruism; he opposed only compulsory poor laws and other state measures." This face-saving ruse is mere balderdash, of course, as it contradicts the fundamental tenet of Spencer's view of social progress: the advancement of society through elimination of the unfit. Obviously, to smuggle the "inferiors" in through the back door would thwart the mechanism of progress that Spencer celebrated. Charity did not operate in nature; why should it in society? This episode in Spencer's career demonstrates two important points: first, that many individuals prior to 1933 objected to Social Darwinian ideas on ethical grounds; and second, that even true believers in the inferiority of the poor and handicapped felt the need to softpeddle the terrible implications of their views—to modify them in response to their critics or before their own conscience. What we will see when we examine German attitudes toward these same groups during the 1920's and 1930's is a disappearance of critical voices toward genocidal ideas about "unworthy life," accompanied by a gradual attenuation of remorse on the part of those who advocated them.

Spencerian notions of natural selection, progress, and elimination of the unfit fed the mounting fears of middle class Europeans and Anglo-Americans in the latter half of the 19th century that the West was entering upon a new phase of degeneration. Like the idea of child killing, the concept of biological decay has an ancient provenance. Plato
asserts in the *Timaeus* that many of the specimens seen in the animal kingdom were descended from humans who had paid inadequate attention to philosophy. Around 500 B.C.E., the Carthaginian writer Hanno the Navigator mistook the apes he encountered near the Gabon River for degenerate human beings. In the mid- to late-1800's, anxiety about degeneration centered on the social effects of the Industrial Revolution. For decades, impoverished laborers and their families throughout the industrializing Western world had flocked into mill towns and cities in search of work. As stark, smoke-belching factories altered the landscapes of the countryside, what would become the industrial proletariat concentrated itself in the tenements of London, Manchester, Hamburg, and New York. With mass urbanization came epidemic disease: tuberculosis, typhoid, and cholera made their deadly rounds, preying upon the urban poor first, then bursting through class barriers to ravage the bourgeoisie. At the same time, the real or conjectured rise in crime, prostitution, homosexuality, and mental illness alarmed many European and American onlookers. For them, Social Darwinism as popularized by Spencer, Thomas Huxley, *et al.* furnished an explanation of these appalling conditions, and pointed to their possible solution. It was in the midst of these fears of societal decay that Charles Darwin's cousin, Francis Galton, invented the science of eugenics.

Although Mendelian genetics had yet to be rediscovered, Victorian scientists were aware of the self-evident principle that like tended to produce like. Botanists and animal breeders bred species of flora and fauna for particular desirable characteristics. Like Spencer (and legions of others who would strike off down this dubious path), Galton extrapolated from the animal kingdom to human society, asking, "Could not the race of men be similarly improved? Could not the undesirables be got rid of and the desirables
multiplied?" Galton would coin the word "eugenics" to denote his program of selective breeding in his *Inquiries into Human Faculty and Development* (1883). As early as 1865, however, he had published an article in *Macmillan's Magazine* (later expanded and published as a book in 1869) exploring how "natural ability" was produced. For Galton, "natural ability" consisted of "those qualifications of intellect and disposition which . . . lead to reputation," that is, the reputation for being "a leader of opinion . . . an originator." Galton consulted Who's Who compilations of prominent men over the previous 2 centuries, containing the names of illustrious politicians, jurists, military leaders, scientists, artists, writers, and musicians. He discovered that many of them were related. From this datum, he drew the conclusion (fallaciously, I might add) that reputable families were more likely than obscure ones to produce children with natural ability. Galton was convinced that heredity controlled talent and character, just as it determined physical attributes.

Foreshadowing population policies under the National Socialists, Galton held it would be "quite practicable to produce a highly gifted race of men by judicious marriages during several consecutive generations." In his *Macmillan's* article, he proposed that the state administer exams to test for natural ability in the populace, publicly lionize the winners, and promote weddings among them at Westminster Abbey. The issue of the marriages would receive generous government subsidies to cultivate their "natural ability." This was the positive side of Galton's ledger. On the negative side, he suggested that the "unfit" be relegated to monasteries and convents to prevent them from reproducing.
Beyond the folk wisdom of “like produces like,” Galton was for a time without a coherent scientific theory of how specific traits were transmitted from one generation to the next. In the 1860’s Charles Darwin posited the theory that particles circulating in the body and eventually settling in the sex organs, which he called “pangenes,” were the vehicles of heredity. For Darwin, the pangenes contained both characteristics acquired during the organism’s lifetime and those latent in the organism. Darwin’s speculations thus struck a balance between a Lamarckian environmentalism and a fixed hereditarianism: heredity was at one and the same time conditioned and innate. Galton rejected Darwin’s account, arguing that ability was immutable and that human beings could only be improved through selective breeding. In 1875 he assailed the theory of acquired characters, contending instead that heredity was determined by the “stirp” (Latin for “root”), a particle containing all of an organism’s hereditary germs, which were conveyed to offspring via the ovum or sperm. Galton then drew an analogy to countries within the Western world: the stirp was like the nation, the individual germs were the men of “natural ability.” Just as aliens in a society poisoned the vitality of a nation, so “alien germs” in the stirps could become the bearers of disease. Much like Spencer before him, Galton biologized the social ills of industrial Great Britain, identifying problems of poverty, disease, crime, unemployment, etc.—all affronts to middle class norms of behavior—with hereditary inferiority and decay.

Galton’s work, as Paul Weindling has demonstrated, signified a watershed event in Western thought about so-called “unworthy life.” With his ambiguous theory of pangenes, Darwin had allowed for social reform through environmental influences; so long as individual heredity was amenable to exogenous forces like education or poor
relief, eugenics need not take a conservative or authoritarian turn. Once fitness was inscribed irrevocably in a unit of heredity like the stirps, however, government programs to improve the lives of its poorer citizens by means of welfare, improved nutrition, and public education became senseless—and counter-selective. Spencer had already denounced such schemes for interfering with the engine of all progress, natural selection; but Spencer could not rely on a "scientific" theory of heredity to support his views. From the late 19th century until the rediscovery of Mendelian genetics in 1900, Western eugenicists increasingly subscribed to hereditarian notions of fixed characters, used to justify their insecurities and social prejudices brought on by modernity.

In Germany, the zoologist August Weismann followed Galton in dismissing the role of environment in heredity. A one-time believer in acquired characters, Weismann abandoned his prior beliefs in favor of an elusive hereditary material he called the "germ plasm." This substance contained "single genes" that steered the development of a physical body's attributes without influence from the environment. The germ plasm was largely static, but natural selection permitted its superior hereditary features to emerge over time: when selection was artificially suspended, degeneration to primitive characters would ensue. Only natural selection was capable of letting the fittest traits within an organism's germ plasm express themselves and keep degeneration at bay. Galton recognized immediately the affinity of Weismann's germ plasm theory with his own theory of the stirp.45 By the 1890's, German biologists were invoking Weismann's account of heredity to explain the social behavior of insects. In Paul Weindling's
estimate, such theorizing "typified the way the hereditarian biology of the 1890's was extrapolated into the realm of social theory; it amounted to a justification for a society dominated by an inherited elite with superior physical and mental qualities."\[^{46}\]

Lending apparent credence to these notions of fixed heredity, eugenic progress, and degeneration was a prevalent doctrine in late 19th century Western intellectual life, that of "recapitulation." If, as Darwin taught, the world around us is the result of millions of years of evolutionary change caused by natural selection, then we should be able to read the tale of that progressive unfolding in the structure of the organisms it produced. Since the fossil record was incomplete, late 19th century naturalists turned to existing higher life forms for study. The German zoologist Ernst Haeckel postulated that the sum total of a species' evolutionary history could be seen in the embryological development of a suitably complex individual organism. His shorthand phrase for this phenomenon—"ontogeny recapitulates phylogeny"—meant that as an individual grows from embryo to adulthood it passes through all the stages of development the species has undergone. In the words of the scientist Stephen Jay Gould, the individual "climbs its own family tree."\[^{47}\]

As we have seen, Darwin's conception of evolution through natural selection was invoked to explain individual and group inferiority among humans. Recapitulation would be treated in the same manner. The father of criminal anthropology, the Italian psychiatrist Cesare Lombroso, used recapitulation to correlate physical and mental characteristics to show that criminals were arrested at a primitive stage of human evolution. Criminals were, in fact, degenerates who recapitulated ape-like characteristics. Lombroso was among the first researchers to establish a fateful link
between career criminals and the mentally ill. Lombroso recalled how in 1870, after he had unsuccessfully sought anatomical differences between the insane and criminals, he finally made a breakthrough discovery as he pondered the skull of Vihella, a notorious armed robber:

This was not merely an idea, but a flash of inspiration. At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal—an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals. Thus were explained anatomically the enormous jaws, high cheek bones, prominent superciliary arches, solitary lines in the palms, extreme size of the orbits, handle-shaped ears found in criminals, savages and apes, insensitivity to pain, extremely acute sight, tattooing, excessive idleness, love of orgies, and the irresponsible craving of evil for its own sake, the desire not only to extinguish life in the victim, but to mutilate the corpse, tear its flesh and drink its blood.**

By applying biometric measurements to a person's anatomy, Lombroso held, we could discern who in our midst was an evolutionary atavism, prone, as Paleolithic apes no doubt were, to deviant acts. The inward tendency toward crime was written on the physical bodies of the criminal—in the "high cheek bones," "prominent" arches, "handle-shaped ears," etc.—all of which constituted a visible index of criminality, savagery, and apishness. For Lombroso, these physical signs, called "stigmata," were the unmistakable evidence of degeneration. A "normal" individual might commit a criminal act, but the "born criminal" advertised his deviance in his anatomy. Nor can this inherited proclivity for deviance be overcome, as Lombroso avers: "We are governed by silent laws which never cease to operate and which rule society with more authority than the laws inscribed in our statute books. Crime . . . appears to be a natural phenomenon."**
The work of Spencer, Galton, and other 19th century eugenicists affirmed a biological basis for social inequality; the work of Lombroso and his interpreters asserted a biological basis for social deviancy. A student of Lombroso's made the rosy prediction that his criminal anthropology would enable legal authorities to apprehend, prosecute, and punish criminals without having to rely solely on real and testimonial evidence. In a comment that prefigured the National Socialists' destruction of alleged "asocials" as part of their attack on the mentally ill, Lombroso maintained that since "born criminals" were incorrigible it made little sense to punish them. Rather, society should "eliminate them completely, even by death." The particular targets of Lombroso's eliminationist thinking were not only individuals within the lower classes, but also entire groups as well, to whom he ascribed atavistic criminality. Two such groups were the mentally handicapped and Gypsies. Regarding the mentally handicapped, Lombroso found that "almost every 'born criminal' suffers from epilepsy to some degree," making epilepsy a "mark of criminality." The Gypsies, on the other hand, were "vain, like all delinquents, but they have no fear or shame. Everything they earn they spend for drink and ornaments. They may be seen barefooted, but with bright-colored or lace-bedecked clothing; without stockings, but with yellow shoes. They have the improvidence of the savage and that of the criminal as well."

The Holocaust historian Henry Friedlander has noted that the National Socialist killers used similar language to describe these same two groups. It is not pure happenstance that among the victims the Nazis specifically targeted for annihilation were Gypsies and "criminals." Tracing ideological influence over time is a tricky business, but the historical record strongly suggests a connection between Lombroso's criminal
anthropology and National Socialist criminal praxis. On November 16, 1944, for example, representatives of prosecutors’ offices from Bamberg, Munich, and Nuremberg met in Bamberg with two members of the Reich Ministry of Justice (the director of Department V and a senior civil servant). In the course of the meeting, according to an item on the agenda entitled, “Burial of prisoners who suffer a lethal accident in excavating and defusing bombs,” the following subject was tabled for discussion:

Museum of outwardly asocial prisoners.
In various visits to penal institutions, prisoners have been observed whose physical form renders them scarcely deserving of the name of a human being: they resemble monstrosities from hell. The submission of photos of such prisoners is desired. It is being considered also to eliminate these prisoners. Criminal act and length of imprisonment play no role.53

This chilling excerpt proves that the Nazi government undertook plans to kill convicted prisoners based purely on their physical appearance.

The Lombrosian connection with Nazi criminality gains additional support when we consider the wide audience his L’uomo delinquato (first published in 1876) reached in Germany when it was translated into German along with his other works in the 1890’s. Inspired by Lombroso’s theories, German researchers probed the brain tissues of murderers for structural divergences from the norm. Apostles of Lombroso’s ideas in Germany founded a movement for criminal biology in the 1890’s dedicated to “scientific” theories of crime prevention. The weekly journal Die Zukunft (The Future) disseminated his teachings to the German public. In its pages appeared articles on Lombrosian criminology side by side with contributions from prominent eugenicists like Ernst Haeckel and Thomas Huxley.54 Presumably, the teachers of future Nazi doctors were exposed to Lombroso’s tenets during their professional training at the fin de siecle.
The late 19th century was a cauldron of Darwinian and pseudo-Darwinian speculation about improving the quality of the human race (defined, of course, in terms palatable to middle class eugenicists), either by promoting “superior” individuals within society or preventing “inferiors” (the mentally handicapped, criminals, Gypsies, and other socially marginal groups) from reproducing. At the turn of the century, this latter goal of eliminating valueless life could be attained in one of three ways: (1) by abandoning the poor and infirm to the forces of “nature,” resulting in their destruction through natural selection (the Spencerian option); (2) by preventing “inferiors” from breeding, e.g., detaining them in “monasteries” and “convents” (the Galtonian option); or (3) killing them (the Lombrosian option). (Eugenic sterilization was not yet a practicable alternative to the “social problem.”) Yet, despite the proliferation of these ideas, organized killing of “valueless” life did not occur until well into the twelve-year imperium of the Third Reich. Industrialization and modernity created the vine on which eugenic ideologies grew; a catastrophic world war was required for the eugenic fruit to ripen into full-fledged programs of mass-murder.

III. World War One, the Weimar Years, and the Transformation of German Attitudes toward the Mentally Ill

Scholars of Nazi criminality identify the First World War (1914-1919) as a major turning point in the history of the National Socialist assault on “unworthy life.” Before 1919, proposals to use state power to eliminate the undesirables from a society perceived to be in the throes of degeneration were on the fringes of public discourse. The radicalizing effects of the Great War, however, pushed these dissident voices from the fringe toward the center. From 1919 until Hitler came to power in 1933, increasing
numbers of Germans—doctors, psychiatrists, health officials, politicians, policymakers, and university professors—were won to the cause of violent solutions to the problem of mental illness.

At the outset, we should distinguish between negative eugenic approaches, which seek to prevent "inferiors" from reproducing (e.g. by forbidding them to marry, forced abortion, mandatory birth control, sterilization, or, as a "final solution," killing them), and "economistic" approaches, which also strive after the goal of eliminating the unfit, but for different reasons. Economistic approaches are not concerned with improving the racial stock of society, but with conserving fiscal and medical resources. On this view, the mentally handicapped are a drain on scarce resources; rather than waste them on "useless eaters" (a phrase commonly used in the Weimar and Nazi periods to refer to severely ill patients), resources should be withdrawn from the mentally handicapped, in whole or in part, and transferred to productive members of society. Postwar German courts adjudicating "euthanasia" trials tend to ascribe the motives of the participants in Nazi medical killing to "crass utilitarian considerations," rather than to eugenic motives to breed a fitter population. While the two motives are conceptually distinct, they are nonetheless clearly related: both depreciate the value of certain groups and urge their removal from society.

Already in the 1890's, voices from the fringe in Germany were calling for the direct killing of incurably ill and mentally handicapped patients. In 1895, Adolf Jost argued for two death-dealing rights in his book The Right to Death (Das Recht auf den Tod): the right of terminally ill persons to end their sufferings through voluntary euthanasia and the right of the state to end the lives of the incurable and mentally
defective. The state, Jost contended, should be permitted to destroy individuals who had become a burden on society and on their relatives, even when they were unable to express their wishes for euthanasia. In a rhetorical move common to many advocates of violence against marginal groups (including the famed American jurist, Oliver Wendell Holmes), Jost grounded the right of the state to kill patients in its right to sacrifice young men in times of war for the welfare of the state.

Jost’s book is an intriguing and instructive illustration of how German theorists of biological inferiority confused separate issues; the dignified right of a terminally ill person to choose euthanasia as an alternative to continued suffering and painful medical intervention is conflated with the state’s power to kill nonterminal patients because they are a financial burden. This style of thought—the tendency to fuse distinct questions and demand a common answer for each—is typical of the planners and policymakers who implemented the Nazi euthanasia program during the Second World War.

The arguments of other euthanasia adherents in the late 19th century betray a similar tendency to erase borders between separate issues. Polemicists like Wilutsky cited the inhumanity of chronic suffering, reasoning that since we end the suffering of animals by killing them, we should accord to “life unworthy of life” (vita non jam vitalis) the same humane treatment. This argument blurs the distinction between the animal kingdom, voluntary euthanasia chosen by terminally ill patients, and involuntary killing of human beings deemed by the state to be without value. Ernst Haeckel, creator of the unwieldy phrase “ontogeny recapitulates phylogeny” and a popularizer of Darwin in Germany, justified the destruction of unworthy life as a humane act that would conserve financial resources. For Haeckel, the ancient Greek practice of infanticide was a sensible
means of introducing natural selection into the social world. As with Jost and Wilutsky, we encounter in Haeckel the conflationary impulse to blend distinct subjects—in Haeckel's case, the humanity of ending pointless suffering and the economistic goal of saving money.

These voices went largely unheeded until after World War I. The catastrophic impact of the Great War on the generation of Germans who experienced it cannot be overstated. The militarism, mass-death, economic privation, defeat, and—perhaps most importantly—code of violence produced by the Great War all left their mark on the future perpetrators of National Socialist criminality. The influence was far-reaching, extending not only to the leadership cadre of the Nazi Party but also to physicians, mental institution directors, nurses, and public health officials.

Conditions within German mental hospitals during World War I were instrumental in forming postwar attitudes toward the mentally handicapped. The German government introduced a war-time rationing program that became increasingly severe as the conflict ground on. Among the first to feel the deprivation were mental hospitals. In Saxon institutions between 1914 and 1918, 6,112 patients died as contrasted with 1,784 deaths between 1911-1914. The British historian of Nazi euthanasia, Michael Burleigh, cites the example of the Saxon asylum at Colditz, where 560 people died during the war as compared with a pre-war annual average of 22 deaths. He notes that the mental hospital at Emmendingen near Freiburg had a mortality rate of 95 per annum from 1913 to 1915; by 1916, the figure mounted to 162 and in 1917 to 285 (due in part to an outbreak of tuberculosis). Food rations for institutionalized patients were stripped of cereals, meat or fats. Burleigh points out that at Berlin-Buch patients' daily
rations plummeted from 2,695 in July of 1914 to 1,987 calories in January of 1918. The mortality rates are inversely proportional to this trend line for the same period: where 302 patients died during the year 1913, 762 perished in 1917. The final statistics on mortality rates in German mental hospitals during the Great War are staggering: 71,787 people died from hunger, disease, or neglect between 1914 and 1918—a figure of ca. 30% of all mental patients institutionalized before the war.59

The Great War was a demographic disaster not just for the mentally ill in German mental institutions, but for all of Germany, which suffered a loss of 1.9 million men and 3.6 million wounded or captured. The British blockade led to severe food shortages, so that, by 1918, the mentally ill were not the only Germans who were starving. Both soldiers and civilians became embittered, and the source of their anger was food: the rank and file within the navy and army resented a system of rationing that gave larger portions to the officers, while German mothers lashed out at the authorities for failing to provide adequate nourishment for their children. About the desperate conditions among the urban working classes the Socialist leader Philipp Scheidemann remarked “that it is like asking a complete riddle when one asks one’s self: What does north Berlin live on and how does east Berlin exist?”60 By 1920, the effects of military defeat, political upheaval, mass death, and famine had altered the moral landscape within German medicine. The chairman of the German Psychiatric Association, Karl Bonhoeffer, discussed this change in his inaugural address before the Association in 1920:

"It could almost seem as if we have witnessed a change in the concept of humanity. I simply mean that we were forced by the terrible exigencies of war to ascribe a different value to the life of the individual than was the case before, and that in the years of starvation during the war we had to get used to watching our patients die of malnutrition in vast numbers, almost approving of this, in the knowledge that perhaps the healthy
could be kept alive through these sacrifices. But in emphasizing the right of the healthy to stay alive, which is an inevitable result of periods of necessity, there is also a danger of going too far: a danger that the self-sacrificing subordination of the strong to the needs of the helpless and ill, which lies at the heart of any true concern for the sick, will give ground to the demand of the healthy to live.  

It is thus no accident that the single most influential document in the development of the National Socialists' attitudes toward the mentally handicapped appeared in this climate of diminished regard for "the life of the individual"—a pamphlet entitled The Permission to Destroy Life Unworthy of Life (Die Freigabe der Vernichtung lebensunwerten Lebens), published in 1920. An eminent retired jurist from the University of Leipzig, Karl Binding (1841-1920), and a professor of psychiatry at the University of Freiburg, Alfred Hoche (1856-1944), were the co-authors of the tract. It was divided into two sections, one written by Binding, the other by Hoche. Binding started his section with a defense of the individual's right over his or her body—an overarching right that entailed the right to suicide. Although he conceded the interest of society in preserving valuable members, the right of a terminally ill patient experiencing intense pain to have a physician end his or her life by artificial means overrode the social interest. Binding referred to this act of voluntary euthanasia as an "act of healing." While he emphasized that euthanasia in such a case had to be consensual, the principle of autonomy was at war with his conception of "valueless" life. He asked: "Is there human life which has so far forfeited the character of something entitled to enjoy the protection of the law that its prolongation represents a perpetual loss of value, both for its bearer and for society as a whole?" The question is of course rhetorical. By posing it, he has segued from an issue involving a competent terminally ill patient in excruciating pain to the question of whether society may destroy individuals whose lives have no value, either
for themselves or for society. Binding, however, does not acknowledge the transition. He treats the two issues as constituting a common problem calling for a common solution.

Binding identified the three groups who qualified for his proposed euthanasia measures: (1) terminally ill patients (including the mortally wounded) who expressed their wish for a premature death; (2) "incurable idiots," no matter whether their idiocy was congenital or acquired; and (3) people who had suffered grievous physical war injuries that rendered them unconscious, but who would desire a foreshortening of their lives if they were able to articulate themselves. These three groups represented a class of individuals Binding called *lebensunwertes Leben* ("life unworthy of life"), an ambiguous phrase that apparently covered persons whose lives had been made unbearable because of physical pain and persons whom society regarded as so defective by virtue of their mental impairment that their lives had no value. Henry Friedlander accuses Binding and his subsequent interpreters of conscious prevarication here: they deliberately cloud the debate "by pointing to the suicide rights of terminal cancer patients facing a certain and painful death when in reality they wanted to 'destroy' the 'unworthy life' of healthy but 'degenerate' individuals." If Friedlander's interpretation is correct—and I believe that it is—then Binding and Hoche's tract is little more than a clarion call for killing people *en masse* whom the state considered "unworthy of life," under the guise of a humanitarian concern for the suffering of the terminally ill. The postwar trial records are replete with similar dissimulations by "euthanasia" doctors.
Unlike terminally ill patients, who under Binding and Hoche's proposals could freely choose euthanasia to end protracted suffering, the state could destroy the "inferiors" even if they would otherwise live without pain for years. In a comment that lifts the veil of bogus humanitarianism from the contempt he obviously harbored for the mentally ill, Binding conjures visions of battlefields strewn with the flower of German youth, contrasting their sacrifice with the pointless maintenance of worthless "idiots:" "If one thinks of a battlefield covered with thousands of dead youth . . . and contrasts this with our institutions for the feebleminded with their solicitude for their living patients—then one would be deeply shocked by the glaring disjunction between the sacrifice of the most valuable possession of humanity on one side and on the other the greatest care of beings who are not only worthless but even manifest negative value." From this invidious comparison, Binding moves on to describe the "terribly difficult burden" that the "incurably" feebleminded imposed on both their families and on society. Enormous amounts of money and medical personnel were lavished on them, while the basic needs of the healthy went unmet. In his section of the tract, Hoche concurred with Binding's points. He referred to the mentally retarded and feebleminded as "ballast" (Ballastexistenz) that could be jettisoned to right the ship of state, and echoed Binding's economistic argument for killing them: "It is a distressing idea," he laments, "that entire generations of nurses shall vegetate next to such empty human shells, many of whom will live to be seventy years or even older." Hoche was untroubled by violations of the Hippocratic Oath, which, he indicated, was a superannuated document "of ancient times." Instead, he asserted the compelling duty on the physician to promote the interests of the collective, even at the cost of sacrificing the lives of "idiots."
Binding ends his contribution to the tract with an outline of the procedures to govern the proposed killing program. The patient, the doctor, or the patient’s relatives could initiate a request for euthanasia, but only the state could authorize it. Binding provided for a panel of “experts” consisting of a jurist and two doctors responsible for evaluating each application. Their decision, Binding stipulated, had to rest on the most current scientific knowledge, the mode of killing had to be “absolutely painless,” and the person administering the killing had to be an expert (Sachverständiger). Errors would doubtlessly occur, but Binding brushed them aside, since “humanity loses due to error so many members, that one more or less really does not make a difference.”

Binding and Hoche’s work ignited a vigorous debate among lawyers, doctors, and theologians in Weimar Germany. Tübingen psychiatrist Robert Gaupp seized on Binding/Hoche’s economistic justifications to argue that the Christian notion of the sanctity of life had to be revised in view of the economic distress caused by the Versailles Treaty. A 1920 address to the Society for Forensic Medicine by the Berlin judge Karl Klee reflected the Binding/Hoche thesis in its proposal to ground capital punishment not in Vergeltungstheorie (lust for revenge), but in its tendency to purify the nation of “parasitic existences.” Notwithstanding these and other advocates of Binding/Hoche, the idea of destroying “life unworthy of life” was fiercely contested during the Weimar era, nor did it find an official foothold in Germany until the late 1930’s. Numerous opponents refuted their arguments, pointing to the dubious business of assigning degrees of value to human life and to the inflationary potential inherent in such an arrogation of power by the state.
A leading critic of the Binding/Hoche thesis was Ewald Meltzer, director of the Katharinenhof asylum in Saxony. Meltzer's is one of the obscure but extraordinary voices in 20th century European history. His scalding retort to the “euthanasia” school demonstrates that proto-Nazi ideas of biological inferiority and mass murder were not entrenched in Germany prior to 1933. He presciently warned in 1925 of the slippery slope down which “euthanasia” could take Germany, and with comparable foresight pointed out that to assign such power over life and death to the state would invest it with tyrannical control over its citizens. Further, he asserted, the mentally handicapped slated for killing under the Binding/Hoche proposal had in fact retained human personalities and were capable of enjoying their lives. He also attacked the Binding/Hoche thesis on ethical grounds, dismissing as an anomaly the ancient Spartan practice of infanticide. Citing thinkers as diverse as Carlyle, Dostoevsky, and Kant, he argued that our preeminent virtue as human beings was compassion; hence, German mental institutions, far from being prodigal expenditures of society's resources to maintain useless “ballast existences,” were shining examples of Christian love that never failed to impress visitors.69

For a time, the views of euthanasia critics like Meltzer held the field in Germany. In 1921, after debating whether or not to support legalizing euthanasia, the Karlsruhe Ärzetetag rejected the idea. When Councillor Borchardt from Liegnitz promulgated a draft law for killing the mentally handicapped in 1922, he was met with vociferous opposition. Some neurologists and mental institution directors denounced “euthanasia” as a blatant violation of the medical ethos of healing; some stressed the difficulty in defining “incurability.” Other critics prophesied that euthanasia would irreparably
undermine the doctor-patient relationship and provoke the public's enmity against hospitals. Dr. (theology) Martin Ulbrich, an asylum director, argued that severe cases of mental illness were the products of sin that served as warnings to all of society. They must be preserved for their minatory value. 70

Meltzer himself, troubled by the controversy over Binding and Hoche's pamphlet, conducted a survey in 1920 to explore parental attitudes toward the "euthanasia" of their incurable mentally ill children. The central question of the survey read: "Would you agree to the painless curtailment of the life of your child if experts had established that it was suffering from incurable idiocy?" Meltzer was astonished when, of the 162 parents who responded, 119 (73 percent) answered in the affirmative. These parents sought relief from the burden of a severely handicapped child, but they wished to be disburdened of it without their knowledge. Some even desired that the physicians "deceive" them by identifying false causes of death. 71 Postwar doctors facing prosecution for their involvement in the National Socialist "euthanasia" program will often invoke the Meltzer survey to justify the cloak of secrecy and deceit thrown around the killing program.

Parental support for destroying "unworthy" life notwithstanding, the German medical profession remained opposed to it during the Weimar Republic. The "change in the concept of humanity" that Karl Bonhoeffer had noticed in the aftermath of World War One, however, gradually crept over the German medical community in the 1920's. Perhaps the most momentous contribution to this "change in the concept of humanity" was a shift of the doctor's duty from the individual patient to an abstract commitment to the "body of the people" (Volkskörper). Late 19th-century eugenics had, of course, always subordinated the individual to the wellbeing of the collective, conceived as state.
society, nation, or, in Germany, as das Volk. The prewar German eugenics movement, unlike its decentralized counterparts in the United States and Great Britain, was concentrated in a single group, the German Society for Race Hygiene (Deutsche Gesellschaft für Rassenhygiene). Its journal, the Archive for Racial and Social Biology (Archiv für Rassen- und Gesellschafts-Biologie, founded in 1904 by Alfred Ploetz), was the leading forum for eugenic ideas in Germany. The German Society shared with American and British eugenicists a belief in congenital “superiority” and “inferiority,” making it the Society’s task to preserve Germany’s “genetic heritage” from biological degeneracy. Prior to the Great War, German eugenicists had de-emphasized the negative implications of their beliefs (i.e., primarily sterilization of the unfit), realizing that little support existed for it in the population, and focused instead on promoting the health of the nation by raising the birth rate of “superior” individuals. The privations of Germany’s military collapse, however, radicalized German eugenics. Among physicians, emphasis shifted from the individual as the object of medical treatment to the “body of the people.” Since German eugenicists tended to be physicians and academic psychiatrists working in state hospitals and university clinics, this meant that caregivers directly responsible for the mentally handicapped were abandoning the Hippocratic ethic of devotion to their patients’ wellbeing. As early as 1915 Alfred Hoche, reflecting an attitude that would win increasing support in the 1920’s and the 1930’s, proclaimed the end of individualism and the beginning of a new order, one in which the nation emerged as an organism with rights ascendant to those of the individual.

Preservation and expansion of the “people’s strength” (Volkskraft) competed with traditional patient-based views of medical practice. One year before the Great War, the
Leipzig Cartel, a league of heavy industry, agribusiness, and middle class associations, had rejected social welfare as being too costly. This was a dissenting view in 1913; by the 1920's, however, growing numbers of doctors were making the same argument, claiming that social security led to a "feminizing" (Verweichlichung) of patients and thus to the decline of the German people. The younger generation of German doctors was especially infused with these ideas of the "new order" (to quote Hoche's phrase). Young German doctors like the geneticist Otmar von Verschuer, mentor to Josef Mengele and co-secretary of the German Society for Racial Hygiene, advocated sterilizing the "unfit" and condemned democracy for imposing financial burdens on superior people. Writing in 1928, he criticized the welfare state for coddling degenerates on the backs of the fittest Germans. The case of von Verschuer is symptomatic of a broad range of German professionals, radicalized by the experience of the Great War, who spurned the Weimar Republic in favor of authoritarian notions of national health and the preeminence of the community over the individual interest.

This process of radicalization demonstrates that the ideology of biological value was not the exclusive preserve of the National Socialists, but circulated in Germany—and, indeed, throughout Western industrial nations in the 1920's—well before Hitler came to power in 1933. Without the Hitlerian Revolution, however, the ardent dream of eliminating the "inferiors" would likely have never been realized. For National Socialism was the most powerful host in which the virus of medical mass murder lurked.
NOTES

6 Isa. 57:5.
7 Lev. 18:21. Despite this prohibition, the Old Testament recounts that at least some of the Israelites at various times worshipped Moloch, erecting shrines to the Ammonite god that would ultimately be destroyed under the kingship of Josiah. See 1 Kgs. 11:5, 7; 2 Kgs. 23:10, 13.
9 Carr-Saunders, p. 217.
13 See infra, chapter 2, p. 93.
15 Cited in deMause, p. 28.
19 Piers, Infanticide, p. 51.
20 Older women suffered from the suspicion that they murdered children through blackmagic and witchcraft. For this reason, the presumption of guilt was activated when a child entrusted to their care died—a presumption that many defendants so accused found it difficult or impossible to rebut. See Richard C. Trexler, "Infanticide in Florence: New Sources and First Results," History of Childhood Quarterly 1 (1973): 98-115.
21 Piers, Infanticide, pp. 69-70.
22 Piers, Infanticide, p. 64.
25 Edmund rails against the social devaluation he has always faced as an illegitimate child:

... Wherefore should I
Stand in the plague of custom, and permit
The curiosity of nations to deprive me,
For that I am some twelve or fourteen moonshines
When my dimensions are as well compact,
My mind as generous, and my shape as true,
As honest madam's issue? ... Lr. I, ii. 2-9

82
The Infanticide Law of 1624 equated child killing with capital murder—but only in cases involving unmarried women who caused the death of their illegitimate children. See Hoffer and Hull, p. ix.


Weir, Selective Nontreatment, p. 16; see also R. Sauer, p. 87.

Weir, Selective Nontreatment, p. 20.


Hofstadter, p. 41. Spencer’s critics were numerous; in the United States, they included members of the Social Gospel movement and prominent intellectuals like Lester Ward, Henry George, Edward Bellamy, and William James. Criticism often focused on Spencer’s ideology of laissez-faire economics. George memorably compared him to “one who might insist that each should swim for himself in crossing a river, ignoring the fact that some had been artificially provided with corks and others artificially loaded with lead.” Henry George, A Perplexed Philosopher (New York: C.L. Webster & Co., 1892), p. 87.


Hersey, The Evolution of Allure, p. 102.


Galton committed the fallacy of confusing correlation with causation. The fact that families of reputation tended to have talented children might be explained on other grounds: enhanced access to education, higher parental expectations and pressure to “make a mark” in society, or favorable connections that paved access to leadership roles in a class-structured social order like Victorian England (e.g. access to command positions in the military or offices within the judiciary).

Kevles, In the Name of Eugenics, p. 4.

Kevles, In the Name of Eugenics, p. 4.


Weindling, Health, Race, and German Politics, p. 92.


Weindling, Health, Race, and German Politics, p. 93.

See Ernst Haeckel, The Riddle of the Universe at the Close of the Nineteenth Century, trans. by Joseph McCabe (New York: Harper & Brothers, 1901); Stephen Jay Gould, The Mismeasure of Man (New York: W.W. Norton & Co., 1996), p. 143. Gould notes that recapitulation “dominated the work of several professions, including embryology, comparative morphology, and paleontology.” For our purposes, we are most concerned with its impact on Cesare Lombroso’s criminological thought.


H. Friedlander, Origins, p. 3.

Quoted in H. Friedlander, Origins, p. 3.
In 1927, Holmes authored the majority opinion in *Buck v. Bell*, in which the High Court upheld the constitutionality of a Virginia law that ordered the sterilization of persons suffering from hereditary “insanity” or “imbecility.” In the opinion, Holmes justified the law, in part, on the following grounds: “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.” *Buck v. Bell*, 274 U.S. 200 (1927).


59 Burleigh, *Death and Deliverance*, p. 11.


61 Quoted in Burleigh, *Death and Deliverance*, pp. 11-12.


63 H. Friedlander, *Origins*, p. 15. Friedlander’s imputation of bad faith gains support not only from the text itself, but from Binding and Hoche’s politics: both men emerged from the Great War as champions of the primacy of the state over the rights of the individual. Binding’s legal positivism traced all norms to the authority of the state, while Hoche argued that the physician’s duty was to serve the welfare of the nation, conceived as a physical organism, rather than the good of the individual patient, who could be annihilated if such would benefit the state. Seen in this light, their halfhearted gestures toward consent are unconvincing. See K. Nowak, ‘Euthanasie’ und Sterilisierung im ’Dritten Reich’ (Göttingen, 1984), pp. 43-44;

64 Weindling, *Health, Race, and German Politics*, pp. 394-395.


69 Burleigh, *Death and Deliverance*, p. 20.

70 Burleigh, *Death and Deliverance*, pp. 21-22.

71 Weindling, *Health, Race, and German Politics*, pp. 396-397.

72 Quoted in Burleigh, *Death and Deliverance*, pp. 22-23.


74 A.E. Hoche, *Krieg und Seelenleben* (Freiburg-Im-Breisgau und Leipzig, 1915).


CHAPTER 2

THE ROUGH BEAST IS BORN:
NATIONAL SOCIALIST "EUTHANASIA,"
1933-1941

Russians consider feebleminded people holy. Despite that, killing necessary.

Extract from the diary of General Franz Halder, 26 Sept. 1941

The darkness drops again: but now I know
That twenty centuries of stony sleep
Were vexed to nightmare by a rocking cradle,
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?

W.B. Yeats,
"The Second Coming" (1921)

It would be raw conjecture to imagine how different world history would have been had Adolf Hitler's Nazi Party not seized control of the reins of government in Germany in January 1933. Although eugenic ideologies were not restricted to the Germans, only in Germany did a virulently racist, eugenically-committed party come to power during an era of economic crisis and social discontent. It may be impossible to find an analogy in American history to illustrate the momentousness of this event. Imagine a situation in the United States in which a major war was lost, political parties multiplied within a postwar government perceived by many as imposed on them by the victors, and economic depression forced around 18 percent of the working population into unemployment. Imagine further that a fringe group like the Ku Klux Klan turned
to mainstream politics and eventually seized control of both the executive and legislative branches of the U.S. government. The analogy may be somewhat strained, but it conveys a sense of the dire implications of Hitler's accession to power, especially for those groups the Nazis had from their earliest days condemned as racial poisons to a healthy German nation.

In the next two chapters, we will examine at some length the Nazis' murderous assault on the mentally handicapped. Because the postwar prosecutions of euthanasia defendants heavily depend on the factual context of that assault, it is essential to a clear understanding of the trials to know about the history of the euthanasia program. The narrative explores the unfolding of the German government's war on the disabled, from discriminatory legislation that required involuntary sterilization of "worthless" people to their planned destruction as the war began. Both chapters take pains to analyze the organizational structure of the killing process, inasmuch as the bureaucratic configuration of the euthanasia program (and, later, of the Final Solution) will largely shape how Nazi mass murder developed between 1939 and 1945. Chapter 2 focuses on the so-called "phase one" of the euthanasia program, in which "incurable" patients were gassed in one of six killing facilities. Phase one ended in August 1941 on Hitler's orders, apparently due to growing popular protest against the euthanasia program. The alleged stop, however, did not terminate the killing program. Chapter 3 examines the second phase of the euthanasia program within the larger context of the Nazis' expanded killing projects. Phase two was characterized by "wild euthanasia"—centrally planned but locally administered killing of patients by means of fatal overdoses of narcotics. Following Henry Friedlander and Ernst Klee, the chapter seeks
to uncover the link between National Socialist euthanasia and the "Final Solution," the Nazis' scheme to make occupied Europe Judenfrei (free of Jews) through the physical obliteration of the European Jews.

The final section of chapter 3 argues for a subtle re-casting of our understanding of how Nazi mass murder spiraled outward from the handicapped to Jews and other groups. Conceding the value of the "cumulative radicalization" theory of genocide, I suggest that the term "violentization" may be more apropos to describe the titanic genocide of a Nazi movement that had been since its founding predisposed toward violence and murder. The term "violentization" highlights a crucial fact that "radicalization" sometimes obscures: namely, that the Nazis were always violent, and that the Final Solution, far from being a bolt out of the blue in late 1941, was the culmination of a chain of destructive acts stretching back into the 1920's and '30's. To a degree, the argument may be interpreted as a contribution to the structuralist-intentionalist debate, one that upholds the malicious intentionality of the Nazi leadership without ascribing to it a specific, concrete, and longterm plan to murder the European Jews.

Before we turn to this history, I would like to give the reader an inkling of why Hitler, the man identified in all the postwar euthanasia trials as the "main perpetrator" (Hauptäter) of Nazi genocide, may have inaugurated programs of mass killing against
those he considered "life without value." Although the view presented below is by no means original to the present study, it gives insight into the psychology of "the main perpetrator" and his closest associates.

I. Demonic Connoisseurship: Adolf Hitler and the Art of Evil

The Germans, as we have seen, did not have a monopoly on eugenic ideas of social improvement. The founders of eugenic thought—Huxley, Galton, Spencer, and Karl Pearson—were British. Influenced by their thought, American eugenicists like Charles Davenport embraced a hereditarian view of social characteristics, constructing hierarchies that ranked individuals, groups, races, and nations in terms of their biological value. Identifying the social problems of their day with innate and unchangeable qualities, American eugenicists persuaded state legislators throughout the country to implement involuntary eugenic sterilization of the hereditarily "unfit." These programs were codified in state law and officially vetted by the U.S. Supreme Court in the 1927 case *Buck v. Bell*. The first American psychologist to introduce the Binet scale to the United States, H.H. Goddard, was a confirmed eugenicist convinced that intelligence was innate. His belief that immigration of Eastern European "degenerates" to the United States would sap the vitality of the nation had many adherents among American eugenicists. Their lobbying efforts contributed to the Immigration Restriction Act of 1924, which drastically curtailed immigration from countries believed to be populated by "inferiors" (chiefly eastern European nations).
Yet, despite the presence of eugenic policy and practice in other Western societies, only in Germany did the “rough beast” of state-organized mass killing of the mentally handicapped come into being. In chapter 1 I indicated one of the primary reasons why this was the case: the brutalizing effects of World War I wrought a change in the German medical profession’s attitude toward so-called “life unworthy of life,” causing ever larger numbers of doctors, psychiatrists, and health officials to embrace radical approaches to treating the mentally ill. Organic views of society as a biological organism in need of medical care gradually supplanted the Hippocratic devotion of the doctor to the individual patient. A disquieting tendency to problematize the treatment of “worthless life” manifested itself; in addressing this “problem,” mainstream voices in the German medical and public health fields increasingly called for violent “solutions” by the state, in the form of either forced sterilization or outright killing of patients. A position advocated only by fringe elements prior to the War had become a part of quotidian public policy discourse by the 1920’s.

The most obvious and important reason why Germany became the cradle of medical mass murder, however, is politics. A political party sympathetic to the most radical views of German eugenicists, the National Socialist German Workers Party, came to power in January of 1933. The rise of the Nazis was at once the victory of the most radical rightwing political movement in Germany and the defeat of those moderates who, in earlier decades, had consistently opposed eugenic and racial-hygienic proposals. By the time Hitler came to power, these voices of criticism had been silenced, effectively relegated to the fringe.
While he was not a scientist, Adolf Hitler was exposed to eugenic ideas at least as early as 1923, when during his time in prison he read what would become a classic text of scientific racism, the Outline of Human Genetics and Racial Hygiene (*Grundriss der menschlichen Erblehre und Rassenhygiene*). Two of the authors of the book—Eugen Fischer and Fritz Lenz—were deeply involved in the Nordic wing of the Race Hygiene Society in Germany. (The third author, Erwin Baur, was an eminent botanist and chief of the Kaiser Wilhelm Institute for Plant Cultivation and Genetic Research.) This wing of German eugenics regarded the Nordic (or Germanic) peoples as superior to all other racial groups. In the 1920's German Nordic eugenicists referred to their "scientific" hierarchies of racial value as either "Race Hygiene" (*Rassenhygiene*) or eugenics (*Eugenik*). After 1933 the Nordic faction would dominate German eugenics, adopting for the first time an aggressive anti-Semitism and enthroning "Race Hygiene" as the sole designation for German eugenics.3

Hitler recorded the influences of this seminal text in *Mein Kampf*, in which he set forth a kind of "eschatological Darwinism" that viewed all of history, both of society and of the natural world, as the arena of a feral struggle for existence. Displaying the degree to which trench warfare had brutalized his thought, he conceived of the universe as driven forward to higher levels of development through ferocious and unremitting conflict. We read:

> Nature . . . puts living creatures on this globe and watches the free play of forces. She then confers the master's right on her favorite child, the strongest in courage and industry . . . . Only the born weakling can view this as cruel, but he after all is only a weak and limited man; for if this law did not prevail, any conceivable higher development of organic living beings would be unthinkable . . . . In the end, only the urge for self-preservation can conquer. Beneath it so-called humanity, the expression of a mixture of stupidity, cowardice, and know-it-all conceit, will melt like snow in the March sun. Mankind has grown great in eternal struggle, and only in eternal peace does it perish.5
In his *Tischgespräche* (*Table Talks*) Hitler inferred from this violent "law of nature" a Machiavellian justification for "all imaginable means" in the struggle between national groups, including "persuasion, cunning, cleverness, persistence, kindness, wiliness, and brutality." Both in *Mein Kampf* and his speeches, Hitler spoke in the cadences of a religious prophet, exhorting his followers to blind obedience to this predatory philosophy, admonishing them: "Woe unto him who lacks faith!" For Hitler, the ends justified the means, since the future of humanity hung in the balance. By disregarding nature's law whereby the strong destroyed the weak and mated only with their own kind (the "titmouse seeks the titmouse, the finch the finch, the stork the stork, the field mouse the field mouse"), higher civilizations throughout history had ensured their own decline and fall. Only by restoring the law of nature to German society could the Aryans preserve their racial stock, and only in this way could true humanity, identified with the cause of the Aryan, be advanced. The alternative was decadence, decay, and death.

While Hitler singled out the Jews as the Aryans' racial archenemy, there is an implicit animus in *Mein Kampf* against all groups perceived by the Völkisch community to be strange or inassimilable. Hitler did not write about killing biological "inferiors" like the mentally disabled in 1923, but the premise that Germany could only stave off cultural extinction by abandoning the weak to the "law of nature" threatened at best indifference, at worst violent intervention by the state once the Nazis came to power. By the late 1920's, the logical ramifications of Hitler's worldview in *Mein Kampf* had crystallized into specific utterances about killing the mentally disabled. Invoking the example of ancient Spartan infanticide in 1928, Hitler commended the Spartans for
putting to death deformed children, claiming that their military strength derived from the
practice of weeding out "defectives." The late-1920's may have been the time when the
fateful marriage of war readiness and elimination of the "unfit" was consummated in
Hitler's mind. During a party rally at Nuremberg in 1929, Hitler, in characteristically
hyperbolic style, railed against the social welfare state for breeding "inferiors" and
destroying the strong. This situation could be corrected, he suggested, by wiping out a
million "burdensome lives."

The affinities of Hitler's ideology with classical eugenics are numerous. Like the
eugenicists, Hitler subscribed to the view that human society consisted of biologically
"worthy" and "unworthy" individuals. The role of the state was to promote the
flourishing (and especially the reproduction) of the fit at the expense of the unfit through
both positive and negative measures—including, in the most radical form, the
sterilization and killing of those deemed "unworthy of life." In Hitler, the twin
rationales for eliminating the "unfit" converged—a eugenic concern to improve the racial
quality of the nation and an economistic motive to conserve scarce resources, which were
to be reallocated to the biological elite. This being said, was Hitler an eugenicist?

By raising this question, we risk assigning a single name or concept to a
complicated phenomenon. In the eyes of the public and of many scholars, Hitler is
synonymous with Nazism, since the latter's successes, failures, and murderous ideology
were bound up with the person of Hitler. By attributing a single coherent motive to
Hitler as the grand perpetrator of National Socialist criminality, we incur the risk of
identifying all of Nazi genocide with the peculiar obsessions and psychopathologies of
Hitler. The German doctors implicated in Nazi mass murder acted for a variety of motives, many of them having little or nothing in common with Hitler’s attitudes. With this caveat in mind, some general assessments of Hitler’s motives can be made.

Although Hitler’s ideology bears a resemblance to eugenic thought, I would argue that the source of his fixation on hereditary health was less eugenic than aesthetic. An artistic sensibility may, in fact, inform the historical attitudes of many Western leaders toward so-called “inferiors.” In The Mismeasure of Man, Stephen Jay Gould records that he has “been struck by the frequency of such aesthetic claims as a basis of race preference.” Gould quotes Benjamin Franklin’s hope that the United States would one day become a nation free of “all blacks and tawneys,” populated only by “the lovely white and red.” Less partial to the “lovely red” color of Native Americans, Oliver Wendell Holmes celebrated their removal as an aesthetic triumph: “… and so the red-crayon sketch is rubbed out, and the canvas is ready for a picture of manhood a little more like God’s own image.”

Francis Galton was likewise interested in furthering the survival and reproduction of “beautiful people.” He designed a “Beauty-Map” of Great Britain that compared the numbers of comely British women in different regions of the British Isles. The map was intended to aid the state in pairing suitably lovely women with eugenically valuable men. Galton actually wandered the streets of towns and cities throughout Great Britain, recording the beautiful, average, and ugly women he saw on a counting machine in his pocket.
Walter Benjamin once summed up Fascism as the "aestheticizing of politics." Hitler would have likely agreed; he often claimed that Nazism had finally overcome the tension between art and politics. His torchlight parades within massive cathedrals of light at Nuremberg were artistic spectacles. According to Albert Speer, Hitler thought of himself as a modern-day Pericles; the autobahn was his Parthenon. He dismissed the idea that Himmler or Hess could replace him because they were lacking in artistic sensibility. Hitler regarded Speer, on the other hand, as an "artist" and thus, for a time, as a worthy successor. He frequently stylized himself as an artist who

became a politician against my will. For me politics is only a means to an end. There are people who think that I would find it hard someday to be no longer active as I am now. Not at all! It will be the best day of my life when I drop out of political life and leave all the worries, the troubles and the vexation behind me . . . . Wars come and go. What remains are the values of culture alone.¹³

As Joachim Fest points out, Hitler surrounded himself with failed, frustrated, or avocational artists: his mentor, Dietrich Eckart, was a mediocre poet and dramatist, Goebbels a casual novelist. Alfred Rosenberg began his adult life as an architect, Baldur von Schirach and Hans Frank as poets. Reinhard Heydrich, chief of the Reich Security Main Office (RSHA) and a leading organizer of the Final Solution, was a classical violinist; Göring plumed himself on being an art collector.¹⁴

The young Goebbels, writing in his diary in July 1926, recognized early on the Promethean urge that animated Hitler's political life. For Goebbels, Hitler was "a genius . . . the naturally creative instrument of a divine destiny."¹⁵ Hitler was, in both thought and deed, a builder. His mania for cyclopean architecture is well-documented. In the mid-30's, he dreamed of turning Berlin into a world capital "comparable only to ancient Egypt, Babylon, or Rome." A chronic insomniac, Hitler spent sleepless nights
Among his unfulfilled architectural ambitions was a domed assembly hall 900 feet high that would seat 180,000 people and the "Führer's Building," a colossal beehive of government offices that would at the same time function as his permanent residence, covering 6 million square feet of colonnades, gardens, a theater, and reception rooms.\textsuperscript{16}
Hitler’s passion for monumental construction was not confined to architecture, but extended even to his ambition to re-make the human race. “Anyone who interprets National Socialism merely as a political movement knows almost nothing about it,” he asserted. “It is more than religion: it is the determination to create a new man.” He purposed to create this new man through selective breeding of “superior” individuals and ideological indoctrination by governmentally-run “political” schools that would inculcate in the future elite a zealous belief in racialism. The model of the “new man” was the SS—doctrinally pure, fanatically uncompromising on matters of race, with a physique designed for aggressive subjugation of the inferior and the chiseled features of a predator, “fearless and cruel.” Hitler’s physical ideal is epitomized in the hulking nude statue of a soldier from the “Great German Art Exhibition of 1939” (Illustration 2.1)—a gigantic figure modeled roughly on the Greco-Roman heroic style, but with none of the classical sense for restraint and moderation: coils of muscle striate the figure’s massive chest, arms, and shoulders, its face fashioned into an aquiline scowl expressive of malice and implacable determination. Hitler’s hand-chosen portraits of German women in the same exhibit are also nude, tall and athletic; their physical health equips them, however, not for striking and subduing, but for bearing the children of the master race. They are heavy-lidded, languorous vessels for procreation.

The historian of art, George Hersey, describes another example that conveys the brutal aestheticism at the heart of Hitler’s political vision. It is a four-panelled cartoon
from a Nazi magazine *Kladderadatsch* (*Mischief*), published in 1933. In the cartoon, Hitler observes a clay sculpture of a mass of struggling, physically dwarfish people; the sculptor, looking on apprehensively from the background, has stereotypically Jewish features. The cartoon Hitler has haughty contempt for the work, and smashes it with a single blow of his fist. The next panel depicts him refashioning the clay, which, in the
final panel, he has re-molded into a grandiose nude male with exaggeratedly broad shoulders and bulging muscles. This cartoon sums up in miniature the two defining characteristics of Nazism: its creative impulse to produce physical “beauty” (as prescribed by Hitler’s monumentalist aesthetics) and its destructive urge to annihilate the “ugly,” “degenerate,” or “unworthy.”

When viewed from this perspective, economistic rationales for destroying “life unworthy of life” emerge as fig leaves pasted implausibly on the true motive behind Nazi criminality: the aestheticization of human society. In using the coercive machinery of government to mold a “new man” compatible with physical standards of perfection, Nazi political praxis transcended the labels of “modernity” and “anti-modernity”—although it had recourse to current technologies in pursuing its creative goals. The mentally and physically disabled, Jews, Gypsies, criminals, and homosexuals were affronts not only to the pure racial community (Volksgemeinschaft), but to Nazi aesthetic standards. Hitler sought to make a work of art out of human society in an act of what Ron Rosenbaum termed “demonic connoisseurship.”

II. The Nazis in Power: Sterilization and the Beginning of “Euthanasia,” 1933-1939

The official assault on the mentally handicapped began shortly after the Nazis came to power in January of 1933. The initial salvo was a governmentally-mandated program of eugenic sterilization. During the Weimar years, the topic of eugenic sterilization was vigorously discussed within all political parties. The Social Democratic Party of Germany (SPD) supported voluntary sterilization as a way to curb poverty and alleviate the strain on social resources of surplus and hereditarily ill children. The Communists (KPD) similarly endorsed a program of consensual sterilization for health
and social reasons. German right wing parties like the Nazis and the German Nationalist People’s Party (DNVP) were fervent adherents of eugenic sterilization. Despite this broad consensus on the fundamental question of sterilizing the “defective,” the National Socialists were its most strident advocates. In 1931, Hitler identified sterilization as “the most humane act for mankind,” urging his listeners to overcome their misplaced pity and misgivings about it. His call for a sweeping program to sterilize a substantial number of the German population received plaudits from eugenicists like Ernst Rüdin (the chief designer of the Nazi sterilization law passed in July 1933) and Fritz Lenz, the co-author of the Outline of Human Genetics and Racial Hygiene that had influenced Hitler during his Landsberg prison term in 1923. Years later, Rüdin would laud Hitler for being the only politician to introduce “the importance of eugenics . . . to all intelligent Germans . . . it was only through him that our more than thirty-year-old dream has become a reality and racial-hygiene principles have been translated into action.”

Prominent Nazi party members like Albert Rosenberg, Walter Gross, Walter Darré, and Dr. Leonardo Conti took up the cause in their public addresses.

Prior to 1933, however, involuntary eugenic sterilization remained an act of criminal assault under German law. With political power came the opportunity and means to change the status quo. On July 14, 1933, the Reich Ministry of the Interior presented to the cabinet a sterilization law, entitled “Law for the Prevention of Offspring with Hereditary Diseases” (Gesetz zur Verhütung erbkranken Nachwuchses). Hitler backed the law, but waited until the Catholic Concordat had been brokered on July 20, 1933 before publishing it on July 26, 1933, to become effective on January 1, 1934. The law was modeled on an earlier Prussian proposal from 1932, with the critical difference
that the Nazi variant did not require the consent of the affected individual. In its final form, the law omitted reference to sterilizing or castrating “hereditary criminals” upon the recommendations of the Reich Justice Minister, who demurred to a common law covering both the mentally handicapped and criminals. In fact, the Nazis dealt with the problem of criminals through a separate law, as we will later see.

The law made it legally permissible to sterilize any person “if medical knowledge indicates that his offspring will suffer from severe hereditary physical or mental damage.” It then enumerated the categories of affliction recognized as grounds for sterilization: “(1) congenital feeblemindedness; (2) schizophrenia; (3) manic-depressive psychosis; (4) hereditary epilepsy; (5) Huntington’s chorea; (6) hereditary blindness; (7) hereditary deafness; (8) severe hereditary physical deformity; or (9) severe alcoholism on a discretionary basis.” It went on to establish a legal procedure for sterilization: the mentally handicapped patients themselves, public health service doctors, and directors of hospitals, nursing homes, and prisons were all competent to apply for sterilization under the new guidelines. Hereditary health courts would receive and evaluate all applications. Each court was attached to a local court of general jurisdiction (Amtsgericht), and consisted of three members: an Amtsrichter, or judge, a doctor from the public health service, and a physician specializing in genetics. An appellate system to handle cases on appeal was built into the regional appellate courts (Oberlandesgerichte); a similar triad of one judge and two doctors constituted these courts of appeal, the decisions of which were final and nonappealable.

As previously noted, the law contemplated both voluntary and involuntary sterilization in cases falling within its parameters. A positive finding by the courts in a
given case permitted local health authorities throughout Germany to institute surgical procedures to sterilize the person, whether or not consent was given. With the passage of the law, nonconsensual sterilization ceased to be a criminal assault and battery; in fact, now physicians and public health officials could invoke the police power to enforce compliance. In the years following passage of the law, these local and state doctors and administrators had tens of thousands of German men and women involuntarily sterilized. In 1934, the majority (52.9 percent) were the “feeble-minded,” followed by those diagnosed with schizophrenia (25.4 percent) and epilepsy (14 percent). In an ominous foreshadowing of the “euthanasia” program, the criteria for identifying a person as “feeble-minded” lacked scientific rigor, amounting to little more than banal social prejudices elevated to a medical diagnosis. The criteria for a presumptive case of feeblemindedness were lying, argumentativeness, laziness and receptiveness to influence. The overarching issue, however, was the question of the person’s value to the Volk: if a case could be made for the person’s social usefulness, the sterilizing hand might be stayed; if not, then the decision was made to proceed with sterilization. The inflationary potential for including ever greater numbers of people in this largest of the sterilization categories is clear and prefigures the expansive direction the “euthanasia” program would take in the 1940’s, as it engulfed first mentally ill children, then mentally ill adults, and later Jews, Gypsies, shell-shocked residents of bombed-out cities, and so-called “asocials.”

Subsequent amendments to the sterilization law enabled the state to eliminate “defectives” even where hereditarily “flawed” women had become pregnant before sterilization. In September 1934 Gerhard Wagner, the Reich Physician leader, informed
German physicians that Hitler would absolve them from civil or criminal liability for abortions performed on women with hereditary defects. Immunity also extended to cases in which the mother was healthy but the father suffered from a genetic abnormality. Wagner's advisement was incorporated into the sterilization law as an amendment on June 26, 1935. The original law had empowered state authorities to restrict the mentally disabled by preventing them from having children; the amendment empowered them to eliminate “undesirables” in utero.

The wave of legislation between 1933 and 1936, of which the sterilization law was a part, identified categories of “unworthy life” that, from 1939 to 1945, would become the targets of National Socialist killing policy. The Law for the Prevention of Offspring with Hereditary Diseases, published in July of 1933, was followed by another four months later, the Law Against Dangerous Habitual Criminals and Regulation of Security and Reform (Gesetz gegen gefährliche Gewohnheitsverbrecher und über die Massregeln der Sicherung und Besserung, enacted on November 11, 1933). Section 42 of this law provided that Asozialen (asocials) could be detained in mental institutions if they were deemed by the courts to have committed their crimes in a state of diminished responsibility. It also permitted the authorities to detain recidivists in public workhouses and detoxification centers and required castration for sexual offenders. Finally, the law forbade offenders from working in their professions. The German expert on National Socialist mass killing, Götz Aly, wrote about the nexus between the sterilization law and the detention law: “Just as the registration and stigmatization procedures of the July 1933 Law for the Prevention of Genetically Diseased Offspring defined those who would later..."
become victims of the euthanasia operation, the Detention Law defined and distinguished the particular group of people who would be persecuted and killed in workhouses, detoxification centers, and psychiatric institutions."  

For both habitual criminals and the mentally ill, the basis of their "worthlessness" was genetic and unalterable. (In the Commentary to the sterilization law, the authors declared that "there can be no doubt that the predisposition for crime is also hereditary." ) For decades, eugenicists and racial hygienists had associated mental disability with criminal activity. The Nazis' detention law made this alleged connection explicit by establishing a legal basis for imprisoning the "asocials" in mental hospitals. During the war, as we will see, many of these individuals were swept up in the "euthanasia" program or deported to concentration camps for extermination through work.

Additional legislation aimed at preventing the reproduction of disadvantaged groups followed two years later, when the regime enacted the Law for the Protection of German Blood and Honor (constituting, along with the Reich Citizenship law, the "Nuremberg Laws"). The law sought inter alia to eliminate Jews from the German völkisch community by illegalizing marriages between Jews and Germans, as well as proscribing extramarital sexual relations between them. Further, it prohibited Jews from hiring German females as domestic help unless they were 45 years of age or older (apparently to prevent Jewish "lechers" from seducing and impregnating young German women). While the thrust of the Nuremberg Laws was directed against Jews, they were not the only group that fell within its purview. Wilhelm Frick, the Reich Minister of the Interior whose Ministry both crafted and administered the Nuremberg Laws, presented
his gloss on the Reich Citizenship law's definition of "alien blood": "No Jew can become a Reich citizen, because German blood is a prerequisite in the Reich citizenship code. But the same applies to members of other races whose blood is not related to German blood, as, for example, Gypsies and Negroes." As Henry Friedlander has observed, although the text of the Blood Protection law only singled out Jews, article 6 was elastic enough to cover other groups: official commentators like Frick, Herbert Linden and Arthur Gütt interpreted article 6's "other racially alien blood" to include "Negroes and Gypsies." 28

The Nuremberg Laws were promulgated in September 1935. It was during this same year that Hitler informed Gerhard Wagner, the Reich Health Leader, of his intention to implement euthanasia of the mentally disabled once war had begun. Karl Brandt, Hitler's escort physician who in 1939 would be invested with the power to authorize German doctors to begin killing "life unworthy of life," explained on direct examination at the postwar Doctor's Trial that Hitler believed the opposition to euthanasia from church circles would be less pronounced during war than in peacetime. 29 In the years preceding the "euthanasia" of the mentally ill, Nazi propagandists declaimed against what Brandt at Nuremberg called the "uncritical pity" of Christianity. Dr. Arthur Gütt, chief of the National Hygiene Department in the Reich Ministry of the Interior and co-author of the official commentary on the sterilization law, urged his readers to abandon Christian charity towards "unworthy life" in his 1935 book The Structure of Public Health in the Third Reich:

The ill-conceived 'love of thy neighbor' has to disappear, especially in relation to inferior or asocial creatures. It is the supreme duty of a national state to grant life and livelihood only to the healthy and hereditarily sound portion of the people in order to secure the
maintenance of a hereditarily sound and racially pure folk for all eternity. The life of an individual has meaning only in the light of that ultimate aim; that is, in the light of his meaning to his family and to his national state.\textsuperscript{30}

Such injunctions struck responsive chords among some German Catholic and Protestant church leaders. Even before 1933, theologians were attentive to the proliferation of “inferiors” and the need to curb their numbers in the population. In a 1927 work on sterilizing the mentally handicapped, Professor Dr. Josef Mayer, professor in moral theology at the University of Paderborn, opened the door to a theological justification of measures aimed at preventing the mentally ill and criminals from having children—so long as sterilization served the greater purpose of “healing the severe damage to the body of the Volk.” Branding the mentally disabled an actual or potential threat to the welfare of society, Mayer even affirmed that extermination might in certain cases be required, analogizing from the treatment of a gangrenous limb:

\ldots if removing a limb which is burnt or otherwise threatens corruption to the other parts becomes necessary to save the entire body, then it is thoroughly praiseworthy and salutary to remove it. Each individual person, however, stands in relation to the community as a part toward the whole. If for that reason a person is dangerous to the whole community and threatens to corrupt it through some type of offense, then it is praiseworthy and salutary to kill him in order to thereby save the common good.\textsuperscript{31}

Four years later, at the height of the Great Depression in May 1931, the Central Committee of the Inner Mission (a charitable foundation that administered the system of Catholic mental hospitals and nursing homes) took up the question of eliminating the mentally disabled from German society. While categorically rejecting “euthanasia,” the Committee endorsed eugenic sterilization of mentally ill patients. The “economic crisis” had altered the “concept of nursing care”: in these hard times, questions of cost, and not the severity of impairment, must govern the allocation of scarce resources. Reducing
public expenditures on such individuals conduced to the communal good, making sterilization not only permissible, but “an ethical duty.”

Despite these and other sympathetic voices from the church, the National Socialists remained apprehensive in the late 1930’s of ecclesiastical attitudes toward a formal “euthanasia” program. Albert Hartl, an ex-priest and from 1935 the Chief of Church Information for the government’s security service (Sicherheitsdienst, or SD), testified before a German court in 1970 that Heydrich instructed him in the latter half of 1938 to report to Viktor Brack of the Führer’s personal chancellery (Kanzlei des Führers, or KdF). Heydrich said Brack would inform him of a top-secret matter, concerning which he would receive further orders. When Hartl met with Brack, the latter related that a considerable number of petitions had arrived in the Führer’s Chancellery requesting that “incurable patients be granted a mercy death.” Brack stated, however, that Hitler had expressed reservations about euthanasia due to possible opposition from both the Catholic and Protestant churches. As a trained theologian, Hartl was in an ideal position to evaluate the attitudes of the churches toward euthanasia. He was accordingly commissioned to prepare a report on the subject.

Hartl claimed he expressed to Brack his qualms about his role in preparing such a study, since he did not feel competent to do it. Instead, he proposed that he find a suitable expert to render an opinion on the subject. Hartl thought of the moral theologian Dr. Josef Mayer, the author of the 1927 Legal Sterilization of the Mentally Ill (Gesetzliche Unfruchtbarmachung Geisteskranker). Mayer had already declared his openness to the possibility of eugenic sterilization; for this reason, Hartl believed he would be qualified to address the question of the Church’s attitude toward it.
Accordingly, Hartl met with Mayer in early 1939 and offered him the job of preparing a memorandum on the subject. Mayer accepted it, and six months later Hartl received five copies of the completed 100-page memorandum. In his judicial testimony, Hartl recalled that Mayer's study was "neither 100 percent in favor of nor against euthanasia."

Mayer's equivocal conclusion was based on the history of debate about the destruction of "unworthy life": since authorities for centuries had adduced sound arguments pro and con, euthanasia was a "defensible" act. Copies of Mayer's study were forwarded to Viktor Brack in the Führer's Chancellery, who approached Hitler with Mayer's findings. In a subsequent meeting, Brack told Hartl that, in view of Mayer's opinion that the Church would not strenuously condemn euthanasia, Hitler was withdrawing his own objections to it. The green light had been given, and the euthanasia program could now begin.34

II. Children's Euthanasia, 1938-1941

A. The Knauer Case and the Beginning of the Children's Operation

According to Albert Hartl, the decision to proceed with killing mentally ill patients was made sometime during the summer of 1939, probably in July. As early as 1938, however, the Nazi government had participated in the destruction of mentally handicapped children. In that year, a severely handicapped child from a family called Knauer was admitted to the Children's Clinic at Leipzig University. The child's father requested that the director, Werner Catel, euthanize the child, an entreaty that Catel declined on legal grounds. The father then applied directly to Hitler through his private chancellery for permission to kill the child. Hitler was intrigued by the case, and sent his escort physician, Karl Brandt, to see the child to determine whether it was as severely
handicapped as the family claimed in their petition. Brandt traveled to Leipzig, confirmed the doctors' diagnosis, and authorized them to euthanize the child, which was done shortly thereafter. Hitler authorized Brandt and the Chief of the Führer's Chancellery, Philip Bouhler, to take the same actions in all future cases of a similar nature. The Knauer case inaugurated the so-called "Children's Operation" (Kinderaktion), a program designed to kill mentally and physically handicapped children.

As Hartl testified in 1970, the Knauer family's petition for euthanasia was only one of a multitude of similar requests for a "mercy death" received by the Führer's Chancellery. This organization, so closely attached to the person of Adolf Hitler, was destined to play a central role in the mass murder committed by the Nazis during the war. The Führer's Chancellery was not a state but a Party agency, separate from the Nazi Party Chancellery (chief: Martin Bormann) located in the Munich Party headquarters and from Hitler's Presidential Chancellery (chief: Otto Meisner). It was also independent of the Reich Chancellery under Hans Heinrich Lammers. Hitler had established it as the "Chancellery of the Führer of the Nazi Party" (Kanzlei des Führers der Nationalsozialistischen Deutschen Arbeiter Parteis) in 1934 to handle correspondence from Party members specifically addressed to him. The aim was to create the impression of Hitler's accessibility to the rank and file. Although much of the correspondence that flowed into the Chancellery's offices was trivial, consisting of petitions, complaints, and altercations between Party members, the volume grew to 250,000 letters by the late 1930's. The request of the Knauer parents that a "mercy death" be administered to their child was just a molecule in the ocean of correspondence that flooded into the Chancellery in 1938.
Hitler could have entrusted the children's euthanasia program to other offices, either within the Reich government or Party: the Reich Ministry of the Interior (within the Reich Chancellery), the Party Chancellery, or the SS. That he chose to give the commission to his own personal Chancellery requires some explanation. Two factors may account for this election. First, the role of the Führer's Chancellery within the National Socialist system of government virtually guaranteed its participation in euthanasia when Hitler had finally resolved to implement it. In 1938 Hitler's Chancellery consisted of five offices. Of the five, Main Office II (Hauptamt II), which typically handled "matters affecting the state and Party" (Angelegenheiten betr. Staat und Partei), was responsible for dealing with applications to Hitler. The chief of Main Office II was Viktor Brack, the bureaucrat who had given Hartl his orders to feel out the position of the Church regarding euthanasia. (We will encounter Brack again in chapter 4 in our examination of the U.S. "Doctors' Trial." for he was a major figure not only in the Nazis' murder of the mentally disabled, but in the unfolding of the Holocaust in 1941 and 1942.) Within Section II, sub-department II b (chief: Dr. Hans Hefelmann) was charged with solving average Germans' problems with the state and Party governmental organs, and to do so in an informal manner. The key word here is "informal:" the very inconspicuousness of the Führer's Chancellery in the vast wilderness of the Nazi state, along with its intimate ties to Hitler, enabled the organization to fulfil Hitler's wishes without going through the customary bureaucratic channels. It could, in short, act directly, discreetly, and without hindrance to accomplish the tasks given it by the Führer.
In view of its very *raison d'etre*, we should not be surprised that the director of Section II b, Hefelmann, was placed in charge of the children’s euthanasia program (although Viktor Brack was Bouhler’s choice as general head of the killing program).

Second, the closeness of the Chancellery to Hitler recommended it as an executory agency of the euthanasia program. As Henry Friedlander has pointed out, to have entrusted the program to a government office (e.g., the Reich Ministry of the Interior) would have expanded the number of officials with knowledge of it. The more the circle of people aware of euthanasia killing increased, the greater the chance the public would discover what was happening. Although Hitler had some basis for believing the German public might accept “mercy killing,” he still feared popular opposition and unrest. Further, commissioning a state agency with the program would have necessitated a paper trail of official orders signed by Hitler—orders that Hitler was loathe to reduce to writing. Similarly, had he given the task to a prominent Nazi Party office like the SS, the participation of conspicuous Party members in the killing program might have compromised its secrecy. By charging his own Chancellery with implementing euthanasia, on the other hand, Hitler could rest assured that a low-profile, compact, and relatively independent organization devoted exclusively to his own person would carry out the killing quietly and with discretion. The *Führer’s* Chancellery was a natural vehicle for officially sanctioned but furtive mass murder.37

The *Führer’s* Chancellery was the leading organizer and administrator of Nazi euthanasia (including the children’s operation), but it was not the only governmental
office involved in the killing process. Department IV ("Public Health Service and Care of the Volk") of the Reich Ministry of the Interior became the sole non-Party office to participate in the euthanasia program. Department IV oversaw the local health administrations of the individual German states (Länder) and supervised the state mental hospitals. From the earliest years of the Nazi regime, it was no stranger to state violence against the disabled: as part of its mandate to improve the public health, it had been an enforcer of the government's racial and eugenic laws. Prior to retiring in 1939, the chief of Department IV, Dr. Arthur Gütt, had been an ardent supporter of Nazi race and eugenic theories, co-authoring two commentaries on the Nuremberg laws. Gütt’s successor was Dr. Leonardo Conti, erstwhile physician of the "martyred" Horst Wessel and founder of the Nazi Doctor’s Association in Berlin. Like Gütt, Conti was a fervent adherent of the National Socialist world view: asked about the Nazi law published in 1938 barring Jewish doctors from treating Aryans, Conti replied, "It is only the elimination of the Jewish element which provides for the German doctor the living space due to him." One level below Gütt (and later Conti) in Department IV was Dr. Herbert Linden, who served as a section chief (Referent) at the rank of ministerial councillor (Ministerialrat). As section chief Linden superintended state hospitals, nursing homes, and the regime’s marital and sterilization legislation. In addition, he had been a coauthor with Gütt on one of the latter’s commentaries on the Nuremberg and sterilization laws. Thus, the jurisdictional competence, along with the eugenic interests of Department IV’s directors, drew the Reich Ministry of the Interior ineluctably into collaboration with the euthanasia program.38
Shortly after the Knauer case had been addressed in 1938, Viktor Brack, Hans Hefelmann, and Herbert Linden met to discuss the commission that Hitler had given Brandt and Bouhler. They developed a plan of action, then expanded the planning group to include pro-euthanasia doctors—Karl Brandt, Werner Catel, Hans Heinze, Hellmuth Unger, and Ernst Wentzler. The reasons for the inclusion of these five men are straightforward. Brandt had been involved in the Knauer case and had been given co-responsibility with Bouhler for euthanasia; Catel had been director of the Leipzig clinic where the Knauer baby was born. Heinze was a psychiatrist and neurologist in charge of the Brandenburg-Gödern state hospital, whom Linden had recommended for inclusion in the planning group. Unger, an ophthalmologist, had written a novel called Mission and Conscience (Sendung und Gewissen) that advocated euthanasia. (The novel was later adapted as a screenplay for the propaganda film I Accuse (Ich klage an), intended to generate support among the German people for “mercy killing.”) Wentzler was a Berlin pediatrician recommended by the Reich Health Leader, Leonardo Conti.

From its earliest stages, the program was shrouded in secrecy, labeled a “secret Reich matter” (geheime Reichssache). Subsequent initiates into the program, especially at the field level, were admonished that divulging the details of the euthanasia campaign to unauthorized persons would result in the severest punishment, possibly even the death penalty. (Postwar courts, both American and German, will seize on the government’s extraordinary efforts to conceal the euthanasia program as evidence of the perpetrators’ conscious wrongdoing.) The most striking feature of the Nazis’ dissimulation was the elaborate structure of camouflage organizations (Tarnorganisationen) contrived to hide the central role of Hitler’s personal chancellery in the killing. The members of the
group planning the children's euthanasia realized that an organization so closely
connected to Hitler should not be the direct conveyor of orders to kill handicapped
children—at least not on the surface. Accordingly, they invented a camouflage body
with a speciously scientific name: the Reich Committee for the Scientific Registration of
Severe Hereditary Ailments (*Reichsausschuss zur wissenschaftlichen Erfassung von erb-
und anlagebedingten schweren Leiden*). This organization, it must be stressed, was
purely fictitious; from its origins, its sole purpose was to mask the involvement of the
members of the *Führer's* Chancellery in systematic murder. In fact, the nominal heads
of the Reich Committee were two high-ranking Chancellery officials, Hans Hefelmann,
chief of Office IIb of the *Führer's* Chancellery, and his deputy, Richard von Hegener.
To thicken the fog of secrecy, Hefelmann and von Hegener used the pseudonym "Dr.
Klein" in all correspondence issued under the name of the Reich Committee relating to
euthanasia. The practice of using false names was common among euthanasia officials
and physicians during the war. (See Table 2.1.)

The clandestine nature of the euthanasia program is one of its most arresting
aspects. Why did the architects of euthanasia, from Hitler and the officials of his
Chancellery to the physicians and nurses in the killing centers, insist so strenuously on
keeping the program secret? There is no univocal answer to this question. The most
cogent theory is that Hitler and his associates feared public reaction to disclosure of the
program. We know that Hitler ultimately rejected his subordinates' pleas for a formal
euthanasia law because of the damaging uses to which it could be put in foreign
propaganda. Real or not, Hitler's concern for enemy propaganda may reflect the actual
ground for the program's secrecy: a genuine foreboding that the German people might
<table>
<thead>
<tr>
<th>Physician</th>
<th>Institutional Affiliation</th>
<th>Pseudonym</th>
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<tbody>
<tr>
<td>Viktor Brack</td>
<td>Chief, Main Office II, Chancellery of the Führer</td>
<td>“Jennerwein”</td>
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<tr>
<td>Werner Blankenburg</td>
<td>Deputy to Brack in Main Office II</td>
<td>“Brenner”</td>
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<tr>
<td>Ernst Baumhard</td>
<td>Grafeneck and Hadamar</td>
<td>Dr. Jäger</td>
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<td>Friedrich Berner</td>
<td>Hadamar</td>
<td>Dr. Barth</td>
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<td>Kurt Borm</td>
<td>Sonnenstein and Bernburg</td>
<td>Dr. Storm</td>
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<td>Heinrich Bunke</td>
<td>Brandenburg and Bernburg</td>
<td>Dr. Schneider</td>
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<td>Klaus Endruweit</td>
<td>Sonnenstein</td>
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<td>Hans-Bodo Gorgass</td>
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<td>Grafeneck and Hadamar</td>
<td>Dr. Ott (?)</td>
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<td>Hartheim</td>
<td>Unknown</td>
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<td>Georg Renno</td>
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<td>Kurt Schmalenbach</td>
<td>Sonnenstein</td>
<td>Dr. Blume (?)</td>
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<td>Horst Schumann</td>
<td>Grafeneck and Sonnenstein</td>
<td>Dr. Keim</td>
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<tr>
<td>Aquilin Ullrich</td>
<td>Brandenburg</td>
<td>Dr. Schmitt</td>
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<tr>
<td>Ewald Worthmann</td>
<td>Sonnenstein</td>
<td>Not known</td>
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not accept the destruction of their mentally disabled relatives and countrymen. As we have seen, Hitler had feared that German church authorities might oppose the euthanasia program on religious grounds. Josef Mayer’s memorandum on the Catholic Church’s
attitude toward euthanasia had assuaged his concerns; presumably, the results of Ewald Melzer's survey from the early 1920's (in which an overwhelming number of respondents indicated their approval of euthanasia) gave Hitler additional reassurance. Nonetheless, he was still in uncharted waters. Not until the program was revealed to the light of public opinion would any one know for certain what the reaction would be. In an uncharacteristic departure from his usual impulsive, devil-take-the-hindmost approach, Hitler decided not to risk the danger of a public backlash against the killing program.

If this explanation of the program's secrecy is true, then it helps illuminate how the Führer conceived of the wrongfulness of killing disabled patients. Like his agents in the regime's killing projects, he was aware that the euthanasia program clashed with traditional German moral and legal culture. The extraordinary lengths the Nazis resorted to in order to conceal the euthanasia program is a significant indicium of their realization that the laws and mores of German society would condemn euthanasia, no matter how much the public was indoctrinated with the ideology of "life unworthy of life." As we will see in the ensuing chapters of this study, numerous postwar courts will interpret the cloak and dagger behavior of the euthanasia killers as evidence of conscious wrongdoing.

In addition to creating the purely notional Reich Committee, the euthanasia planning group was faced with a fundamental logistical problem: how would the killing experts in the Führer's Chancellery know precisely who qualified for destruction and where they were to be found? The problem was solved with the introduction of a registration system, on the basis of which infant patients would be selected for killing. Registration forms (Meldebogen) would be sent to mental hospitals, nursing homes, and pediatrics clinics throughout Germany, where the on-site medical staff would fill them
out for each of their patients and return them to the "Reich Committee." The forms arrived at a post office box in Berlin; from there, Hefelmann and von Hegener picked them up for distribution to a group of experts (Gutachter) for review.\textsuperscript{41} Sometime in the summer of 1939, this planning phase came to an end. In the meantime, Mayer had delivered his memorandum on the Church's conjectured acquiescence to euthanasia, quashing Hitler's fears of a religious backlash. Meditating on the impending war against Poland, Hitler may have felt it was time to initiate the killing program he had mentioned to Gerhard Wagner in 1935. The first systematic killings of handicapped children would occur in October 1939—scarcely one month after the war had started.

The Reich Ministry of the Interior stiffened the enforcement arm of the euthanasia planners with a decree on August 18, 1939, the "Requirement to Report Deformed etc. Newborns" (Meldepflicht für missgestaltete usw. Neugeborene). The decree, like virtually everything connected with the killing program, was designated a "secret Reich matter," a status that explained why it did not appear in the official ministry gazette. Its source was Department IV of the Interior Ministry. The decree enjoined all midwives and physicians to report to the competent local health office newborns and children under the age of three "suspected" of suffering from the following "congenital" illnesses:

1) idiocy as well as mongolism (especially cases involving blindness and deafness),
2) microcephaly,
3) hydrocephaly of a severe and advanced degree,
4) deformities of every kind, especially missing limbs, severely defective closure of the head and the vertebrae, etc.,
5) paralysis, including Little's Illness [i.e., spastic diplegia].\textsuperscript{42}
Attached to the decree was a reporting form to be filled out by the health care provider. The form required, among other things, the name, age, and sex of the child, a description of its illness, the impact of the illness on its ability to function in the hospital, its estimated life expectancy, and the prognosis for improvement. Once health care providers had completed and forwarded these reports to local health officials, they were sent to the Reich Committee postbox in Berlin for evaluation by the Gutachter.

The preamble to the Reporting Decree offered no hint of the actual reasons behind the procedure. Instead, the language of the Preamble lent a reassuring air of scientific legitimacy to it: “In order to clarify scientific questions about deformed newborns and mental retardation, the earliest possible registration of appropriate cases is necessary.” Despite the uncanny secretiveness of the procedure and the curious use of a post office box to receive the completed forms, the reporting process was broadly accepted as an innocuous request for governmental data.

Once the forms arrived in Berlin, Hefelmann and von Hegener of the Führer’s Chancellery, Office II b, collected and sorted them. Although neither man had a medical background, they selected the forms deemed appropriate for review and passed them on to three experts in the Führer’s Chancellery: Werner Catel, Hans Heinze, and Ernst Wentzler. We have already encountered this trio in our discussion of the euthanasia planning group; each was a committed advocate of killing the mentally disabled. The Führer’s Chancellery attached its own form to every copy of the incoming reports. It bore the letterhead of the fictitious “Reich Committee” and contained little space for explanatory comments. A cryptic semiotic system determined the life or death of the child: a plus sign (+) meant that the child was to be destroyed, a minus sign (—) signified
that the child's life would be spared. Final decision about uncertain cases was deferred with the word "observation." In the absence of carbon copies, the same form along with the original report were sent to each of the three experts for review and notation—meaning that each expert knew how the others had voted.  

When the experts arrived at a positive finding, the "Reich Committee" (in reality, the officials of the Führer's Chancellery) wrote to the local public health office with orders to prepare the selected child for transport to one of several "children's wards" (Kinderfachabteilungen) established in state mental institutions and clinics throughout Germany. The sole purpose of these children's wards was to "euthanize" mentally and physically disabled children. The first was erected at Brandenburg-Gördern near Berlin under the direction of the Hitler Chancellery expert Hans Heinze. Subsequently, children's wards were erected in clinics in Leipzig, Niedermarsberg, Steinhof (Vienna) and Eglfing-Haar; during the war, others were established in Waldniel, Ansbach, Berlin, Eichberg, Hamburg, Kalmenhof, Kaufbeuren, Hadamar, Grossschweidnitz, Loben, Lüneburg, Meseritz-Obrawalde, Schleswig, Schwerin, Stadtroda, Stuttgart, Uchtspringe, and am Spiegelgrund (Vienna). (We will explore the roles of many of these institutions in National Socialist euthanasia in chapters 5, 7, and 8.) There were approximately thirty such children's wards, staffed with medical personnel recruited for killing by the Führer's Chancellery. Hefelmann and von Hegener of the Führer's Chancellery, Office
II b. and Herbert Linden of Department IV of the Reich Ministry of the Interior did the recruiting. Once a doctor agreed to participate in the euthanasia program, he or she became an associate of the “Reich Committee.”

The children’s ward at Brandenburg-Görden was the prototype for those that followed it. Henry Friedlander describes Görden as a “training center for physicians assigned to direct the killing of children.” Hermann Wesse, indicted by the German authorities in 1947 for his involvement in child murder at the Rhineland mental hospital Waldniel, was mentored at Görden before undertaking his killing assignments. Furthermore, as Friedlander has noted, the director of the institution, Hans Heinze, and his students used the occasion of the children’s deaths to conduct medical research—a practice that would become characteristic of the euthanasia program in general (as well as the Holocaust) as it spun outward to embrace mentally ill adults.

At Görden and the other children’s wards, the Führer’s Chancellery left it to their hand-selected physicians to devise efficient means of killing. Their preferred method was overdoses of medication. At Steinhof in Vienna, mentally disabled children were given excessive dosages of morphine-scopolamine; at Egling-Haar in Bavaria, they received lethal cocktails of luminal and veronal. The “medication” was administered either in tablets or in liquid form to the children. Occasionally, it was injected directly into them. From the standpoint of preserving secrecy, there was much to commend these medications as killing agents. First, they were readily available in German mental hospitals as sedatives. Second, they were not poisons, and became deadly only in overdoses. Third, they did not immediately kill the child; rather, they typically gave rise to complications like pneumonia, which then became the immediate cause of death after
two or three days. The physician could then soberly ascribe the child’s death to a conventional cause, rather than to poisoning. Although the Führer’s Chancellery supplied the children’s wards with sufficient amounts of morphine, veronal, etc., the Chancellery’s own supplier was Office V of the Reich Security Main Office (RSHA), the Criminal Police Office (Kriminalpolizei, or Kripo). From the time the children’s wards were established until the end of the war, Kripo was the main provider to the Führer’s Chancellery of the medications used to kill both mentally ill children and adults.47

Clearly, this program required that the children identified by the medical experts of Hitler’s Chancellery for killing be transported to the children’s wards. The Chancellery did not itself arrange the transfer of the children to the wards; rather, this was left to individual state health offices within local ministries of the interior. Thus, for example, Business Section X of the Württemberg Ministry of the Interior, which administered mental institutions in the state of Baden-Württemberg, orchestrated the transportation of 93 children from Württemberg institutions in late 1942 to the children’s ward at Eichberg, where they were murdered.48 The order to put the children to death, however, always originated with the central authorities at the Führer’s Chancellery, working through their front organization, the Reich Committee. The killing order arrived as an official document under the letterhead of the Reich Committee, bearing the signature of a Chancellery bureaucrat—frequently Hefelmann.49 The language of the order was couched in euphemisms: the word “treatment” (Behandlung) functioned as a code word for killing. In a 1942 letter from the “Reich Committee” to the Württemberg Interior Ministry, Hefelmann refers to the pediatrics wards (Kinderfachabteilungen) installed by the Committee in mental hospitals, university clinics, and children’s hospitals
throughout Germany, in which children “registered on the basis of the registration requirement” were subjected to “observation and treatment.” Since such correspondence was top-secret, it is not entirely clear whether the use of recondite vocabulary was designed less to hoodwink outsiders than to enable the killers to maintain for themselves the illusion of a clinical procedure. In his U.S. Army interrogations, the euthanasia doctor Hermann Pfannmüller, chief of the pediatrics ward at Egling-Haar, could not bring himself to admit that he killed children within the ward; when the interrogator accused him of killing them with overdoses of medication, he responded, “Yes, they received too many sleeping tablets, yes.” Later in the same interrogation, Pfannmüller resisted the Army interrogator’s characterization of the Kinderaktion as “child killing,” countering with the euphemism “child treatment.”

The official polestar in the selection process was severe and incurable mental illness perceived to be congenital in nature. The criteria set forth in the Reich Ministry of the Interior’s reporting decree of August 18, 1939 were determinative. Euthanasia defendants who enforced these criteria, from the highest ranking functionaries within the killing apparatus to the lower level nurses acting on their superiors’ orders, defended their actions at the postwar trials on humanitarian grounds. Fighting for his life at Nuremberg after the war, Karl Brandt emphasized the humanity that guided his actions in releasing incurable mentally ill patients from their suffering, as this exchange with his defense counsel shows:

Q. . . . do you agree with me that the State did not cease interest in the life of a human being worthy of protection?
A. Yes.
Q. On the authority of Hitler and being familiar with these prerequisites, that is, the incurably insane, have you seen in that the statement by the head of the State that the interest of the State ceased in the lives of . . . the mentally and incurably ill?
A. No, I have not seen that.
Q. And why not?
A. In this I have seen only the thought to help the condition of the person and to bring it to an end in the interest of the afflicted person. That was part of the State interest.\(^{53}\)

In his testimony before the *Schwurgericht* in 1970, Albert Hartl expressed his horror at the extent of the euthanasia killings, claiming that at the time he had assumed “only special cases that were carefully examined” would be considered for destruction.\(^{54}\)
Likewise, Dr. Hermann Pfannmüller defended himself against the accusations of his U.S. Army interrogator that he was a “mass-murderer” by stressing the compassionate motives behind his killing: the “final goal” of his actions was “the deliverance [Erlösung] of a patient from incurable suffering. That was the only reason.”\(^{55}\) Despite these representations, the criterion of severe mental and physical disability that was both congenital and incurable was often disregarded. The very concepts of “severity” and “incurability” are murky; not infrequently, the euthanasia doctors in the children’s wards deemed a child to be “hopelessly” ill, even though the child’s family doctor did not consider its condition particularly grave. The ease with which T-4 operatives identified patients as “hopeless” or “incurable” indicates that the actual thrust of the program was to destroy “life unworthy of life,” not to “release” patients from intractable suffering.\(^{56}\)

**B. Motives for the Children’s Euthanasia**

Why were the so-called “Reich Committee children” killed? This is one of the questions that repeatedly confronted the postwar courts presiding over euthanasia trials, as we will see in later chapters. In Henry Friedlander’s view, the children were killed “because they represented posterity; elimination of those considered diseased and deformed was essential if the eugenic and racial purification program was to succeed.”\(^{57}\)

This motive is disturbing enough, yet other agendas that inform the mass murder of
disabled children may be even more disquieting. Various medical research organizations bated on the informational opportunities afforded them by the euthanasia program. Students of Holocaust history will not be surprised by such calloused opportunism on the part of medical researchers: the role of German medicine in exploiting defenseless prisoners to the point of inflicting pain or grievous bodily harm on them—or, in extreme cases, killing them to harvest their organs for research purposes—is abundantly documented in the postwar trials. According to the director of the Siemens concern in Gleiwitz, who spent part of the war inside the industrial facilities of the Auschwitz complex, not a few doctors took a predatory interest in the death camp prisoners: “In general, in reference to the doctors I can say that many outside the camp were interested in receiving prisoners for experimental purposes.”

Although many researchers vied for access to the trough, two research centers were closely allied with the euthanasia program. The first was a data collection department attached to the killing center at Brandenburg-Görden (site of the first Kinderfachabteilung) under the direction of a Gutachter (medical expert) in the Führer’s Chancellery, Professor Hans Heinze; the second was the Clinic for Psychiatry and Neurology of Heidelberg University, led by Dr. Carl Schneider. These research centers (and others as well) studied the Reich Committee children before they were transported to pediatric wards for killing. On a routine basis, they autopsied the corpses of the children, removing organs from them (especially their brains) for subsequent analysis. At Görden, for example, 33 children were killed on October 28, 1940, and dissected for their brains within four hours of their death. These children, it should be emphasized, were not “mentally dead” creatures in continual pain; in fact, they attended a special
school in Brandenburg-Görden. Many of them came from underprivileged or abusive family backgrounds. These victims were far from beneficiaries of a “mercy death;” they were relatively healthy children, albeit disabled, responsive to their environment and capable of enjoying their lives—children murdered by the euthanasia doctors for the primary purpose of harvesting their bodies for research materials.

Suspicion thickens when we consider the macabre traffic of brains that flowed between the children’s ward at Eichberg and Schneider’s research clinic in Heidelberg. A letter dated August 23, 1944 from Dr. Julius Deussen, a member of the Heidelberg clinic, to the Eichberg director refers to “4 cases involving imbecility and idiocy” who “were comprehensively examined by us here.” Deussen indicates that the four children were being sent on that very day to the Eichberg pediatrics clinic. When the brains of these and other murdered children whom Schneider and his team had sent to Eichberg had not been returned to the clinic for further study pursuant to agreement, Schneider dashed off a letter of complaint to Professor Paul Nitsche at the Führer’s Chancellery. Dated September 2, 1944, the letter bemoaned the loss of “half of the idiots” Schneider had examined prior to their transfer to Eichberg. The problem, he averred, was due to “inadequate possibilities for autopsies,” since Eichberg was not staffed with enough competent doctors to perform the delicate job of dissecting and preserving the brains. Schneider asked Nitsche whether the latter would assign a “useful party comrade in the medical field” to Eichberg to ensure that the brains of the “idiots examined by us” were properly maintained. There is no smoking gun in this correspondence—but an impression steals over the reader that Schneider and his colleagues were involved in a
grisly quid pro quo with the Eichberg pediatrics ward, in which the lives of the Reich Committee children were bartered to the euthanasia killers for the children’s organs.

As in National Socialist killing projects generally, so in the *Kinderaktion* a centrifugal tendency to break out of appointed limits manifested itself as the war progressed. The program began with newborns and children under the age of three; when military defeat had ended it in 1945, the program had grown to include older children and teenagers. Nor were all of these youngsters “empty shells of human beings,” to use the frequently-cited phrase of Binding and Hoche. Like the 33 children killed in October 1940 at Gorden, not a few had been institutionalized for learning disabilities or adjustment disorders.

The incompleteness of the historical record makes a death toll impossible to ascertain with certainty. The Frankfurt prosecutor’s indictment of Werner Heyde, Gerhard Bohne, and Hans Hefelmann in May 1962 estimated a figure of around 5,000.62

**IV. The Adult Euthanasia Program, Phase I (1939-1941)**

Children’s euthanasia was a prologue to the more ambitious and destructive campaign to kill mentally ill adults. Sometime in July 1939, Hitler commissioned his escort physician, Karl Brandt, and the head of the *Führer’s* Chancellery, Philip Bouhler, to organize adult “euthanasia.” In collaboration with Herbert Linden of the Reich Ministry of the Interior’s Department IV (a co-developer of the *Kinderaktion*), they assembled a circle of ideologically reliable doctors around them to assist with planning and executing the program. The circle included the chaired professor of neurology and psychiatry, Max de Crinis; the director of the Clinic for Psychiatry and Neurology of Heidelberg University, Carl Schneider; Professor Berthold Kihn of Jena; and Werner
Heyde, Professor of Psychiatry and Neurology at the University of Würzburg. The circle of initiates also included Ernst Wentzler, Helmut Unger, Hans Heinze, Hermann Pfannmüller, Dr. Bender of the mental hospital at Berlin-Buch, and Professor Paul Nitsche of the asylum at Sonnenstein near Pirna. In late July and August 1939, a series of meetings occurred between these hand-selected individuals in Berlin. Bouhler explained to the participants that “euthanizing” mental patients in German asylums and nursing homes would create necessary hospital space for the impending war, freeing up medical staff to care for the wounded. Bouhler further indicated that Hitler had refrained from publishing a euthanasia law for foreign policy reasons. He went on to reassure everyone present that they would be immune from criminal prosecution for their actions in connection with the killing program, inviting dissenters to recuse themselves from involvement if they so desired. Notwithstanding the absence of coercion, Bouhler’s invitation met with overwhelming assent. In a pre-trial statement given before a German court in 1961, Werner Heyde recalled that, after receiving the acclamation of the doctors, Bouhler suggested that a system of expert evaluation should be created “similar to that envisioned in the work of Hoche and Binding.”

Bouhler’s meetings with the euthanasia experts in the summer of 1939 are reminiscent of Major Wilhelm Trapp’s colloquy with the men of Reserve Police Battalion 101, related by the American historian of the Holocaust, Christopher Browning. In July 1942 these men were ordered by Odilo Globocnik, the Higher SS and Police Leader for the district of Lublin, to assemble the 1,800 Jews in the Polish village of Jozefow. The Battalion members were to send Jewish men of working age to one of the camps in the Lublin district; women, children, and elderly Jews were to be shot. Major Trapp, the
Battalion commander, addressed the men given this odious commission. Like Bouhler, he invited the older members of the Battalion to opt out of their assignment if they felt themselves unable to endure it. In contrast with the euthanasia experts, however, between ten and thirteen Battalion members accepted Trapp’s invitation not to participate in the shooting.

When placed in juxtaposition, the two incidents represent a pair of important truths about the Nazi regime’s genocidal practices. First, the implementers of mass killing, whether in government bureaucracies, mental institutions, the killing fields of the east, or the concentration and death camps, were never coerced into participation. As Bouhler’s summer meetings and Major Trapp’s address to his men suggest, the pattern was to approach potential accomplices, solicit their collaboration in the killing, and afford them an opportunity to decline the offer. Second, the unanimity with which Bouhler’s offer was accepted by the experts in attendance indicates that they were true believers in the National Socialist ideology of biological value. They were predisposed from the very beginning to affirm the tenet that some kinds of human being had forfeited their legally protected right to continued existence. The men of Reserve Police Battalion 101 did not—at least at the onset of their murderous activities—share the Nazi government’s ideological commitment to extirpating racial and genetic “inferiors.” Comparison of the two events underscores the important distinction between the visionary ideologues at the top of the Nazi pyramid, enthused with chimerical ideas of resculpting the human race into a model of Aryan perfection, and the field-level implementers of the Nazis’ völkisch utopia at the base. The contrast between the euthanasia experts and Browning’s “ordinary men” illustrates the greater readiness of the former group to design and
inaugurate mass killing as a matter of policy. Further, it suggests that Hitler’s initial misgivings about the German public’s reaction to euthanasia killing may have been warranted, and that, to overcome the deeply ingrained moral revulsion against the destruction of innocent human beings, the public would have to be subjected to massive doses of ideological indoctrination.

After the initial recruitment meeting with Bouhler in the summer of 1939, the physicians returned to their institutions and sought out suitable personnel there for the work of mass killing. The names of these individuals were then relayed to the Führer’s Chancellery in Berlin. In the meantime, having found accomplices for their murder project, Bouhler and Brack applied their ingenuity to choosing an appropriate means of killing. Wanting something that was quick, lethal, and painless, they consulted three prominent pharmacologists, who recommended the substance that would become the murder agent of choice in the first phase of Nazi euthanasia: carbon monoxide gas. A chemist in the Criminal Technical Institute (Kriminaltechnische Institut, or KTI) within the Reich Security Main Office, Dr. Albert Widmann, confirmed the pharmacologists’ recommendation in a meeting with Viktor Brack. In its findings of fact in Widmann’s postwar trial, the Landgericht (State Court) of Stuttgart describes how Brack commissioned Widmann and the KTI to obtain canisters of carbon monoxide and deliver them to the Führer’s Chancellery. Presumably, the aim here was to divert any possible suspicion away from the Chancellery by using another organization to procure the lethal materials. Widmann accepted this commission, and thereafter received orders for the poison from the individual killing centers, which he filled in the name of the KTI at the I.G. Farben factories in Ludwigshafen. A Chancellery official, Dr. August Becker,
arranged for picking up and transporting the carbon monoxide canisters to the killing centers. All costs incidental to these orders were charged to the KTI.65

Concerns about the legality of the killing program nonetheless persisted. Under German law (StGB sec. 211), killing a human being—with the exception of battle-field combat and the legal execution of persons duly convicted and sentenced by the courts—was a capital offense in Germany even during the Nazi era. At a meeting convoked by Hitler sometime in September 1939 to discuss the inchoate euthanasia program, the Chief of the Reich Chancellery and Hitler's closest legal advisor, Hans Heinrich Lammers, argued that the program should be established on a legal basis. If Lammers' testimony under U.S. Army interrogation is to be believed, Hitler commissioned Lammers with drafting a euthanasia law. The draft was accordingly prepared, but Hitler subsequently changed his mind, on the grounds that an official law would "cause too great a sensation."66 Throughout the duration of the killing program, many of the health care providers and public health officials involved in it would express their apprehensions of criminal liability without an authorizing statute. Acting on their concerns, the Führer's Chancellery asked Hitler for a written authorization for euthanasia. He assented, and the Chancellery prepared for his signature an authorizing document, printed on Hitler's own stationery. He signed the authorization in October 1939, but backdated it to September 1, 1939, perhaps in an attempt to convey the symbolic linkage of the war with purifying the Volkskörper. Because so many postwar German defendants would appeal to this document as a legal basis for their actions, it merits quotation in full:

Berlin, 1 September 1939

Reich Leader Bouhler and Dr. med. Brandt are charged with the responsibility of enlarging the competence of certain physicians, designated by name, so that patients who,
on the basis of human judgment, are considered incurable, can be granted mercy death after a critical evaluation of their state of health. (signed) A. Hitler

The legal status of this “euthanasia authorization” (Euthanasie Ermächtigung) was hotly debated in the postwar euthanasia trials, when doctors implicated in the mass killing of disabled patients invoked it as a legal justification for their activities. Never was the decree accepted by a West German court as a valid law, as we will see in chapters 5, 7, and 8.

Although Bouhler, as head of the Führer’s Chancellery, was in charge of the adult euthanasia program, he rarely participated in its daily operations. He chose, rather, to entrust the hands-on supervision of euthanasia to his deputy, the Chief of Section II of the Chancellery, Viktor Brack. Brack, whose educational background was not in medicine but in agriculture (he received a diploma in agriculture from the University of Munich in 1927), confronted the task of designing a killing program that, like the fictive Reich Committee in the children’s euthanasia, would conceal the central role of the Führer’s Chancellery. From the beginning, it was understood that adult euthanasia would surpass in scope the relatively modest Kinderaktion. It was therefore clear to Brack and his associates that their current offices in the Voss Strasse in Berlin would be inadequate to accommodate the enlarged staff needed to administer the program. Central Office II of the Führer’s Chancellery thus relocated to a confiscated Jewish house at number 4, Tiergartenstrasse, in Berlin-Charlottenburg. This address was eponymous for the central killing administration, which was thereafter referred to as “T-4;” the killing program itself was called “Operation T-4” (Aktion T-4).
“T-4” (i.e., the Führer’s Chancellery, Main Office II) subsumed numerous offices within its bureaucratic structure, as depicted in Table 2.2. These offices—particularly the T-4 Medical Office, which evaluated registration forms, selected patients for killing, and both appointed and trained the medical staffs detailed to the killing centers—were the sub rosa puppet masters behind a series of front organizations (Tarnorganisationen) invented by the Führer’s Chancellery to disguise its direction of the program. Whereas in the children’s euthanasia a single front organization, the Reich Committee, concealed the Chancellery’s involvement, four such entities were established for the adult program: (1) the Reich Cooperative for State Hospitals and Nursing Homes; (2) the Charitable Foundation for Institutional Care; (3) the Central Accounting Office for State Hospitals and Nursing Homes; and (4) the Charitable Foundation for the Transport of Patients, Inc.

The Reich Cooperative for State Hospitals and Nursing Homes (Reichsarbeitsgemeinschaft Heil- und Pflegeanstalten, or RAG), a front for the T-4 Medical Office, conducted correspondence with private and governmental parties about the process of registering, evaluating, and selecting adult patients for “euthanasia.” The Charitable Foundation for Institutional Care (Gemeinnützige Stiftung für Anstaltspflege) was a front for the T-4 Central Office, and dealt with all matters related to financing the program, including hiring and compensating employees of T-4. The Central Accounting Office for State Hospitals and Nursing Homes (Zentralverrechnungsstelle Heil- und Pflegeanstalten) collected payments for patient care. Its practice of charging per diem expenses for patients even after they had been liquidated enabled T-4 to run consistently in the black, using the excess proceeds to finance its operations. The Charitable Foundation for the Transport of Patients, Inc. (Gemeinnützige Kranken-
Transport G.m.b.H., or GEKRAT) camouflaged the T-4 Transport Office; it transferred patients selected for euthanasia to the killing centers. The Reich Cooperative and GEKRAT were established in November 1939; the Charitable Foundation and the Central Accounting Office were erected in April 1940, coinciding with the Main Office II’s move into the Tiergartenstrasse villa.69

The personnel recruited to staff the actual T-4 offices standing behind these organizational simulacra were informed about the assignment at the beginning of their service with the Führer’s Chancellery. Dr. Kurt Borm, a T-4 doctor active at two of the major killing centers, Sonnenstein and Bernburg, related in his postwar interrogation: “Blankenburg [director of Office II a in the Führer’s Chancellery and Brack’s deputy] . . . explained to me that it involved a secret Reich matter of killing mental patients who were incurable and resistant to therapy; my task was to cooperate in these measures.” Another T-4 employee, the electrician Herbert K., who performed the electrical work in the construction of the gas chambers in Sonnenstein and Bernburg, was instructed at the beginning of his work with T-4 of the “necessity” of killing the mentally disabled: “They were useless eaters and moreover we needed the nursing personnel for field hospitals [Lazarette] and the care of wounded soldiers.”70

The theme of limited resources is a constant refrain among the rationales offered to justify the killing of disabled patients. In both the U.S. and West German trials after the war, the view that Nazi euthanasia was actuated by the desire to conserve resources would become the leading judicial interpretation of the killing program. As we saw in chapter 1, the harsh experience of privation during World War I, when the British blockade had choked off all food imports into Germany, had coarsened a generation of
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<th>Office</th>
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<td><em>Führer's</em> Chancellery Central Office II</td>
<td>Viktor Brack</td>
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<td>Deputy: Werner Blankenburg</td>
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<td>T-4 Central Office (Zentraldienststelle)</td>
<td>Manager (Geschäftsführer) Dr. Gerhard Bohne</td>
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<td>Summer 1940: Dietrich Allers</td>
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<td>T-4 Medical Office (Medizinische Abteilung)</td>
<td>Professor Dr. Werner Heyde</td>
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<td>Dec. 1941: Professor Dr. Paul Nitsche</td>
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<td>T-4 Administrative Office (Büroabteilung)</td>
<td>Dr. Gerhard Bohne</td>
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<td>Summer 1940: Friedrich Tillmann</td>
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<td>T-4 Central Finance Office (Hauptwirtschaftsabteilung)</td>
<td>Willy Schneider</td>
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<td>March 1941: Fritz Schmiedel</td>
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<td>Jan. 1942: Friedrich Robert Lorent</td>
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<td>T-4 Transport Office (Transportabteilung)</td>
<td>Reinhold Vorberg</td>
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<td>Deputy: Gerhard Siebert</td>
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<td>T-4 Personnel Office (Personalabteilung)</td>
<td>Friedrich Haus</td>
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<td>Arnold Oels</td>
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<td>T-4 Inspector's Office (Inspektionsabteilung)</td>
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Young Germans. Malnutrition, disease, and starvation stalked not only institutionalized mental patients, but mainstream Germans as well. Mothers had watched their healthy children sicken and die. The situation in the German armed forces had not been substantially better: smouldering resentments developed among the common soldiery,
who took umbrage at the larger food rations given to the officers. The bitter taste of the sufferings of the war years was still in the mouths of many Germans in the 1930's. The idea that resources are finite and that their eventual depletion would cause the death of individuals and the ruin of society was largely a war-time mentality, an incubus of the Great War that continued to oppress Germans well into World War II. The vitality of the idea of limited resources helps explain why Nazi ideologues could initially justify the euthanasia program on economic grounds and strike a sympathetic chord in their audience.

We saw in our discussion of the children's euthanasia how the officials of the *Führer's* Chancellery established a registration system for all newborns and children up to the age of three suffering from a delineated set of incurable congenital illnesses ("idiocy," microcephaly, hydrocephaly, etc.). This reporting system enabled officials in Hitler's Chancellery to identify youngsters eligible for destruction, as well as where they could be found when the time for their transfer to the children's wards had come. The decree of August 18, 1939, requiring physicians and midwives to register handicapped children on pre-printed forms to be submitted to their local health authorities, had sharpened the teeth of the reporting system. These forms, we will recall, were forwarded to the Reich Committee, where they were evaluated by three experts. In its creation of the adult program, the leadership of the *Führer's* Chancellery drew upon these precedents, gathering information on adult mental patients in German mental hospitals by means of registration forms forwarded to the *Führer's* Chancellery for evaluation by medical experts.
As in the *Kinderaktion*, so with adult euthanasia a decree by the Reich Ministry of the Interior facilitated the registration process. On September 21, 1939, the Reich Ministry of the Interior dispatched a decree to state governmental offices called “The Registration of State Hospitals and Nursing Homes” (*Erfassung der Heil- und Pflegeanstalten*). It required that local authorities supply the names of all mental hospitals within their region to the Reich Ministry by October 15, 1939 in which “mental patients, epileptics, and the feebleminded” were institutionalized. All institutions, public, private, religious, and charitable, were included, as were old-age homes. The Ministry of the Interior informed the respondent state authorities that the information was needed because the Ministry wished to send questionnaires directly to such institutions throughout Germany; local governments were to ensure timely completion and submission of the questionnaires. Once the lists of institutions had been returned, the Reich Ministry sent the questionnaires to them, either directly or through the local state offices. The documents consisted of a single-page questionnaire (called the “*Meldebogen 2*”) that canvassed data about the size, staffing, and patient population of the institution. More ominously, it inquired about the number of patients with a criminal background, the number of Jewish patients, and the proximity of the institution to transportation arteries. In addition to *Meldebogen 2*, the document package included a set of one-page reporting forms (*Meldebogen 1*) to be filled out by a doctor on individual patients. The form asked for the name, birth date, nationality, race, period of institutionalization, the names of relatives and frequency of their visits, the name and address of the guardian and the payor, and whether the patient had been institutionalized.
for criminal insanity. Finally, the doctor was invited to offer his diagnosis in a cramped section on the form and to evaluate the patient’s ability to perform work.71

Attached to these Meldebogen forms was a one-page instruction sheet (Merkblatt) that identified the kinds of patients to be registered. These included patients who had been institutionalized for five years or longer; patients suffering from schizophrenia, epilepsy, senile illnesses, therapy-resistant paralysis and other syphilitic diseases, feeblemindedness, encephalitis, Huntington’s disease and other terminal neurological diseases—so long as these patients were incapable of any work in the institution other than pure mechanical work (such as weeding); patients institutionalized for criminal insanity; or patients who were neither German citizens nor of German or related blood. For patients falling into the last category, the instruction sheet required the reporting doctors to describe the citizenship and race of the patient. In a footnote, the sheet provided examples: “German, or related blood (German-blooded), Jewish, Jewish hybrid (Mischling) of the first or second degree, Negro, Negro hybrid, Gypsy, Gypsy hybrid, etc.”72

Over the course of the euthanasia program, patients within each of the categories specified above would be annihilated. The single most important criterion for selection, however, was capacity for work. Already in September of 1939, registration form 1 (Meldebogen 1) and the accompanying instruction sheet stressed the importance of labor productivity beyond mere “routine” work as a factor in identifying patients to be reported. The prewar literature on “life unworthy of life”—especially that strain of it inspired by Binding and Hoche’s work—had made the utilitarian argument the linchpin
of the pro-euthanasia viewpoint, referring to the mentally disabled as “ballast lives” (Ballastexistenz) and “useless eaters” (unnütze Esser). In this sense, then, the Nazi assault on the mentally disabled can be interpreted as the terminus in which post-World War I attitudes about the “uselessness” and costliness of such patients had accumulated.

We saw flashes of this mentality in the 1933 sterilization law, which aimed to sterilize all Germans deemed “useless” to the community. The conference on eugenics of the Inner Mission in 1931 had elevated the “question of cost” to the highest consideration in deciding whether or not sterilization was justified. T-4 employees like Herbert K. were told that the mentally ill were “useless eaters” whose deaths would ensure transfer of adequate resources to more “valuable” citizens. In a sworn statement given at Nuremberg on October 12, 1946, Viktor Brack echoed these economistic views in his explanation of why Hitler had launched the euthanasia program:

The final aim Hitler sought to achieve with the introduction of the euthanasia program in Germany was to eradicate those people, who were kept in mental hospitals and such institutions and who were of no use for the Reich. These people were regarded as useless eaters and Hitler was of the view that by destroying these so-called useless eaters the possibility would arise to release more doctors, nurses, and other personnel, sick beds and other resources for the use of the Wehrmacht.73

Brack’s interpretation of Hitler’s motives is compatible with the rationale Philip Bouhler proffered to the newly recruited doctors during their meetings in July and August of 1939.74

As it did with the children’s program, the Führer’s Chancellery established a system of medical experts (Gutachter) to review the incoming registration forms submitted from German mental hospitals. The system of expert review in the adult example, however, was more intricate than the children’s program. The Medical Office of Hitler’s Chancellery, Section II, in its guise as the Reich Cooperative for Mental
Hospitals and Nursing Homes (Reichsarbeitsgemeinschaft Heil- und Pflegeanstalten, or RAG), established a two-tiered structure of expert review. The first tier consisted of medical experts (Untergutachter), to whom the registration forms were first sent for evaluation. Their assessments were then proofed by a second tier of experts (Obergutachter) to guard against error. Extant documentation indicates that around forty doctors, among them nine professors of medicine, served at one time or another as medical experts for T-4. Of this number, the overwhelming majority were first-tier experts (Untergutachter). As the program unfolded, only three doctors—Werner Heyde, chief of the T-4 Medical Office till December 1941, Paul Nitsche, Heyde’s successor, and Herbert Linden of the Reich Ministry of the Interior’s Department IV—would function as second-tier experts (Obergutachter).75

When the registration forms arrived at the Reich Ministry, Herbert Linden sent them to the T-4 Medical Office (i.e., the so-called “RAG”), where they were collated and catalogued. Five photocopies were made of the original forms; one copy was sent to each of three first-tier medical experts for evaluation. After a period of time the photocopies returned to the Medical Office, marked with one of three characters: a plus sign (+) in red meant that the patient was to be killed; a minus sign (—) in blue signified that the patient should be spared; and, occasionally, a question mark indicated a borderline case. A majority of the three Untergutachter determined whether a patient lived or died; unanimity was not required. Once the three photocopies with their annotations were collected, they went along with the original form and one more photocopy to the second-tier experts, typically Werner Heyde and Paul Nitsche. These Obergutachter, in no way bound by the opinions of the first-tier experts, marked the additional photocopy with
either a plus sign (death) or a minus sign (life). The Obergutachter were the ultimate arbiters of life and death for the registered patients, determining literally with the stroke of a pen who would be allowed to live and who would be destroyed. If the form bore a plus sign, the "RAG" (the T-4 Medical Office) sent it to the T-4 Transport Office, which drafted lists of the patients designated for killing.76

The RAG contacted the institutions that accommodated the selected patients several days prior to transport. (Notice was conveyed via Linden’s Department IV in the Reich Ministry of the Interior to individual state interior ministries, and thence was disseminated to local mental hospitals.) The institutions, called by the T-4 killing specialists “surrendering institutions” (Abgabeanstalten) and by the postwar German courts “original institutions” (Ursprungsanstalten), were instructed to send all medical records and personnel files along with the patients, as well as all their personal possessions (money, jewelry, etc.), which were to be logged on special forms. Prior to the pickup day, GEKRAT sent a list to the surrendering institution of the patients to be transported. Perhaps as a result of the doctors’ intentional practice of underestimating their patients’ capacity for work, perhaps due to the haste with which the forms were reviewed by the T-4 experts, GEKRAT’s lists often contained the names of patients who did productive work in the institution. In such cases, institutional directors tried to persuade the GEKRAT representatives to exempt these patients from transport. Since a sum-certain quota of transportees had to be filled, GEKRAT typically agreed to exemption only if other patients could be substituted.∗ The patients appearing on the

∗ Sometimes, patients institutionalized for criminal insanity were substituted for labor-productive patients. In a letter to the Karlsruhe Interior Ministry dated March 1, 1940, the director of the Wiesloch mental hospital proposed that eight patients with criminal backgrounds be substituted for those exempted as
final GEKRAT list were picked up in large gray busses. Occasionally, some patients among those transferred seemed to intuit what was happening, and heartrending scenes of crying, pleading, and protest broke out as they were forced into the busses.\(^{77}\)

Once the patients had left the surrendering institution, it notified the next of kin that the patient had been transferred to another facility on orders of the Reich defense commissar, and that this facility would eventually contact them about their relative. Within a brief span of time, the killing center wrote to them that the patient had arrived, but it forbade them from visiting their relative with the assurance that they would be apprised of any change in his or her condition. In reality, the killing center—like so many of the T-4 individuals, offices, and institutions—imitated a conventional mental hospital as part of the charade to deceive onlookers. When the patient was killed, the killing center authorities informed the family of the death, ascribing it to natural causes and reporting that the risk of epidemic disease had forced the institution to cremate the body. An urn containing the ashes was available for shipment to them.\(^{78}\)

It should be emphasized here that these patients were killed without their or their families’ or guardians’ consent. Nor were they transferred with the notification and agreement of themselves, their families, or their guardians. The killers did not inform local magistrates who had institutionalized the patients; welfare and insurance organizations that financed their medical care were likewise kept in the dark.\(^{79}\) The reasons should now be abundantly clear: fearing popular backlash, the Nazi government

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\(^{77}\) valuable workers. The director attached a “diagnosis” to his letter, which described the “condition” of the eight substitutes as follows: “murderer, recidivist criminal dangerous to the community, murderer, murderer, murderer, murderer, murderer, murderer, recidivist criminal dangerous to the community.” (excerpted in Klee, Dokumente, pp. 107-108)
did everything in its power to cloak the euthanasia program in secrecy. It was designated a "secret Reich matter" (geheime Reichsache); its perpetrators and accomplices were sworn to secrecy, violation of which was threatened with harsh punishment, even death; its executory office, the Führer's Chancellery, acted through official-sounding front organizations, and its top employees used aliases to conduct their deadly work; patient transports were misrepresented as relocations necessitated by the war; the families were deceived about the actual circumstances of their relatives' deaths; the functioning of the murder apparatus was so mysterious that even the staffs of the surrendering institutions—at least at the beginning—often had no inkling of what lay in store for their patients. The postwar courts will seize on the byzantine aspect of the euthanasia program as evidence that the T-4 killers were fully conscious of the wrongfulness of their actions.

The covertness of the Nazis' euthanasia program had an immediate—and tragic—sequel. Doctors in local mental hospitals who completed the registration forms on their patients often did so without knowledge of the purpose for the registration. In fact, in a rueful misapprehension of the central government's goals, many physicians deliberately underestimated their patients' ability to do work, fearing that patients capable of work would be sent away from the institution to perform war-related labor. As a result, these patients became ensnared in the nets of the T-4 killing program.80

*  *  *  *  *

The idea of establishing killing centers developed out of discussions between representatives of Hitler's Chancellery, the Reich Ministry of the Interior, and the chemist Albert Widmann of the Criminal Technical Institute (KTI) of the Reich Security Main Office (RSHA). Under interrogation by the German authorities in 1960, Widmann
claimed that Leonardo Conti, the Reich Health Leader and head of the Department of Health in the Ministry of the Interior, had rejected injections as a killing agent in favor of poisonous gas. As we have seen, in the aftermath of these discussions, Widmann met with Viktor Brack to work out the mechanics of how the patients would be gassed. Widmann’s suggestion that carbon monoxide gas be released through the air ducts of the patients’ hospital rooms was dismissed on practical grounds. The notion of the killing center emerged as a more expedient alternative.81

Brack and Karl Brandt had a short-lived difference of opinion about the most efficacious way to kill the patients. From his discussions with Widmann, Brack was convinced of the utility of carbon monoxide. Brandt, however, initially opposed this idea, arguing that, since the euthanasia program involved “medical measures,” a correspondingly “medical means” must be adopted; he favored injections.82 (Brandt, as we will see, eventually overcame his scruples and agreed on carbon monoxide.) The jurist Gerhard Bohne, chief of the T-4 Central Office and of its front organization, the RAG, recalled in 1959 that the decision to test the effectiveness of carbon monoxide gas on human guinea pigs grew out of this disagreement between Brack and Brandt. Bohne’s account is corroborated by Werner Heyde, T-4 Obergutachter and chief of the T-4 Medical Office, whose postwar judicial testimony characterized Brandt as “a very conscientious man, who took his responsibilities quite seriously. Since he was commissioned by Hitler together with Bouhler to implement the euthanasia measures, he had to see with his own eyes which killing method should be employed . . . . ”83
The experiment took place sometime in the early winter of 1939-1940 at Brandenburg an der Havel, a former jailhouse in the city of Brandenburg conveniently linked to Berlin by rail. Workers from the SS Main Construction Office installed in this vacated prison something that would become an infamous symbol of Nazi genocide—a gas chamber disguised as a shower room. A chemist ordered by Brack to assist in the gassing procedure, Dr. August Becker of the KTI, depicted the first appearance of the Nazi gas chamber as follows:

A room similar to a shower room and furnished with ceramic tiles, in size around three by five meters and three meters high. Benches lined the walls and around 10 centimeters from the floor a pipe ca. 1 inch in circumference ran along the wall. This pipe was perforated with small holes, from which carbon monoxide gas streamed. The gas canisters stood outside this room and were already connected to the supply pipe. The installation of this system was performed by a mechanic from the SS-Main Construction Office . . . . A rectangular viewing window was cut into the door to the chamber; this door was constructed similar to an air raid shelter door.4

According to Becker, the KTI’s own Dr. Widmann conducted the first gassing (an assertion Widmann strongly denied after the war). Also present at the demonstration were Richard von Hegener and Hans Hefelmann of Office II b of Hitler’s Chancellery; Dr. Irmfried Eberl, director of the killing centers at Brandenburg and Bernburg before appointment as commandant of Treblinka, a man who, in the words of T-4 doctor Heinrich Bunke, wanted to “gas God and the world;” Dr. Ernst Baumhardt, director of the killing centers at Grafeneck and Hadamar; Karl Brandt and Philip Bouhler; Reinhold Vorberg, the chief of the T-4 Transport Office (GEKRAT); Leonardo Conti and Herbert Linden; Viktor Brack and his deputy, Werner Blankenburg; Werner Heyde and Paul Nitsche of the T-4 Medical Office; and perhaps the most sinister figure in Nazi
euthanasia, Christian Wirth, who became involved in mass gassings of patients at Grafeneck, Brandenburg, Hadamar and Hartheim en route to his work as commandant at the death camps of Belzec, Sobibor, and Treblinka. 85

Becker describes the spectacle that this Who's Who of euthanasia perpetrators had assembled to view:

... around 18 to 20 people were led into this "shower room" by nursing staff. These men had to undress in the antechamber, so that they were completely naked. The doors were closed behind them. These people went into the room quietly and with no signs of agitation. Dr. Widmann operated the gassing equipment. Through the viewing window I could see that after a few minutes the patients keeled over or lay down on the benches. There weren't any kind of scenes or tumults. After another 5 minutes the room was aired out. SS people designated for the task removed the dead from the room on specially-constructed stretchers and brought them to the cremation ovens. If I say specially-constructed stretchers, I mean stretchers constructed just for this purpose. These could be set directly in front of the cremation ovens and by means of a device the corpses could be mechanically conveyed into the ovens without the need for the carrier to touch the corpse. These ovens and stretchers were built in Brack's office. 86

During this same period at Brandenburg, approximately six mentally disabled patients were given lethal injections of morphine and scopolamine by Brandt and Conti. The purpose of the injections was to compare their effectiveness with that of carbon monoxide. According to Werner Heyde, our primary source for this episode, the results cast doubt on the injection method: "The patients," Heyde remembered, "died quite slowly, and it is possible... that the injections had to be repeated." 87 According to August Becker, Brack was "satisfied" with the carbon monoxide experiment. Even Brandt was won over to carbon monoxide, but stressed along with Brack that "these gassings should only be performed by doctors." "In this way," Becker summed up, "the beginning [of gassings] in Brandenburg was deemed a success." 88
Brandenburg became the first of six institutions specifically designed to kill
"unworthy life" with carbon monoxide gas. Shortly after Brandenburg became
operative, Grafeneck in Württemberg opened its doors in January 1940. In order to deal
with the volume of victims, T-4 opened two other killing centers at Hartheim near Linz
(May 1940) and Sonnenstein in Pirna near Dresden (June 1940). The final two
euthanasia centers, Bernburg on the Saale River and Hadamar just north of Wiesbaden in
Hessen, were designed as successor institutions to Brandenburg and Grafeneck. In each
of these killing centers, a suitable room was chosen for conversion into a gas chamber
disguised as a shower room. The design in all material respects followed the model of
Brandenburg. Moreover, jurisdiction over killing was divided among each of the
institutions. Brandenburg killed mental patients from Berlin, the Prussian provinces of
Brandenburg, Saxony, and Schleswig Holstein, and the states of Brunswick,
Mecklenburg, Anhalt, and Hamburg. (As Brandenburg’s successor, Bernburg would
cover this region after 1941.) Grafeneck disposed of south German patients from
Bavaria, Württemberg, and Baden; its own successor, Hadamar, took over these regions
plus the state of Hessen and the Prussian province of Hanover. Hartheim killed patients
from Austrian mental institutions, as well as some from southern Germany and Saxony.
Finally, Sonnenstein gassed patients from Saxony, Thuringia, Silesia, and southern
Germany.89

"The subterfuge developed by the killing center staffs to deceive the patients was
the appearance of normality," Henry Friedlander has written. "Every procedure was
designed to conceal the function of the killing center and to simulate a normal hospital."90
One would think that, if the patients were really as unaware of the external world as the
postwar T-4 defendants would later claim, there would be little need for this deception. Yet, the verisimilitude of normality lulled the patients into the mistaken belief that they were being transferred to a hospital no different from other institutions they were already familiar with. GEKRAT buses transported the patients to the killing center; in some cases, they arrived by rail, and were then picked up by so-called “death buses” and driven to the institution. Upon arrival, patients were met by staff members who conducted them to a changing room, where they were instructed to remove their clothes. The testimony of a Hadamar nurse from the German Hadamar trial illustrates the procedure that usually prevailed in all the killing centers:

... On the ground floor, the victims came into a reception area divided at the time into two rooms, the first of which served as a waiting area. Here some beds were provided for non-ambulatory patients. The second room of the reception area was the changing room, in which I was involved. There first the men and then the women were disrobed. From here, the patients were led through a hallway into the doctor's room, where they were again given a brief medical exam and were given a number with reference to their medical papers. These numbers were written on their backs with a colored marker. From the doctor's room they came into an adjacent room, the purpose of which I do not know. From this room they were led into a photography room next door, in which they had to wait until all the members of the transport had been gathered. They were then brought together down a staircase into the gas chamber lined with glazed tiles, which outwardly resembled a shower."

The “brief medical exam” mentioned by this nurse was alleged by T-4 defendants to ensure that only incurable and severely ill patients were earmarked for killing. In a rare moment of candor, however, a T-4 doctor admitted after the war that these exams were performed in order to find the most plausible “cause” of death for entry on the patient’s death certificate. “The persons were led to us, that is either to me or to Dr. Eberl or both together,” the doctor recalled. “We examined the patients and then determined what
cause of death could be used. We then entered the cause of death in the space on the lower left [of the registration form] ... They were led from our room directly into the so-called shower rooms, in order to be put to sleep there with carbon monoxide gas.”

Another eyewitness, a “stoker” (Brenner) who cremated the victims’ corpses at the Sonnenstein killing center, testified before an examining judge in 1966 that at least some of the patients he observed “still had a certain mental ability.” as evidenced by the fact that they carried washcloths and soap with them into the gas chamber. When the patients had all entered the gas chamber, the gassing technicians ensured that the door and ventilation shafts were tightly sealed. Only then did the physician open the valve of the gas tank and fill the chamber with carbon monoxide. Within five minutes, all the patients were unconscious; within ten, they were dead. Staff members waited a couple of hours before airing out the chamber with fans. Once this had been done, attending physicians pronounced the victims dead and the corpses were carried out (or, in some instances, dragged out) by the stokers to a nearby room, where the bodies were arranged in piles. The bodies were done one final indignity before cremation: they were plundered by staff members. Patients with gold teeth had been marked prior to gassing with a cross on their backs (at Sonnenstein, the marking was on their chest). A staff member identified the corpses with gold teeth by these markings and wrenched the teeth out of their mouths with pliers. They were deposited with a secretary in the institution’s main office, and eventually forwarded to the T-4 authorities in Berlin. Other corpses became the objects of autopsies, designed both to train younger physicians (who received academic credit from the autopsies) and to harvest brains for study in German research.
institutes. We have previously seen how German researchers exploited the bodies of murdered children for their research purposes; a similar process transformed the bodies of murdered adults into laboratory specimens.\

The stokers cremated the bodies of the murdered patients in ovens, working in shifts through the night to reduce the corpses to ashes. The ashes were literally swept into a pile and indiscriminately deposited in urns. Each urn bore the name of a patient killed in the gas chamber, but it did not necessarily contain that patient’s ashes. The names of each patient were then entered in the death book (Sterbebuch) maintained at every killing center. Obviously, the T-4 killers could not report that a large number of patients (some transports comprised as many as 150) had all died simultaneously of natural causes. False causes and dates of death had to be concocted. At the beginning of the euthanasia program, the T-4 Medical Office disseminated lists of “causes of death” to its participating doctors that could be cited by them in furtherance of the charade. One such list contained 61 different illnesses, along with brief descriptions of the etiology (cause), course (symptoms, duration, fever, differential diagnoses), therapy, and complications of each disease. Stroke, pneumonia, heart attack, tuberculosis, and circulatory collapse were among the causes of death most frequently given. The killing center doctor recorded the fraudulent cause of death on the death certificate, certifying it with a false name, and this fiction was reproduced in official correspondence and in so-called “consolation letters” (Trostbriefe) sent to the patient’s family or guardian. Since the patient had already been gassed before the killing center’s notification of his or her safe arrival had been sent to the relatives, it was likewise necessary to falsify the date of death. The administrative offices of the killing centers sent the “letter of consolation” to
the family or guardian around ten days after the patient’s death. The letter was boiler plate, informing the family of the patient’s death and the “cause” and “date” of his or her demise, and offering an unctuous reassurance that the patient had been “delivered” from suffering. It also indicated that, in order to “hinder the outbreak and spread of communicable diseases,” the local police authorities had required the cremation of the patient’s body and the “disinfection” of his or her belongings. Urns containing the ashes would be sent to the family if they responded within 14 days and presented proof that they had made arrangements for proper interment.96

From the historical record, it is clear that T-4 operatives, both in the Führer’s Chancellery and in the killing centers, were concerned that the patients’ relatives would discover what had really happened to their family members. This fear helps account for the tortuous lengths T-4 personnel resorted to in an effort to conceal the mass murder from the families of the victims. In each killing center, maps of Germany with colored pins demonstrated how many patients from different geographic areas had thus far been killed. If too many pins accumulated in a given region, the dates and places of death had to be changed, in order to avert the suspicion that too many patients from the same area had died simultaneously in the same locale. A Grafeneck staff member told the Münsingen Amtsgericht in 1947 that in the spring of 1940 the Berlin T-4 authorities had ordered Brandenburg and Hartheim to exchange patient records, so that a different place of death could be recorded for some of the patients.97

Apprehensions of public protest nonetheless continued. Scholars of National Socialist euthanasia have differed over whether such fears contributed to the decision to close Brandenburg and Grafeneck in late 1940. For Henry Friedlander, gradually
spreading knowledge among the civilian population of the killing program was a proximate cause of Brandenburg and Grafeneck's closure. At least with regard to Grafeneck, Friedlander bases his case on a letter sent by Himmler to Walter Buch, the chief judge of the Nazi party court. Buch had expressed his concern to Himmler in a letter dated December 7, 1940 that knowledge of the euthanasia program among the people in the town of Grafeneck was causing unrest, and suggested that a different solution be formulated. Himmler replied to Buch on December 19, agreeing that "the process must be faulty if the matter has become as public as it appears . . . . I will immediately contact the office that has jurisdiction to point out these errors, and advise them to deactivate Grafeneck." Thereafter, Himmler ordered Viktor Brack to close Grafeneck "because the worst public mood has taken hold there." Ernst Klee, on the other hand, discounts the role of public pressure in forcing Himmler's hand. Instead, he argues that Brandenburg and Grafeneck were closed because they had served their purpose of decimating "unworthy life" in their regions. Applicants for jobs in Grafeneck in May of 1940 were informed that their work would only last until the end of the year; among the civilian population, it was generally known as early as November 1940 that the institution would soon be dissolved. As for Brandenburg, in 1960 the gas provider for T-4, Dr. August Becker, testified that by the end of 1940 "there were no more people to gas in Brandenburg, the region had been emptied." Whatever the true reasons, the first two killing centers in the assault on the lives of mentally disabled patients were closed by December 1940, only to be replaced by Bemburg and Hadamar. The killing went on without pause.
Concern for public opinion among the Nazi leadership may also account for the creation in the fall of 1940 of transit centers (Zwischenanstalten). On an increasing basis, patients designated for killing were transferred from the surrendering institutions to these transit centers, where they stayed for two to three weeks before final transfer to a killing institution. During the Nuremberg Doctors Trial, both the prosecution and the defense referred to them as Beobachtungsanstalten (observation institutions). Euthanasia defendants like Karl Brandt and Viktor Brack devised the canard that the transit centers had a quality control function, ensuring that no mistakes had been made in the selection process. In fact, the transit centers were designed to confound any efforts to trace a given transport to its ultimate destination. The more labyrinthine the program, the more difficult it was to follow T-4's sleight of hand—or so it seemed to the T-4 directors. Nonetheless, some of the transit centers did on occasion seek to withhold patients capable of work from transfer to the killing centers. When they did so, they were admonished by the Berlin authorities that such exemptions were “impeding” the “operation.” The director of the Hadamar euthanasia institution alluded to this rebuke from Berlin in reminding the director of the transit center of Wiesloch to “distance himself from every exemption.”

By August of 1941, the death toll of mentally disabled patients murdered in T-4's killing centers had reached 70,273. These figures are culled not from official T-4 records, many of which were destroyed before the end of the war, but from figures compiled by a T-4 statistician discovered at the Hartheim institution after the war. The figures, reproduced in Tables 2.3 and 2.4, document the number of those killed at each of the six killing centers for each calendar month beginning in January 1940 and ending in
August 1941. As Henry Friedlander points out, however, German prosecutors after the war believed these figures underestimated the number of the dead. Based on the evidence they had collected, they argued the T-4 statistician had, among other miscalculations, miscounted the patients “euthanized” at Hartheim and Sonnenstein. They arrived at a conservative estimate of 80,000 patients killed until the official “end” of the operation in August 1941.\textsuperscript{102}

The reason why Hitler ended the first phase of adult euthanasia on August 24, 1941 is a subject of controversy among historians. For years, conventional treatments of the euthanasia “stop” have credited pressure from the Catholic church for persuading Hitler to terminate phase one of the killing program. The bombshell was a sermon delivered on August 3, 1941 by Count Clemens August von Galen, the bishop of Münster. Galen was informed on July 25, 1940 by Dr. Karsten Jaspersen, the chief doctor in the Bethel psychiatric hospital, that Leonardo Conti’s ministry (Department IV of the Interior Ministry) had authorized a program of euthanasia against German mentally ill patients. Galen and his associates chose not to lodge a public protest at that time, however, for lack of sufficient evidence. By August of 1941, Galen felt it was time to go public with opposition to the killing; his sermon represented the first public protest against Nazi euthanasia. In the sermon, Galen referred to the high mortality rate among the mentally ill in German institutions that “did not occur randomly, but rather was intentionally produced.” Despite the declaration of the German Bishops on July 7, 1941 condemning the killing of an “innocent person except in wartime or in justified self-defense,” the murder of mental patients had continued, and now threatened the province of Westphalia. Galen condemned the killings as violations of statutory law
under section 211 of the German Penal Code and of divine law set forth in the 5th Commandment, "Thou Shalt not Kill." Galen’s sermon was read from pulpits throughout his diocese, and soon became a topic of discussion both within and outside Germany. (British pilots dropped thousands of copies of the sermon on German cities.) The Nazi elite was furious. A propaganda director, Walter Tiessler, suggested to Bormann that Galen be hanged. The proposal was rejected on the grounds that executing Galen would only turn him into a "martyr" and stir up even more popular unrest. In the meantime, Galen’s coup-de-main had opened the floodgates to protests from Catholic and Protestant clerics, many of which were sent directly to the National Socialist leadership. "All god-fearing people regard this destruction of helpless creatures as an injustice crying to the heavens." Bishop Hilfrich wrote to the Reich

<table>
<thead>
<tr>
<th>INSTITUTION</th>
<th>1940</th>
<th>1941</th>
<th>1941</th>
</tr>
</thead>
<tbody>
<tr>
<td>A (Grafeneck)</td>
<td>9,839</td>
<td>------</td>
<td>9,839</td>
</tr>
<tr>
<td>B (Brandenburg)</td>
<td>9,772</td>
<td>------</td>
<td>9,772</td>
</tr>
<tr>
<td>Be (Bemmburg)</td>
<td>------</td>
<td>8,601</td>
<td>8,601</td>
</tr>
<tr>
<td>C (Linz/Hartheim)</td>
<td>9,670</td>
<td>8,599</td>
<td>18,269</td>
</tr>
<tr>
<td>D (Sonnenstein)</td>
<td>5,943</td>
<td>7,777</td>
<td>13,720</td>
</tr>
<tr>
<td>E (Hadamar)</td>
<td>------</td>
<td>10,072</td>
<td>10,072</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>35,224</td>
<td>35,049</td>
<td>70,273</td>
</tr>
</tbody>
</table>

Table 2.3. Internal T-4 Statistics concerning the Number of Patients gassed until September 1, 1941. Source: Hartheim Statistics, reprinted in E. Klee, Dokumente zur "Euthanasie," p. 232.
Justice Minister on August 13, 1941. "And if it is said at the same time that Germany cannot win the war if there is a just God, then such a statement doesn’t originate from a lack of patriotism..." 104

According to Ernst Klee and Henry Friedlander, the opposition of the churches and the public protest occasioned by it induced Hitler to cancel the official euthanasia program on August 24, 1941. Their contention finds support not only in the proximity of Galen’s sermon to the stoppage date, but also in the postwar testimony of T-4 operatives. Dr. Friedrich Mennecke, director of the Eichberg institution and a T-4 medical expert (Gutachter) told a German court in 1946 that Hitler’s private train had to make an unexpected stop in a station along the route from Munich to Berlin, sometime in August 1941. When Hitler went to the window of his compartment to inquire about the delay, he was seen by a group of people who were loading mentally handicapped patients onto a transport. They exhibited a “threatening attitude” toward Hitler, and a spontaneous demonstration against the euthanasia program allegedly broke out on the platform outside Hitler’s window. Mennecke ascribed Hitler’s stop order to his disconcerting adventure during this train ride. 105

The German historian of Nazi genocide, Götz Aly, does not reject the impact of church protest and public discontent on Hitler’s decision, but points out that other motives may have been equally important. For Aly, the end of Phase One may be due to the simple fact that the program had reached (and even exceeded) its initial target of killing 70,000 patients. Galen’s sermon also happened to coincide with the release of a
propaganda film (*Ich klage an*) produced by Hitler’s Chancellery to render the public more amenable to euthanasia; the stoppage in late August may have been ordered to give the film a chance to influence public opinion.\textsuperscript{106}

Although the evidence permits more than one interpretation of the motives, it is undisputed that the killing program underwent a seachange after August of 1941. Thereafter, in terms of organization, method, and scope, the National Socialist attack on “life unworthy of life” attained new and unprecedented levels of virulence. The language of resource scarcity—part of a war-time sensibility with roots in the scarifying traumas of World War I—continued to be adduced to legitimate killing that was increasingly driven by racial and political motives. As we will see, the official “stop” of the euthanasia program did not diminish the killing, but witnessed its expansion to other “valueless” groups after August 1941—including the European Jews.
### 1940

<table>
<thead>
<tr>
<th>Institution</th>
<th>Jan</th>
<th>Feb</th>
<th>Mar</th>
<th>Apr</th>
<th>May</th>
<th>June</th>
<th>July</th>
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<th>Sept</th>
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<tbody>
<tr>
<td>A</td>
<td>95</td>
<td>234</td>
<td>500</td>
<td>410</td>
<td>1119</td>
<td>1300</td>
<td>1262</td>
<td>1411</td>
<td>1228</td>
<td>971</td>
<td>548</td>
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<td></td>
<td>105</td>
<td>495</td>
<td>477</td>
<td>974</td>
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<td>1529</td>
<td>1419</td>
<td>1382</td>
<td>1177</td>
<td>397</td>
<td>387</td>
</tr>
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<td>C</td>
<td></td>
<td></td>
<td>633</td>
<td>982</td>
<td>1449</td>
<td>1740</td>
<td>1123</td>
<td>1400</td>
<td>1396</td>
<td>947</td>
<td>947</td>
<td>9670</td>
</tr>
<tr>
<td>D</td>
<td></td>
<td></td>
<td></td>
<td>10</td>
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<td>1221</td>
<td>1150</td>
<td>801</td>
<td>947</td>
<td>698</td>
<td>5943</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>95</td>
<td>339</td>
<td>995</td>
<td>887</td>
<td>2726</td>
<td>3723</td>
<td>5356</td>
<td>5791</td>
<td>4883</td>
<td>4139</td>
<td>3711</td>
<td>2572</td>
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</table>

Institution A (Grafeneck)  
Institution B (Brandenburg/Bemburg)  
Institution C (Linz/Hartheim)  
Institution D (Sonnenstein)

### 1941

<table>
<thead>
<tr>
<th>Institution</th>
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<th>Feb</th>
<th>Mar</th>
<th>April</th>
<th>May</th>
<th>June</th>
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</thead>
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<td>1084</td>
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<td>1426</td>
<td>638</td>
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<tr>
<td>C</td>
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<td>1178</td>
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<td>1123</td>
<td>1106</td>
<td>1364</td>
<td>735</td>
<td>1176</td>
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<tr>
<td>D</td>
<td>365</td>
<td>608</td>
<td>760</td>
<td>273</td>
<td>1330</td>
<td>1297</td>
<td>2537</td>
<td>607</td>
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<tr>
<td>E</td>
<td>956</td>
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<td>889</td>
<td>2063</td>
<td>1687</td>
<td>1783</td>
<td>700</td>
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<tr>
<td>TOTAL</td>
<td>3052</td>
<td>4023</td>
<td>3794</td>
<td>3369</td>
<td>5815</td>
<td>5754</td>
<td>6481</td>
<td>3121</td>
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</table>

Institution B (Bernburg)  
Institution C (Linz/Hartheim)  
Institution D (Sonnenstein)  
Institution E (Hadamar)

Table 2.4. The Number of Patients Gassed, divided into the months for the years 1940-41.  

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Notes

1 U.S. v. Karl Brandt et al. (The Doctor's Trial). National Archives and Records Administration [hereafter NARA], RG 238, M887, p. 2545.
2 Henry Friedlander, Origins, pp. 4-7; see also Stephen Jay Gould, Mismeasure, pp. 188-201.
3 H. Friedlander, Origins, pp. 11-13; Weindling, Health, Race, and German Politics, p. 397.
4 The Outline was cited as scientific authority by the authors of the commentaries on the Nuremberg laws in 1936. H. Friedlander, Origins, p. 13.
6 Tischgespräche, quoted in Fest, p. 219.
7 Mein Kampf, quoted in Fest, p. 220.
9 Weindling, Health, Race, and German Politics, p. 545.
11 Quoted in Gould, Mismeasure, p. 64.
12 G. Hersey, The Evolution of Allure, p. 103.
13 Quoted in J.C. Fest, Hitler, p. 397.
15 Fest, Hitler, p. 256.
16 Fest, Hitler, pp. 548-549.
19 Rosenbaum, Explaining Hitler, p. 218.
21 Weindling, Health, Race, and German Politics, p. 454.
22 Weindling, Health, Race, and German Politics, pp. 524-525. The Prussian proposal was itself modeled on sterilization laws from 24 U.S. states. The American influence on the Nazis’ approach to eugenic sterilization was considerable. German sociologist and historian Stefan Kühl writes: “Indeed, the entire German sterilization discussion prior to the implementation of the Law on Preventing Hereditarily Ill Progeny, passed on July 14, 1933, was strongly influenced by American models.” S. Kühl, The Nazi Connection: Eugenics, American Racism, and German National Socialism (New York: Oxford University Press, 1994), p. 23.

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Interrogation of Dr. Hermann Pfannmüller, 21 September 1946, NARA, M 1019, Roll 52, pgs. 545, 555.

Supra, pp. 116-17.

Testimony of Karl Brandt, Case 1 (\textit{The Doctors’ Trial}), NARA, RG 238, M 887, p. 2468.

Quoted in Klee, \textit{Dokumente}, p. 149.

Interrogation of Dr. Hermann Pfannmüller, 21 September 1946, NACP, M 1019, Roll 52, p. 596.

Quoted in Klee, \textit{Dokumente}, p. 250.
For Aly, murdering these children to procure research materials is not merely a suspicion, but a certainty; he charges Heinze and the neuropathologist Julius Hallervorden with killing the children to further their anatomical studies in brain pathology. Hallervorden's collection of dissected brains was preserved and used until 1990 at the Max Planck Institute for Brain Research in Frankfurt. See Aly, pp. 224-225.

2 Js 476/45 StA Ffm, excerpted in Klee, Dokumente, p. 251.

Heidelberg Documents, Bl. 127903 ff., excerpted in Klee, Dokumente, pp. 253-254.

GstA Frankfurt, Anklage Heyde, Bohne und Hefelmann, Ks 2/63 (GstA), Js 17/59 (GstA), 22 May 1962, p. 177, cited in H. Friedlander, Origins, p. 61.

Statement by W. Heyde, 10/25/61 (VI), quoted in Klee, “Euthanasie,” p. 84. On this crucial meeting of euthanasia doctors in Berlin, see Klee, “Euthanasie,” pp. 83-84; Klee, Dokumente, p. 68; Burleigh, Death and Deliverance, p. 113; H. Friedlander, Origins, pp. 64-65. Heyde was one of the central figures in the planning and implementation of euthanasia. In addition to his duties as an SS-doctor and a chaired professor in Würzburg, Heyde was the head of T-4’s Medical Department until late 1941 and a T-4 chief expert (Obergutachter) in the adult euthanasia program.


Urteil des LG Stuttg. vom 15.9.67 (Ks 19/62), quoted in Klee, “Euthanasie,” p. 84. See also Klee, Dokumente, p. 68; Burleigh, Death and Deliverance, p. 119.


Nuremberg Document NO-824, excerpted in Klee, Dokumente, p. 85.

H. Friedlander, p. 68. In addition to its address in the Tiergartenstrasse, T-4 occupied offices in the Columbus House on the Potsdamer Platz in Berlin.

On the erection of the camouflage organizations, see H. Friedlander, Origins, pp. 73-74; Klee, Dokumente, p. 93; Klee, “Euthanasie,” pp. 102-103, 166-67; G. Aly, “Medicine Against the Useless,” p. 38. The Central Accounting Office of T-4 was so successful in duplicitously overcharging insurance carriers that the originator of the scheme, Hans Joachim Becker, became known among the T-4 staff as “Millions” Becker. Alan Beyerchen has perceptively pointed out to me that Becker’s shrewd (if illegal) practices exemplify an “entrepreneurial” dimension of the Holocaust, in which general goals filtered down from the Nazi leadership to middle-level technocrats, who then applied their entrepreneurial ingenuity to achieve the regime’s aims. In this fashion, Hitler and the Party elite could mobilize the talents, industry, and energy of German middle managers on behalf of their genocidal purposes. Without such mobilization, the scope of human destruction wrought by the Nazis would have surely been smaller.

Quoted in Klee, Dokumente, pp. 93-94.

H. Friedlander, Origins, pp. 75-76; Klee, “Euthanasie,” pp. 87-88. Over the course of time, this form was revised to include additional questions, e.g. marital status of the patient, religion, previous institutionalization, et al. Most significantly, it expanded the section for evaluating the patient’s ability for work.

For a facsimile copy of the Merkblatt, see Klee, Dokumente, p. 96.

NO-824, excerpted in Klee, Dokumente, pp. 85-86.


H. Friedlander, Origins, p. 77.


H. Friedlander, Origins, p. 84.


Quoted in Klee, “Euthanasie,” p. 112.

H. Friedlander, Origins, p. 93.

H. Friedlander, Origins, p. 94.


CHAPTER 3
THE EMPEROR OF ICE-CREAM: NATIONAL SOCIALIST EUTHANASIA, 1941-45

Call the roller of big cigars,
The muscular one, and bid him whip
In kitchen cups concupiscent curds.
Let the wenches dawdle in such dress
As they are used to wear, and let the boys
Bring flowers in last month’s newspapers.
Let be be finale of seem.
The only emperor is the emperor of ice-cream.

Take from the dresser of deal.
Lacking the three glass knobs, that sheet
On which she embroidered fantails once
And spread it so as to cover her face.
If her horny feet protrude, they come
To show how cold she is, and dumb.
Let the lamp affix its beam.
The only emperor is the emperor of ice-cream.

Wallace Stevens.
“The Emperor of Ice-Cream” (1923)

More than 100,000 euthanized. Men over the age of 70 are
to receive no medical treatment. Who is still worthy of life?
Only the National Socialist.

Bishop Ludvig Sebastian,
August 19, 1942

Any one who believed the worst of National Socialist violence against
marginalized groups was over with the end of Phase One in August 1941 was gravely
mistaken. By the fall of 1941, what had begun as a program to eliminate “incurable”
mental patients had ballooned into an official policy of state-sponsored murder. The
targeted groups included Soviet POWs, “asocials,” the Sinti and Roma, and European
Jews. Without the techniques of destruction refined and the killers trained in the euthanasia program, the attack on these other groups, when it came, would have been substantially different, if it would have occurred at all. Euthanasia furnished an already murderous government with the skills, personnel, and materiel for expanded genocide. Just as important, the euthanasia program gave the Nazis a precedent for solving problems through mass killing. Beginning in late 1941, the “questions” that confronted the Third Reich—the “Gypsy question,” the “Eastern Worker question,” and the “Jewish question,” to mention only the prominent ones—were answered through mass murder. The regime’s experiences with euthanasia had made the unthinkable thinkable.

In this chapter, we resume the history of the euthanasia program as it entered upon its second phase, paying special attention to the connections between euthanasia and events in the eastern territories. The chapter concludes with a meditation on how we might understand the outbreak of Nazi genocide. Taking issue with an inadequacy of the “cumulative radicalization” theory posited by structuralists, a theory is advanced that interprets the genocide as the logical outgrowth of a style of thought that found increasing acceptance within the Nazi Party and state ministries. This ideology, located on the outskirts of social discourse prior to the 1930’s, became a mainstream approach to problem-solving by the 1940’s. The process by means of which the ethic of solving problems through genocide infiltrated the Nazi thought-world I call “violentization.”

I. Killings of the Mentally Disabled in the East, 1939-1945

Before the T-4 killing program had even started, the SS and the Gestapo were murdering mental patients in occupied Poland. Possibly at the suggestion of Gauleiter Schwede-Coburg, the president of Pomerania (the Prussian province on the Polish
border), Heinrich Himmler decided after the invasion of Poland in September 1939 to clear Pomeranian nursing homes for use as SS military bases and field hospitals. The modus operandi consisted of shooting and gassing by mobile gas vans of allegedly "incurable" patients. The earliest mass murder of the mentally disabled occurred at the hands of SS troops in October 1939—nearly three months before the experimental gassing at Brandenburg. SS-Oberführer Kurt Eimann received the "unpleasant task" to clear Pomeranian mental hospitals on Himmler's orders. The patients were to be "eliminated" (the verb used was beseitigen) so that these buildings could be used to care for wounded SS soldiers. There was no question in Eimann's mind that "eliminated" meant "killed." Vehicles belonging to the Danzig traffic police would transport the patients from the train station in Neustadt to the killing fields. In a ghoulish anticipation of the Jewish Sonderkommandos, Polish prisoners from the nearby concentration camp Stutthoff who had been sentenced to death were forced to dig mass graves for disposal of the corpses; afterward, Eimann's men shot these prisoners. Eimann himself chose the site for the killing, a forested area near Piasnitz. The locale was ideal, since it was easily accessible to the Danzig police vehicles and afforded privacy against would-be eyewitnesses. This killing field was part of the Polish territory incorporated into the German Reich as the Reichsgau West Prussia in the decree of October 8, 1939 (effective as of November 1, 1939).¹

As shooters and cordon guards Eimann selected members of his unit who had proven themselves "characterologically and ideologically reliable." Sworn to secrecy prior to the operation, they were subjected to propaganda films and other morale-boosting measures so long as they participated in the killing. These individuals escorted the
patients one by one from the vehicles to the trench; Eimann followed a short distance away. Once the patients had come abreast of the trench, one of the SS men shot them in the back of the neck, killing them instantly. (Eimann shot the first patient, a woman, in order to prove he was willing "to dirty his own hands" with the killing.) Their lifeless bodies crumpled into the mass grave. When the SS guards waiting at the vehicle parked fifty meters away heard the pistol shot, they prepared the next patient for the death march to the gravesite. The shooting continued for several hours until every patient had been killed. If a body in the grave exhibited signs of life, the SS killer shot him or her from the edge of the grave.²

These shootings of Pomeranian and West Prussian mental patients lasted until the end of November 1939, amassing a death toll of around 3,500. Once the job was completed, Eimann and his men killed all the Stutthof prisoners.³

This destruction of mentally disabled patients in Pomerania was only the beginning of a campaign of murder in the East that continued long after Eimann had finished his "work." A ghastly episode of mass shooting in situ occurred at the psychiatric hospital in Chelm Lubelski on January 12, 1940, where 440 mentally disabled patients were machine-gunned on the hospital grounds. In the sordid history of Nazi mass murder, it would be hard to find a more shocking example of wanton cruelty than the Chelm Lubelski shootings described in the "Bulletin of the Main Commission for the Investigation of German Crimes in Poland." Because a mere paraphrase of this event cannot fully convey its horror, I quote extensively from the translated report.

In the first days of January 1940, some Gestapo officers arrived . . . who were well acquainted with the terrain of the hospital and the patient lists. After a few days, on 12 January 1940, 30 Gestapo soldiers arrived during the morning hours . . . however, they did not reveal the purpose of their visit. At the same time, the Polish workers of a nearby
brickworks were ordered to excavate two large trenches at a distance of 150 meters from the hospital. That afternoon, the service personnel were all ordered to assemble in a special room, and after a few hours were ordered to leave the hospital premises.

In the evening, the soldiers expelled the patients from Building 2. A machine gun was set up in front of the exit and opened fire on the patients as they were driven out of the hall over the threshold. A growing stack of corpses piled up. The resistant German patients were driven through the rooms and hurled out of the second or third floor windows.

One young girl in particular, who suffered from psychotic depression, was hunted by the Germans throughout the entire building from floor to floor; finally she was found and thrown out a window on the second floor, and thereafter shot....

A few patients succeeded in breaking through the cordon of Germans, and thus began a hunt on the hospital grounds that ended with the murder of the runaways. A wounded patient fled almost a kilometer before he was captured and murdered. After a flight of three-quarters of a kilometer from the hospital, a second patient hid himself for almost a month before he was found and murdered....

The most difficult task for the Germans was seizing the children—patients in the pediatrics ward—who ran around on all floors and hid themselves in cabinets and under beds and the like. All the children were sought after and shot.

The pile of corpses was guarded by the Germans during the night. The moaning of the dying could be heard, because not all the victims had been killed; many of them had only been severely wounded.

Toward morning, the Germans halted the flow of farmers' vehicles, sent the drivers home and ordered workers from the brickworks to load the corpses on the vehicles. The corpses were buried in two trenches, which had already been excavated.

After the corpses had been removed, it was discovered that a patient who had lain at the bottom of the pile of corpses was still alive. When this patient crawled out and began to run away, she was shot....

The shootings at Chelm-Lubelski were distinguished by their inexplicable ferocity and their on-site location, but they were only a fraction of the murders committed against mental patients in occupied Poland during the war. Victims ranged from Pomeranian Germans, West Prussian Germans and Poles, and German, Jewish, and Polish mentally disabled patients from the Warthegau. The killers were typically members of the SS and Gestapo, although in at least one case German army soldiers carried out the shootings.

Sometimes they acted in collaboration with German doctors. In the liquidation of mental patients at the mental hospital Kochanówka (Woiwodschaft Lodz) in March 1940, two
German doctors, Herbert Grohmann and a Dr. Kleebank, selected patients for shooting. Similarly, at the psychiatric hospital in Wartha in April 1940, Dr. Fritz Lemberger and Hans Renfranz assisted the SS in killing 499 mental patients.⁶

Pistols and machine guns were not the only weapons used against the mentally ill in Poland. Early on in these killings, another lethal device was deployed against them, the mobile gas van. According to the 1962 testimony of SS-Oberscharführer Gustav Sorge, this macabre device was built in the summer of 1938 at the Sachsenhausen concentration camp and subsequently used to gas the mentally ill in Stralsund (Pomerania) and Posen (a German province lost to Germany after 1918 and reincorporated into the Reich as part of the Wartheland in the aftermath of the Polish campaign).⁷ The gas vans were essentially mobile gas chambers, often disguised as Kaiser Coffee Company delivery trucks (bearing the motto Kaisers Kaffee Geschäft). Patients were loaded into the sealed cab; attached to it with a rubber hose was a steel tank of carbon monoxide gas. The driver cranked open a valve on the tank, admitting pure carbon monoxide into the cab via the hose. Among the first “applications” of this technology was the clearing of the mental hospital Tiegenhof (Polish Dziekanka) near Gnesen in December 1939-January 1940. A unit specially created to kill Wartheland patients conducted the gassings, the Lange Commando under the direction of SS Hauptsturmführer (Captain) Herbert Lange.⁸ The Commando arrived at the institution in early December 1939 and, after dismissing a large number of the nursing staff, loaded the patients in groups of ten into the gas van, in which they were asphyxiated as it departed the hospital. The Polish doctor Jan Gallus estimated the number of those murdered in this fashion between December 12, 1939 and January 12, 1940 at 1,043 patients.⁹
success of the Tiegenhof gassings, coupled with the favorable results of Viktor Brack’s experimental gassings at Brandenburg, convinced the Nazi authorities that carbon monoxide gas should be used as a killing agent to deal with the Wartheland’s mental patients.  

In January 1940, 534 patients of the Kosten mental hospital (Koscian/Woiwodschaft Posen) were gassed over several days in vehicles disguised as furniture trucks. A few months later, in May and June 1940, the Lange Kommando was sent to the Soldau concentration camp in East Prussia to assist in killing German mental patients. At Soldau, the unit killed 1,558 patients in its gas vans in 19 days. Typically, it loaded on average forty patients into a van and gassed them as the vehicle drove away, dumping the bodies in mass graves in the lonely region around the Soldau camp. When the van returned after three hours, it was empty.

Ultimately, the mass murder of patients in the eastern territories prior to the invasion of Russia was only tenuously related to the T-4 program administered from Berlin by the Führer’s Chancellery. There were no registration forms, no expert evaluators, no T-4 authorizations, no “mercy deaths” administered by medical personnel. Although in a couple of isolated cases German physicians participated in selecting patients for killing (as in the liquidation of patients at the psychiatric hospitals in Kochanówka and Warta), most of the selection and shooting were done by non-medical SS and Gestapo units. As the example of Chelm-Lubelski graphically proves, there was no pretense of ending the lives of suffering patients on humanitarian grounds in these killings—nor is any such pretense even maintainable. The SS needed hospital space and medical staff, and the mentally disabled were perceived as standing between the SS and
the object it coveted. The killers proceeded with the pitilessness of one seeking out and
destroying a rabid animal that poses an immediate threat to the community. Hurling a
screaming patient out of a third story window or shooting a whimpering child as it
cowers under a bed hardly reflects a high-minded concern for easing human pain—quite
to the contrary. In these shootings, perhaps, the true face of Nazism grins for a moment
in the spotlight of history in all its heartless cynicism.

For brutality and destructiveness, however, the murder of mentally ill patients in
occupied Poland—frightful though it was—pales beside the Russian campaign in the
summer of 1941. On June 22, 1941 the German army, in open defiance of the Soviet-
German nonaggression pact, invaded the Soviet Union. The lethal dynamism of
National Socialist violence burst upon its unsuspecting victims with a savagery that may
be without example in human history. In addition to the disabled, who had been
murdered in Poland since October 1939, the Nazis targeted two ethnic groups for
extermination: Jews and Gypsies. The killers were mobile killing units
(Einsatzgruppen), made up of members from the Security Police (Sicherheitspolizei, or
Sipo) and the Security Service (Sicherheitsdienst, or SD). Sipo comprised state Offices
IV (Gestapo) and V (the criminal police, or Kripo); the SD comprised party Offices III
(Inland) and VI (Foreign). Together, Sipo and the SD constituted the Reich Security
Main Office (Reichsicherheitshauptamt, or RSHA), established in 1939 by Himmler and
his protégé, Reinhard Heydrich. Under Heyrich’s malignant stewardship, it became the
primary institutional engine behind the Final Solution. (Its most infamous member,
Adolf Eichmann, directed the deportation of European Jews to the death camps from Office IV B 4.) It also furnished the killers of mentally ill patients during the Russian campaign. The delicacy of this task was such that the army was unfit to carry it out. Jodi noted that a draft directive to troop commanders about the Russian invasion, which had been sent to Hitler for his feedback, should be revised to reflect Hitler's instructions. One matter Jodi felt Himmler should be approached about was the possibility of using SS and Police units in the army's operational area to guarantee Bolshevik commissars would be quickly "rendered harmless." Accordingly, the final revised draft directive signed by General Field Marshal Wilhelm Keitel, Chief of Staff of the High Command of the Armed Forces (OKW), informed the troop commanders that Hitler had commissioned Himmler to perform certain tasks in the operational area. These tasks were—so the language of the directive—related to the final confrontation between two mutually hostile political systems. Himmler was to enjoy independence of action in carrying out his commission. Once the war had begun, the battlefront would be sealed off to all non-military personnel save for police units that Himmler had assigned to execute Hitler's orders.

* We have already encountered the word *beseitigen*—literally, "to eliminate" or "get rid of"—in the context of Eimann's orders to exterminate the mentally disabled in Pomeranian hospitals. It represents yet another of the many connections between the assault on the disabled and the Holocaust.
Another war diary, that of General Franz Halder, Chief of the Army General Staff (OKH), reveals that the General Quartermaster of the Army, General Wagner, had discussed “police questions, border customs” with Reinhard Heydrich sometime after the final directive had been issued. As the General Quartermaster of the Army, Wagner had responsibility for quartering and supplying the police units permitted under the directive to carry out Himmler’s “special commission” (Sonderauftrag) in the army’s operational area. An agreement between Wagner and Heydrich resulted from this discussion on March 26, 1941: according to its terms, the Einsatzgruppen would be allowed to conduct operations in the Soviet Union. The language reads: “Within the framework of their instructions and upon their own responsibility, the Sonderkommandos are entitled to carry out executive measures against the civilian population.” Both the RSHA and the Army acknowledged that the mobile units could act within the army group rear areas and the army rear areas. Although they would be administratively subject to Army command, functional control would reside with the RSHA. Thus, the Army was charged with controlling the movement of the Einsatzgruppen and supplying them with quarters, food, gas, and (if necessary) communications; however, the mobile units would take their operational orders from Heydrich.

Subsequent amendments to the Army-RSHA agreement in May 1941 expanded the range of the Einsatzgruppen’s operations. In the final version of the agreement, the mobile units were permitted to conduct operations not only in the army group rear areas and army rear areas, but on the battlefront itself. Regarding this alteration in the agreement, the eminent Holocaust historian, Raul Hilberg, has commented: “This concession was of great importance to the Einsatzgruppen, for the victims were to be
caught as quickly as possible. They were to be given no warning and no chance of escape.” Now that the road to efficient mass killing had been paved, it remained to the RSHA to assemble the *Einsatzgruppen*. Staffed by RSHA members from Sipo, SD, Gestapo, and Kripo, these mobile killing units comprised four separate groups, lettered A, B, C, and D, each the size of a battalion. Each of the four mobile units comprised operational units of company size, called *Einsatzkommandos* and *Sonderkommandos*.¹⁶

In early June 1941, the *Einsatzgruppen* were assigned to German Army groups—*Einsatzgruppe* A to Army Group North, B to Army Group Center, C to Army Group South, and D to the Eleventh Army in the far south. When the German Army swept into the Soviet Union on June 22, the mobile killing units followed swiftly on their heels, arresting Jews, Gypsies, and alleged partisans in villages and towns along the border.¹⁷ The *Einsatzgruppen* conducted mass shootings that closely resemble Kurt Eimann’s method used with Pomeranian mental patients in October 1939: after arrest, the victims were conveyed to remote areas and shot in the back of the neck or head either singly or in groups, their corpses disposed of in mass graves.

As the German army advanced into Soviet territory, the mentally disabled also became targets of these *Einsatzgruppen* murders. During the summer campaign, the mobile units shot between 1,800 and 2,200 patients in the eastern psychiatric clinics of Riga, Daugavpil, Jelgava, Düneburg, and Mitau to create hospital space for German army troops in Latvia.¹⁸ According to *Einsatzgruppen* action reports, on August 22, 1941 they killed 544 mentally handicapped patients at the Aglona asylum, ostensibly to free up the staff of 150 health care professionals for army field hospitals.¹⁹ These reports are replete with the wholesale murders of patients in the eastern territories: in September
1941, 545 "incurables" were shot in Poltawa, the hospital space then being placed at the disposal of the Ortskommandanten; in October, the mobile units "gave special treatment" to 632 mental patients in Minsk and 836 in Mogilev (sonderbehandelt, a euphemism for killing that will resurface in connection with the Final Solution); 1,500 patients met the same fate at Dnjepropetrowsk in November, while 240 Baltic patients at the Makarjewo asylum were "eliminated" (beseitigt) on the grounds that "they might attack other people, and further they are objects which, in the German view, are no longer worthy of life."

The Einsatzgruppen action reports often cite the mentally ill in their listings of groups shot by the mobile units in the east. One such report mentions the annihilation of more than 800 Gypsies and mentally disabled patients. It goes on to enumerate the murdered by group affiliation: "... 678 Jews, 359 communist functionaries, 153 partisans, and 810 asocials, Gypsies, mentally ill and saboteurs."

Although such reports are important sources of information on the extent of Nazi criminality in the eastern territories, they do not capture the psychological toll these shootings were taking on the members of the Einsatzgruppen. There were, of course, killers who either enjoyed their work (the Exzesstäter, or "excess perpetrators," motivated by a sadistic joy in destruction) or became inured to mass killing. However, the fiction that all Jews in the East were saboteurs in league with the Red Army rapidly became incredible when orders were given to shoot obvious noncombatants like young children and the elderly. Alcohol flowed freely among the Einsatzgruppen to numb frayed nerves and salve psychological wounds. Frequently the alcohol remedy was not enough; nervous
breakdowns began to affect some of the shooters. One mobile unit killer recalled after
the war the psychic trauma he experienced after a mass shooting of mental patients:

I still remember the screams of the mentally ill patients before the shooting. Generally,
what I remember about this shooting of patients is that it was the most horrible
experience of my time with the unit. This shooting caused a nervous breakdown.
Although I was physically well. I fell apart and had a high fever.25

It was in this context that Heinrich Himmler changed the course of history by
seeking an alternative to mass shootings. Himmler had visited Minsk in mid-August of
1941, where he had asked the Commander of Einsatzgruppe B, Arthur Nebe, to kill a
hundred people for his own edification. Himmler was visibly shaken by what he
observed. After the shooting, he conversed with a co-witness, Obergruppenführer Erich
von dem Bach-Zelewski, who complained to Himmler: “Look at the eyes of the men in
this Kommando, how deeply shaken they are! These men are finished for the rest of their
lives. What kind of followers are we training here? Either neurotics or savages!”26 Later
Himmler toured a mental hospital with Nebe, vom dem Bach, and the chief of Himmler’s
Personal Staff, Karl Wolff. He ordered Nebe to end these patients’ lives, but, still
affected by the shooting he had witnessed, asked Nebe to consider a more humane
method than shooting. Nebe suggested dynamite, which Himmler agreed to. (Why he
would find blowing up patients more humane than shooting them is an unfathomable
question). Nebe ordered Albert Widmann of the RSHA’s Criminal Technical Institute
(KTI) to report to him in Smolensk with dynamite in tow. Widmann, we will recall, was
the chemist ordered to supply the killing centers with carbon monoxide cylinders.27 On
arrival, he was briefed on his assignment to test the efficiency of killing mental patients
with dynamite. “Subjects” for this gruesome experiment were chosen from mental
hospitals in Minsk and Mogilev.28
The "subjects" were locked in a pillbox that was then blown up with dynamite. The results were predictable: the explosion destroyed the pillbox and sprayed the area with body parts. Nebe and Widmann astutely inferred that dynamite was an unacceptable alternative. A second experiment was conducted the following day in Mogilev, where several mentally handicapped patients were asphyxiated with carbon monoxide gas from a car and a truck conducted into a sealed room through hoses. The lethal effects of the gas satisfied Nebe and Widmann. According to Henry Friedlander, the success of the gassing experiment in Mogilev commended carbon monoxide "as the model for the method used in the killing centers of the final solution." Dr. Friedlander's contention may be overstated; after all, the Nazis had been using poison gas to eliminate mental patients since late 1939, and one and a half years prior to the Mogilev experiment, Brack and Brandt had a meeting of the minds on the preferability of carbon monoxide to other forms of killing (such as injections). This notwithstanding, the results of the Mogilev experiment became the occasion for introducing into the occupied Soviet Union a device we have previously encountered in Poland—the gas van.

In the wake of the Minsk and Mogilev experiments, sometime in September 1941, Himmler ordered the Criminal Technical Institute (KTI) to engineer a more efficient gas van. The older model used to gas mental patients at the Koscian Institute and elsewhere in Poland suffered from a significant drawback: the gas canisters were both costly and arduous to transport in the far-flung Eastern theater of war. The KTI's improvement was to direct carbon monoxide from the vehicle's own exhaust system into a sealed cab area with hoses, along the lines of the gassing experiment in Mogilev. In late autumn, the improved van was tested in the Sachsenhausen concentration camp by T-4 employee Dr.
August Becker, who had been responsible for obtaining gas canisters for the T-4 killing centers in the early phases of the euthanasia program. During the Sachsenhausen trial run, between 40 and 50 Russian POWs were murdered using the innovative gassing technology. Encouraged by the results, the KTI ordered production of this new model of gas van.30

Gas vans were introduced to the Soviet theater in early 1942, when each of the Einsatzgruppen received two or three vans to expedite their killing of Soviet POWs, Jews, Gypsies, partisans, and the mentally ill. At his criminal trial in 1967, Widmann, the gasser and dynamiter of the mentally disabled, pleaded that he had not known prior to the use of the gas van to kill enemies of the Third Reich that the device would be deployed against anyone but mental patients. When he expressed his concerns to his superior in the KTI, Dr. Heess, Heess rejoined: “But you see, it is done anyway. Do you want to quit by any chance?” As Raul Hilberg wryly notes, Widmann stayed on and was promoted to Hauptsturmführer.31

Yet, even the improved vans proved to be less efficient than Himmler had hoped. Much of their success hinged on a hermetically-sealed interior, but in the field and with repeated use, the cabs quickly lost their seal. To further complicate matters, the vans tended to break down in the rain. Those responsible for removing the bodies experienced headaches, while a too energetic depression of the accelerator meant that the victims’ faces would be hideously contorted and their bodies covered with excrement. For men already contending with the strain of mass shootings of men, women, and children, this additional grotesquerie worked its effects on their minds. Psychological traumas continued.32
Nazi mass slaughter in the east was not strictly speaking an expression of the T-4 euthanasia program. However, the Nazis' willingness to employ mass murder as a means of problem-solving was first tested and then refined in the T-4 killings of mental patients. The precedent introduced to history by the Führer's Chancellery guided the decision-making of the Nazi elite after 1941; now, Hitler and his inner circle realized that social, economic, and political problems could be solved through genocide. Whatever the goal, be it freeing up hospital space for soldiers, finding accommodations for bombed-out civilians, conserving scarce resources for "valuable" citizens, or eliminating racial undesirables from the Volksgemeinschaft, it could be achieved through violence and death. Arguably, without the first phase of the euthanasia program, this predatory psychology would never have come into being. In the second phase of euthanasia, the genocidal logic of National Socialism would unfold against a backdrop of scarce hospital space, the perceived inadequacies of shooting and gas vans, and military defeat. This final phase, the last genocidal convulsion of the Nazi government, witnessed the expansion of the category of "life unworthy of life" to embrace Jews, Gypsies, Soviet POWs, so-called "asocials" (criminals), and tubercular workers from the east (Ostarbeiter), to mention only some of the victim groups. Despite the official end of euthanasia in August of 1941, the killing of the mentally disabled would also continue, albeit on a different organizational footing.
II. Phase II of Euthanasia and the Expanded Killing Projects of National Socialism, 1941-45

On August 24, 1941, in the face of mounting pressure from the church and public unrest, Adolf Hitler ordered an official cessation to the euthanasia program. Notwithstanding this order, however, the murder of mentally disabled patients continued in T-4 killing centers, with one critical difference: whereas the pre-August 1941 T-4 killings were restricted to psychiatric patients, the radius of killing after the August stoppage was expanded to new categories of "unworthy life," defined less in medical than in social, racial, and political terms. The centrifugal tendency of Nazi genocide between late 1941 and the end of the war is the central feature of this second phase in euthanasia.

The post-August 1941 period is also characterized by an organizational shift in administration. On October 23, 1941, Herbert Linden was appointed to a new office in the euthanasia apparatus, the Reich Commissioner for Mental Hospitals. The enabling law passed to create this position defined the Reich Commissioner's primary duty as supervising all institutions "concerned, even in part, with the accommodation and treatment of the mentally ill, feebleminded, epileptics, and psychopaths." It further stated: "The Reich Commissioner for Mental Hospitals has economic tasks to carry out regarding mental institutions. He is subordinate to the [Reich Interior Ministry] and is authorized to take necessary measures in coordination with the head of the Reich Association of Mental Hospitals." The Reich Association, of course, was a front organization of the T-4 Administrative Office, Main Office II of Hitler's Chancellery—
an administrative body already responsible for the murders of between 70 and 80,000 mental patients. Henceforth, Herbert Linden as the Reich Commissioner for Mental Hospitals, Department IV of the Reich Ministry of the Interior, became one of the leading bureaucratic figures in Nazi euthanasia.\(^{33}\)

Linden's appointment was not the only sign that the killing program would not actually end. One month later, at the end of November 1941, Viktor Brack met with T-4 representatives from all the euthanasia centers. During the meeting he informed them that the "operation" would continue despite its official termination.\(^{34}\) The evidence available to us indicates that only the means of killing—gas chambers—changed as a result of the stop order. Beginning in late 1941, instead of gassing patients T-4 doctors murdered handicapped adults with the method used to eliminate disabled children: overdoses of medication. Others starved patients to death by slowly depriving them of food, a program referred to as *Hungerkost*.\(^{35}\)

The waning months of 1941 are a climacteric in the history of National Socialist mass murder. During this period, a bewildering array of events took place that changed fundamentally the Nazi assault on "life unworthy of life." In this extraordinary time official euthanasia ended and a new phase of so-called "wild" euthanasia (i.e., decentralized killing loosely overseen by the Berlin authorities) began, using not only psychiatric criteria but novel categories like "public menace," "criminality," "antisociality," "psychopathy," and racial "inferiority" to identify individuals for destruction by the T-4 physicians. Sometime in this period, moreover, Hitler issued what is generally believed to be an oral order to exterminate the European Jews. The death camps of the "Final Solution" would not become operational until late 1941-early 1942; yet, the fate
awaiting Europe's Jews was already presaged in the murder of concentration camp Jews in the T-4 killing centers—the notorious Operation 14f13. In the remainder of this chapter, I would like to discuss each of these events—so-called "wild" euthanasia, the application of euthanasia to other groups (like "asocials" and tubercular eastern workers), and Operation 14f13—as they relate to the original plan to eliminate mentally disabled Germans. What we will find is that the foundational premise of Nazi euthanasia—that "useless" or "valueless" life should be eradicated through state-organized violence—was extended in late 1941 from the mentally ill to justify the murder of other socially marginal groups.

A. "Wild" Euthanasia, September 1941-April 1945

Even after the euthanasia "stop," the Reich Ministry continued to distribute questionnaires to German mental institutions biannually. In his role as Reich Commissioner for Mental Hospitals, Herbert Linden submitted the forms to the KdF's medical experts for evaluation. Killing proceeded on the basis of these expert assessments, but the gas chambers of the killing centers were largely dismantled; henceforth, patients selected for euthanasia were given lethal overdoses or injections of narcotics, or simply starved to death. Furthermore, while original killing centers like Hadamar and Bernburg were still euthanizing patients after the stop order, the locus of killing shifted to the transit centers—many of which were simultaneously murdering disabled children in their children's wards. Facilities such as Eichberg, Kalmenhof, and Eglfing-Haar began to kill adult patients on-site. The Meseritz-Obrawalde mental hospital in Pomerania and Tiegenhof (Dziekanka) in the Wartheland became major
centers for destroying the mentally handicapped. These institutions represent only a fraction of the facilities involved in killing the disabled during the period of "wild" euthanasia that ensued after August 24, 1941. A considerable number of hospitals murdered their patients when transportation to defunct killing centers became impossible.\(^{36}\)

Under cross-examination at the Nuremberg Doctors Trial, Karl Brandt tried to portray the T-4 euthanasia program as ending in late August 1941. Whatever killing of mental patients occurred after this date, Brandt claimed, had nothing to do with the "humane" program he and Bouhler had been commissioned to establish.\(^{37}\) Brandt's assertions contain a kernel of truth, but they are inaccurate and misleading. Without question, "wild" euthanasia was decentralized and locally-administered, leading some T-4 notables like Hans Heinze to assume the Führer's Chancellery had no control over it, as this letter from Heinze to Paul Nitsche, dated January 20, 1944, suggests:

> You know that I have clearly made known my opposition to these wild E[uthanasia] measures, which are subject to no central control. It's horrifyingly obvious what madness ... is being carried out ... These things would only be correctly administered if they were modeled during the illegal interim along the lines of the Reich Committee experiences, and then in any case they would again achieve central direction. The central authority, however, must have the authority to apply drastic remedies and punish each person who acts on his own initiative. If we do not achieve this, all of our efforts to elevate the standing of psychiatry will be lost.\(^{38}\)

_Pace_ Brandt and Heinze, the reality was that the T-4 Offices continued to register and evaluate patients for killing even after the official "stop;" it never fully relinquished control over euthanasia to local institutions. Just as it had up to August 24, the T-4 authorities in Berlin directed the transports of patients to destinations where they were killed, provided these facilities with narcotics to poison them, and made available its experienced personnel to perform the killings. Nonetheless, T-4's control of euthanasia
was not as top-down as it had been during Phase 1, when the T-4 Central Office had orchestrated a program of selection, transportation, and immediate killing on arrival at one of the six killing centers. Phase 2 ("wild") euthanasia transpired in numerous institutions, the multifariety of which posed obstacles of command and control to the Berlin offices.39

The period of "wild" euthanasia also saw intense aerial bombardment of German cities and production centers by the Allies. Beginning in February 1942, the Royal Air Force embarked on a devastating campaign to demoralize German citizens and workers by destroying their cities. The head of the British Bomber Command, Sir Arthur Harris, was a disciple of the theory that the war could be won by bombing German cities into oblivion. An essential part of the demoralization campaign was "incendiary" bombing, designed not merely to damage plants, buildings, houses and to rain violent death on civilians, but to engulf large urban areas in flames. In some instances (e.g., the attack on the German town of Lübeck in March 1942), cities that were especially flammable were chosen for bombing. Allied sorties on Germany culminated in the summer of 1943 in "Operation Gomorrah," a joint U.S.-British assault on Hamburg designed to reduce it to ashes. The numerous wooden buildings in Hamburg conduced to rapid combustion, and within a short time the city was an inferno. When Gomorrah had ended, 45,000 civilians had been incinerated; 13 square miles of the city were nothing but a charred ruin.40

The result of Allied bombing was a grave crisis in hospital space to accommodate the wounded. Already in 1941, possibly in response to the demolition of a hospital at Emden by British pilots, Hitler had charged his escort physician, Karl Brandt, "to designate evacuation hospitals for other cities that were in danger." Under U.S. Army
interrogation after the war, Brandt claimed that his new duties, modest at first, were significantly enlarged in 1942-1943—due most likely to damage caused by Allied bombing. On July 28, 1942, Hitler appointed Brandt “Commissioner for the Health Care System.” Brandt described his duties to his Army interrogator:

> The basic task of a general [Commissioner] meant the adjustment of the needs of the civilians for materials and physicians to the Wehrmacht sanitary needs and also space for hospital cases. This basic task could not be carried through after 1942 because on every one of these sides there was a greater need than materials available. This is why the adjustment always meant taking something away from somebody who had nothing anyway.\(^1\)

Brandt’s work as Commissioner for the Health Care System (which had really begun in late 1941) developed into an official program code-named *Aktion Brandt* (Operation Brandt). Under its auspices, mentally disabled patients were evacuated from psychiatric hospitals and clinics. The reason offered for their removal was to protect them from air raids. The chief of the T-4 Central Office, Dietrich Allers, dispatched evacuation orders to local mental hospitals throughout the Reich, stating that Brandt as General Commissioner was ordering the transfer of patients from psychiatric hospitals in areas “particularly endangered” by Allied bombing.\(^2\)

In our discussion thus far, we have seen that deception and camouflage were integral to National Socialist euthanasia from the very beginning. Operation Brandt was no different. Even as the authorities professed a concern for the safety of mental patients, these same patients were transferred to institutions in the occupied territories like Meseritz-Obrawalde or to Reich facilities such as Hadamar, Eichberg, and Kaufbeuren, where physicians and nurses killed them through starvation or overdoses of medication. The surrendering institutions themselves, rather than the T-4 experts in Berlin, typically chose patients for transport. The language in Allers’ evacuation order, like so much of
T-4’s practices, was calculated to mislead both the public and the surrendering institutions into believing that the transfers were undertaken in the patients’ interests. After the war, Allers admitted that exposure to bombing was a non-factor in the transports. In this manner, in early 1943 hundreds of patients were transferred from mental hospitals in the Rhineland to the General Government’s Kulparkov Asylum near Lvov and Warsaw’s Tvorki Asylum—thinly disguised killing centers for the mentally handicapped, in which all of these Rhineland patients died within one-and-a-half years.43

Many other disabled patients met the same fate during Operation Brandt. In 1943, Brandt carved out hospital space by evacuating the “Mahaneim” house in Bethel and transferring the patients to the Meseritz-Obrawalde asylum for killing. When the mental hospital in Bremen was damaged during an air raid in November 1943, Herbert Linden invited the Bremen director to transfer some of his patients to Meseritz-Obrawalde. Of the 341 patients sent there, one died en route; by February 2, 1944, 242 others were dead.44

With Operation Brandt, National Socialist euthanasia branched outward from allegedly “incurable” mental patients (the so-called Endzustände, or “terminal cases”) to embrace a variety of victim groups. As the war ground on, creating new problems for the German government within the Reich, the Nazis employed mass killing as an instrument of population policy. In the aftermath of the Hamburg incendiary bombings in late July 1943, for example, Hamburg women deranged by the trauma of the firestorm were transported to Hadamar, where, it is believed, they were all murdered. When a concerned parent sought information about his shell-shocked daughter at the Eppendorf
Hospital, he was told that she and others had “been transferred to less dangerous areas, in order to make room for victims of the Hamburg raids.” In addition to traumatized civilians, members of old-age homes became ensnared in the coils of Operation Brandt after the July bombing of Hamburg. They were transported to Neuruppin Mental Hospital and to Meseritz-Obrawalde for killing.45

B. Other Victims of “Euthanasia”: the “Asocials” and Eastern European Forced Laborers

Increasingly in the Third Reich, as the euphoria of the German Army’s initial conquests evaporated amid military reversals and sustained Allied bombing of German cities, murderous violence was employed to “solve” political, social, and economic problems facing the Nazi government. Many of the problems were related to population policy questions, particularly the need for army and civilian hospitals. Responding to these needs with an entrepreneurial sense of efficiency, the officials involved in Operation Brandt expanded euthanasia to include not only “incurable” mental patients but shell-shocked civilians as well—ostensibly in an effort to provide hospital space for injured but “curable” Germans. During the era of wild euthanasia, two additional groups became victims of the National Socialist killing project: the “asocials” (Asozialen) and sick eastern European laborers (Ostarbeiter).

The etymology of the word “asocial” in Nazi discourse about euthanasia clarifies this murky concept for the English-speaking reader. (As we explore its meaning in the Nazi thought world, we will have an uncanny moment of recognition, since the National Socialists’ linkage of “asociality” with mental illness was already present in the work of Cesare Lombroso, the late 19th Italian psychiatrist and father of criminal anthropology.)
In July 1940, as top-level discussions about drafting a euthanasia law were underway, the head of the Reich Security Main Office (RSHA), Reinhard Heydrich, was on hand as a participant in the talks. While the majority of those present argued the draft law should cover only incurably ill mental patients, Heydrich urged that it should also include social nonconformists. For Heydrich and the RSHA, the categories of incurable mental illness and social deviance were indistinguishable. Götz Aly has pointed out that the temporary name given to the legal draft, “Law on Euthanasia for those Incapable of Living and Alien to the Community,” captures Heydrich’s influence on the proceedings. The notion of being “alien to the community” is at the core of “asociality.” and thus itself requires elucidation.

The phrase “alien to the community” (gemeinschaftsfremd) was a sociological term commonly used at the time to describe deviant or socially noncomformist individuals. In 1945, a law regarding the Gemeinschaftsfremd was drafted but never enacted. It defined the concept as follows: “An ‘alien to the community’ is: 1. One whose personality and way of life render him incapable of fulfilling the minimum demands of the national community through his own efforts, especially as a result of extraordinary defects in judgment or character.” If this definition is vague, the law went on to make it more substantive, identifying unruliness, drunkenness, and laziness as “alien to the community.” Beggars, thieves, grifters, and criminals also fell into this category. On June 20, 1942 the Information Service of the Racial Political Office of the NSDAP issued a call to the Gau of Vienna to suppress its “asocials,” since they “represent an element of political unrest of the first order.” In the eyes of the Information Service, a person was an “asocial” who
1. as a result of impulses that are criminal, hostile to the state, and malcontented comes into conflict with the criminal law, the police and other authorities; or
2. . . . is averse to work (those living parasitically on social welfare, pension, or insurance, etc. despite ability to work); or
3. . . . continually seeks to burden public or private charitable organizations, the RGB, the WHW, with maintenance for himself or his children; . . . or
4. . . . is especially improvident and unscrupulous and out of a lack of a consciousness of responsibility has neither a settled household nor is able to raise his children to become productive members of the community [Volksgenossen]; or further
5. . . . spend[s] a substantial part of [his]income on alcohol and [is] so dominated by [his] habit that it threatens [him and his family] with ruin; or
6. [is a person] who earn[s] [his] living partially or entirely through immoral activities, i.e. prostitutes, pimps, immoral criminals [Sittlichkeitsverbrecher], homosexuals, etc..

The instruction sheet setting forth this capacious definition of “asociality” then affirmed the biological inferiority of “those incapable of community:”

The inheritance of decisive physical and psychological traits and characteristics which cause a person’s incapacity for community life [is biological]. There are studies which trace the incidence of incapacity for community life more than 10 generations into the past. These studies demonstrate why the many educational, meliorative, and medical strategies that liberalism has used with these people have met with little success."

The Information Service’s conception of social deviance as an unalterable, genetically predetermined phenomenon is typical of Nazi attitudes toward marginal social groups. At a meeting of government officials to discuss how to deal with the “asocials” in the Lower Danube Gau, Dr. H.W. Kranz, Gau Office Director of the NSDAP Racial Office, Gau Hessen-Nassau, followed the logic of biological determinism to argue for the “special treatment”—i.e., killing—of those “incapable of community” due to hereditary unfitness. He assured his listeners that this solution to the problem of social deviance “is justified in every way scientifically.”

Such attitudes permeated the upper echelons of the Nazi Party. Shortly after his appointment as Justice Minister on August 20, 1942, Otto Thierack assembled the leading members of Department V of the Justice Ministry (the office responsible for the criminal penal system). He informed them of Hitler’s complaint that “inferiors” were being
preserved in institutions while the flower of the *Volk* perished on the front. To correct the inequity, Hitler had decided to use prisoners as minesweepers and to work them to death. In the wake of this meeting, Thierack met with Goebbels and then with Himmler to discuss Hitler's wishes. Concerning his meeting with Goebbels on September 14, Thierack wrote: "Regarding the destruction of asocial life, Dr. Goebbels believes that Jews and Gypsies, Poles who have been sentenced to 3 or 4 years in jail, Czechs and Germans who have been condemned to death, life sentences, or protective custody, should be exterminated. The notion of extermination through work [*Vernichtung durch Arbeit*] is best." A few days later, Thierack met with Himmler on September 18, 1942, at Himmler's field headquarters in the Ukraine. They arrived at an understanding that "asocial" prisoners would be transferred to concentration camps and placed at the disposal of the armaments industry. The aim was, quite literally, to work them to death through heavy labor and inadequate nutrition.51

Pursuant to this agreement, in late October 1942, Thierack informed the directors of German prisons, prosecutors' offices, the chief attorney in the People's Court, and the presidents of state appellate courts in Graz, Innsbruck, Linz, and Vienna that all Jews, Gypsies, Poles, Russians and Ukrainians, German preventive detainees and prisoners were to be handed over for preventive detention by Himmler—a euphemism for transfer to a concentration camp. In November, Justice Ministry officials visited prisons throughout the Reich for the purpose of selecting "asocials" for transfer. Of the prisoners chosen, two-thirds were sent to Mauthausen, and from there many were transferred to the nearby concentration camp of Gusen. The death toll among these prisoners is staggering: of the 12,658 transferees, 5,935 (app. 47 percent) were dead by
April 1943. It should be emphasized here that the Justice Ministry officials charged with selecting prisoners for transport to the concentration camps were not medical doctors. One of them, a Dr. Hupperschwiller, selected patients based on the impression their appearance made on him: if they seemed cretinous or otherwise repugnant to him, he took note of their names.52

Nearly a year after the decision to exterminate prisoners through work had been made, on July 2, 1943 the Justice Ministry issued an order to send “criminally insane” patients to the concentration camps. Section 42 of the “Law Against Dangerous Habitual Criminals and Regulation of Security and Reform,” enacted on November 11, 1933, had supplied a basis for detaining “asocials” in psychiatric institutions if they were deemed by the courts to suffer from mental illness.53 Invoking sec. 42 of this law, on August 8, 1943, Herbert Linden of the Interior Ministry apprised directors of affected institutions that all patients institutionalized under the Detention Law were to be surrendered to the police authorities. Quite apart from “cleansing the institutions of undesired and destabilizing elements,” Linden wrote, the removal of the criminally insane would free up much-needed beds for German citizens. Again, the ideological impulse to blot out “valueless” life from the People’s Community intersected with the population policy need for medical resources. Once in police custody, the “criminally insane” were transferred to the Mauthausen concentration camp and Auschwitz. There they were subjected to hard labor; at Mauthausen, after the last ounce of stamina had been wrung from them, they were sent to the Hartheim killing center and gassed.54
Along with the "criminally insane," sick eastern European workers (Ostarbeiter) living in the Reich were caught up in the lethal nets of wild euthanasia. Beginning in late 1941, as hopes for a meteoric victory over the Soviets faded and the prospects of a long-term war of attrition took shape, the need for labor to sustain the wartime economy became acute. In response, Hitler deployed Soviet and Polish POWs and civilian workers throughout the Reich as forced laborers. Harsh living conditions and maltreatment, however, gave rise to epidemic disease among the Ostarbeiter. By 1944, substantial numbers of them were unable to work due to tuberculosis. With the Red Army closing in and fearing the spread of the contagion, German health authorities began sending these unfortunate people to facilities for killing. The problem of epidemic disease was an issue of population policy; destruction of the disease-bearing agents was the regime's solution. Between July 29, 1944 and March 18, 1945, 465 Ostarbeiter were given lethal injections at Hadamar; others were gassed at Hartheim. On September 6, 1944, the Interior Ministry gave an official imprimatur to these killings by decreeing that all eastern laborers incapable of work because of mental illness were to be sent to designated hospitals. This decree reflected the Nazis' tendency to blur distinctions between separate concepts; the Ostarbeiter targeted by the Interior Ministry were not mentally but physically ill. The regime had already equated "asociality" with mental illness; now, tubercular eastern workers were also identified with the mentally disabled. The logic of the Nazis' hierarchy of human value was playing itself out in the form of a murderous syllogism: since the mentally ill were "unworthy of life," they were to be killed; and since "asocials" and tubercular eastern workers were "mentally ill," they should be accorded the same "treatment."
The September 6 decree identified eleven state hospitals that would serve as “collection points” (Sammelstellen) for sick Ostarbeiter. They included notorious killing centers like Tiegenhof, Kaufbeuren, Maur-Öhling, and Hadamar. The T-4 Central Office under Dietrich Allers provided the transportation and financing for this new chapter in National Socialist “euthanasia.” By February 17, 1945, however, war conditions were such that the September decree was revised: henceforth, the patients were to be remanded to local mental hospitals responsible for areas in which the sick Ostarbeiter were located.57

There is an interesting prologue to this extension of the killing program to tubercular eastern workers. On May 1, 1942, Arthur Greiser, Gauleiter of the Warthegau (that portion of western Poland annexed to Germany), wrote to Himmler requesting authorization to “exterminate” around 35,000 tubercular Poles, whose illness threatened to infect the recently resettled ethnic German population. The calloused matter-of-factness with which Greiser broached this idea to Himmler shocks the reader fifty-eight years after the fact. As of the date of the letter (May 1942), Greiser admitted that killing “incurable” patients suffering from tuberculosis in “Germany proper” was “not possible.” The Warthegau, however, was a different story, and Greiser freely offered to “take the responsibility for any suggestion to have cases of open TB exterminated among the Polish race here . . . .” To Greiser’s request Himmler replied on June 27, 1942, saying he had “no objection” to giving tubercular Poles “special treatment,” but insisted that Greiser coordinate his actions with the Security Police “to assure inconspicuous accomplishment of the task.”58 Although Himmler later changed his mind at the instance of the Deputy Reich Health Leader, Kurt Blome (primarily out of fear for public 190
opinion and foreign propaganda), this exchange demonstrates how receptive Nazi policymakers were to using mass killing as a tool of population policy. By 1944, Greiser's earlier scruples about exterminating tubercular eastern workers within Germany proper had been overcome; they were murdered alongside the “asocials,” shell-shocked civilians, and the mentally handicapped.

C. Euthanasia and the Murder of the European Jews

Respected scholars of Nazi genocide regard the T-4 euthanasia program as an overture to the murder of the European Jews, conceptually, organizationally, and logistically related to that infamous event. “Euthanasia,” Raul Hilberg writes, “was a conceptual as well as technological and administrative préfiguration of the ‘Final Solution’ in the death camps.” Ernst Klee, describing the way in which Jews, Soviet POWs, Gypsies, and others were murdered at Chelmno (the first of the death camps on Polish soil), refers to the killing process there as “a copy of the euthanasia measures.”

Along the same lines, Henry Friedlander affirms an intimate link between the T-4 killings and the Final Solution:

The murder of the handicapped preceded the murder of Jews and Gypsies, and it is therefore reasonable to conclude that T4’s killing operation served as a model for the final solution. The success of the euthanasia policy convinced the Nazi leadership that mass murder was technically feasible, that ordinary men and women were willing to kill large numbers of innocent human beings, and that the bureaucracy would cooperate in such an unprecedented enterprise.

Postwar judicial authorities were also convinced of the relationship between the T-4 killing program and the Holocaust. In his opening statement at the Doctors Trial, U.S. Chief of Counsel Telford Taylor portrayed Nazi euthanasia as “a polite word for the systematic slaughter of Jews and many other categories of persons useless or unfriendly to the Nazi regime.” Taylor then alluded to a theme the prosecution would successfully
belabor throughout the trial, i.e., the assignment of T-4 personnel to construct and operate the death camps in the east.\textsuperscript{62} Similarly, German postwar trials of Nazi defendants often note connections between Nazi euthanasia and the Final Solution; in the words of one German court, "the personnel of the euthanasia centers, who were no longer required [after August 24, 1941],... already had experience in carrying out top-secret killing operations and had become accustomed to systematic mass slaughter."\textsuperscript{63} Their professionalism in mass murder had, in other words, made them ideal candidates for carrying out the Final Solution to the Jewish question. As August Becker, the T-4 gassing expert, related in his judicial testimony, "Himmler wanted to deploy people who had become available as a result of the suspension of the euthanasia programme, and who, like me, were specialists in extermination by gassing, for the large-scale gassing operations in the East which were just beginning."\textsuperscript{64}

Even before the beginning of the Holocaust, T-4 members were killing Jewish concentration camp prisoners based solely on their racial background. The murders occurred as part of an operation conceived and administered by the SS to reduce the mounting population of Germany's concentration camps. As they did in their assault on the disabled, "asocials," and sick eastern workers, the Nazis solved a problem of population policy through genocide. Aware of T-4's efficient work in the euthanasia program, Himmler had contacted in early 1941 the chief of the Führer's Chancellery, Philip Bouhler, about the possibility of using T-4's "personnel and facilities" to deal with the camp populations. The issue of their colloquy was a new killing program that began in April 1941, the "Sonderbehandlung (Special Treatment) 14f13." The term Sonderbehandlung, as we already know, is verbal camouflage for killing, a euphemism
widely used by the SS and police forces. The arcane term “14fl3” was a file number employed by the Inspectorate of the Concentration Camps, designating the annihilation of camp prisoners in T-4 killing centers. Victims of 14fl3 were prisoners of concentration camps administered by the Inspectorate. SS camp doctors selected the prospective victims based on an “official” criterion of incurable physical illness that rendered the individual incapable of work. Unofficially, these SS physicians received oral instructions (either from the Inspectorate or from SS couriers who visited the camps expressly to relay these instructions) to use racial and eugenic guidelines in making their selections. At Buchenwald, SS doctors were ordered to select the disabled, Jews, and prisoners with criminal records. The major criterion in every case, however, was fitness for work (although this standard, like all criteria that supposedly governed National Socialist “euthanasia,” was arbitrarily enforced). ¹⁶

Once the victims had been chosen, T-4 physicians arrived in the camps to proof the SS selections. These visits are reminiscent of similar trips made by T-4 employees to German mental hospitals to ensure that euthanasia was properly carried out. At least 12 T-4 doctors appeared in concentration camps as participants in 14fl3. They included Hans-Bodo Gorgass (Hadamar), Otto Hebold (Eberswalde), Werner Heyde and Paul Nitsche (successive chiefs of T-4’s Medical Office), Rudolf Lonauer (director of Hartheim and Niederhardt), Friedrich Mennecke (head of the Eichberg children’s ward), Robert Müller (Königslutter), Viktor Ratka (director of the Tiegenhof mental hospital), Horst Schumann (director of Grafeneck and Sonnenstein), Kurt Schmalenbach (assistant to Schumann at Sonnenstein), Theodor Steinmeyer (Warstein and Mühlhausen/Thüringia), and Gerhard Wischer (director of Waldheim). Each of these individuals
had extensive experience with T-4 as euthanasia medical experts (*Gutachter*). They arrived in the concentration camps either by themselves or as members of teams. Seated at tables, the T-4 doctors reviewed the prisoners selected by the SS as they were paraded before them. The SS had previously filled out questionnaires on every selectee, containing the prisoner's name, birth date and place, last residence, citizenship, religion, race, and date of arrest. As a prisoner walked past the table, the T-4 physician decided

<table>
<thead>
<tr>
<th>Camp</th>
<th>Opening date</th>
<th>Location</th>
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<tbody>
<tr>
<td>Dachau</td>
<td>March 1933</td>
<td>Town of Dachau near Munich</td>
</tr>
<tr>
<td>Sachsenhausen</td>
<td>Aug. 1936</td>
<td>Town of Oranienburg near Berlin</td>
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<tr>
<td>(Oranienburg)</td>
<td></td>
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<tr>
<td>Buchenwald</td>
<td>July 1937</td>
<td>City of Weimar</td>
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<tr>
<td>Flossenbürg</td>
<td>May 1938</td>
<td>Near city of Hof in Bavaria</td>
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<tr>
<td>Mauthausen</td>
<td>Aug. 1938</td>
<td>Near city of Linz in Upper Austria</td>
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<tr>
<td>Neuengamme</td>
<td>Dec. 1938</td>
<td>City of Hamburg</td>
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<tr>
<td>Ravensbrück</td>
<td>May 1939</td>
<td>Town of Fürstenberg north of Berlin</td>
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<tr>
<td>Wewelsburg</td>
<td>Jan. 1940</td>
<td>Near town of Paderborn, Westphalia</td>
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<tr>
<td>(Niederhagen)</td>
<td></td>
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</tr>
<tr>
<td>Auschwitz</td>
<td>May 1940</td>
<td>Town of Oswiecim in Upper Silesia (near Cracow)</td>
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<tr>
<td>Gross-Rosen</td>
<td>Aug. 1940</td>
<td>Town of Rogoznica in Lower Silesia</td>
</tr>
<tr>
<td>Natzweiler</td>
<td>July 1941</td>
<td>Near Strasbourg in Alsace</td>
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whether to uphold the SS determination to include the selectee in the operation. A plus sign (+) entered at the bottom of the form signified inclusion in 14f13. This cattle-call method of processing did not admit of time for a thorough medical exam. At Buchenwald, in fact, two T-4 doctors reviewed 873 prisoners in five days. As Mennecke confided to his wife about one such examination, the T-4 personnel did little more than rubber-stamp the SS’s selections. Nonetheless, they were obliged to give a “diagnosis” of the prisoner’s condition (unless such was already provided by the SS).^66

No such “diagnosis” was required with Jewish prisoners selected for liquidation in 14f13. Instead, justifications for inclusion were culled from personal records, especially arrest records; this data was then entered on the prisoner’s questionnaire. Mennecke, for example, recorded as “medical diagnoses” such characterizations from the personal records of Jewish prisoners as “anti-German agitator,” “lazy and indolent,” “anti-German behavior,” “vile Germanophobe,” “attitude hostile to the State,” etc.^67

Prisoners selected under 14f13 were subsequently transported to the euthanasia centers Bernburg, Hartheim, and Sonnenstein, which were all actively involved in killing the 14f13 prisoners. Prior to the stoppage ordered by Hitler on August 24, 1941, these institutions gassed both the mentally handicapped and 14f13 selectees; after August 24, the handicapped were murdered by overdoses of medication, whereas the 14f13 selectees continued to die in the gas chambers. 575 prisoners were murdered at Sonnenstein alone. By the time Himmler ordered the end of 14f13 in 1943 (on the grounds that too many prisoners capable of work were being liquidated), the operation had claimed the lives of between 10,000 and 20,000 prisoners.^68
14f13 was not the only nexus between Nazi euthanasia and the Holocaust. In a letter regarding “the solution to the Jewish Question” from Ernst Wetzel, an expert in the Reich Ministry for the Occupied Territories, dated October 25, 1941, to Heinrich Lohse, the Reich Commissar for the Ostland, Wetzel reported that “Oberdienstleiter Brack of the Führer’s Chancellery has indicated his readiness to assist in producing the required accommodations as well as the gassing equipment.” According to Wetzel, the “equipment” was not at that time available in the eastern territories, and thus had to be manufactured. Wetzel reported Brack’s apprehensions of the “many great difficulties” that would be occasioned if the equipment were produced within the Reich. To forestall such problems, Brack considered it “most expedient” to send his chemist Dr. Helmut Kallmeyer to Riga, “who would take care of everything there.” Since the “procedure under consideration” was “not without danger,” certain “protective measures” would have to be observed. Accordingly, Wetzel asked Lohse to have his Higher SS- and Police Leader (HSSPF) contact Brack about sending to the east both Dr. Kallmeyer “and other auxiliary resources.”

Among Holocaust researchers, this document has become known as “the gassing letter.” It was the smoking gun that implicated Viktor Brack at the Doctors Trial in the earliest planning stages of the Final Solution. In the letter, Wetzel asserts that Adolf Eichmann (Chief of the Gestapo’s Jewish Office and a primary implementer of the mass murder of the European Jews) was “in agreement with this procedure;” Eichmann had informed Wetzel that “camps for Jews were to be erected in Riga and Minsk, into which Jews from the ‘old Reich territory’ would also eventually come.” Jews were even then being evacuated from the Reich, Wetzel confided, and sent to the Litzmannstadt (Lodz)
ghetto and “to other camps;” later, these German Jews would be transferred to the east as slave laborers, “so far as they were capable of work.” Concerning those Jews deemed incapable of work, however, “there should be no second thoughts about removing them with the Brackian devices.” The thrust of this last sentence is clear: Jewish deportees to Riga and Minsk capable of work would be used as slaves, while those unfit for hard labor would be gassed. Recently discovered German documents from Moscow reveal that the SS had ordered a monstrous crematorium for Mogilev (in eastern Byelorussia, the site of carbon monoxide gassing experiments) that would incinerate in excess of 2,000 corpses per day. (Many of the materials ordered for use in this notional cremation site were later re-routed to Auschwitz.) These documents suggest, as Götz Aly has noted, that the Nazis may have been planning to erect a major extermination center for European Jews in Mogilev—a thesis that gains in persuasive power when read together with Wetzel’s gassing letter. In fact, due to military reversals on the eastern front and the obvious difficulties they posed to transports, the Jewish camps envisioned in Wetzel’s letter never materialized; instead, they were erected in former Poland.

The “Brackian devices” Wetzel referred to in his letter to Heinrich Lohse were gas vans. The Lange Commando, we will recall, had murdered the mentally disabled from Wartheland hospitals with these vans beginning in late December 1939-January 1940. In September 1941, after experiments with gas vans were conducted by KTI employee Albert Widmann (the poison gas supplier to the T-4 killing centers) in Mogilev, Himmler had ordered the KTI to engineer an “improved” gas van that would recycle the vehicle’s own motor exhaust into a sealed compartment. T-4’s gassing expert August Becker tested the new van at the Sachsenhausen concentration camp in the late
fall of 1941; thereafter, the new vans were manufactured and sent in early 1942 to assist the Einsatzgruppen in their war on the eastern European population. Even before their formal introduction to the USSR in early 1942, these “Brackian devices” were being used to murder Jews and other groups at the Nazis’ first death camp, Chelmno (German Kulmhof).

Chelmno was a tiny village in the Wartheland of 250 Polish inhabitants and Wolhynian ethnic German settlers (Volksdeutschen) engaged in farming. Situated on the Ner River, it lay 40 kilometers from Lodz and 100 kilometers from Posen. In October and November 1941, the Lange Commando was sent to this idyllic hamlet in the Polish countryside, where it established a camp with one purpose alone—the killing and cremation of human beings. By December 1941, Commando members were using gas vans to kill Gypsies, malarial patients, Soviet POWs, the mentally disabled, and even a group of Austrian World War I officers. By far the largest victim group murdered at Chelmno, however, was Jewish (particularly Jews from the Lodz ghetto). In its technique and style of execution, the Commando’s modus operandi was almost identical to the T-4 euthanasia killings. On arrival, the victims were told to remove their clothes for a shower. Supervised by members of the Lange Commando wearing the white coats and stethoscopes of doctors, the victims were herded down a flight of steps past a sign reading “To the Bath” and along a camouflaged ramp into a waiting gas van. When the full complement of victims had been loaded into the van’s interior, the doors were closed and a hose connected to the floor of the van was joined to the exhaust pipe. While in theory the victims were supposed to fall asleep painlessly and die from asphyxiation.
within ten minutes, the reality was other. Their shrieks could be heard from the van interior as they pounded frantically on the locked doors and walls of the van. The death throes of the victims could last for hours until they finally expired.\textsuperscript{72}

When the screams abated, the gas van departed the camp premises and drove to a wooded area, where Jewish prisoners were forced to unload the corpses. Victims who had miraculously survived the ordeal were shot on the spot. Body cavities were searched for objects of value, including gold teeth, which were torn from the corpses' mouths with a pair of pliers. After the dead had been looted, they were thrown unceremoniously into a mass grave. In this manner, at least 152,000 victims were murdered at Chelmno between 1941 and 1944.\textsuperscript{73}

While Chelmno was beginning the first systematic gassings of Jews and others at a fixed location, Himmler gave the Higher SS Police Leader (HSSPF) in Lublin (Poland), Odilo Globocnik, an order to initiate the mass murder of the Jews of central and southern Poland. (This new phase of National Socialist violence was code-named "Operation Reinhard" after Reinhard Heydrich of the RSHA, who died on June 4, 1942 from wounds suffered in an assassination attempt by two Free Czech agents). Globocnik thereupon erected three killing centers in the Lublin area of the General Government (that portion of Poland to the east of the Wartheland that was never formally incorporated into greater Germany). The three killing centers—Belzec, Sobibor, and Treblinka—became operational in late winter-early spring of 1942: Belzec from March 1942 to December 1943, Sobibor from April 1942 to October 1943, and Treblinka from July 1942 to autumn of 1943. In contrast with Chelmno, which murdered its victims in mobile gas vans, these
extermination centers employed a technique that had earlier proven successful in the T-4 killing centers—immobile gas chambers in which victims were asphyxiated with carbon monoxide gas.74

In addition to these three sites, Himmler designated two others to help expedite the new killing program. They were Auschwitz in Upper Silesia and the POW camp at Majdanek, a Lublin suburb. These two facilities were not, like Treblinka, Sobibor, and Belzec, pure extermination centers; they were hybrids that served both as concentration/labor camps and as killing factories. The extermination arm of Auschwitz, known as “Auschwitz II,” was at Birkenau, where over a million people were gassed with a pesticide used throughout the concentration camp system as a fumigation agent, hydrogen cyanide (better known under its trade name, Zyklon B). The first experiment with Zyklon B gassing was carried out on September 3, 1941 at Auschwitz; by 1942, the SS had converted two farmhouses in Birkenau into gas chambers, which were used to gas Jews and others until four gas chambers were installed there in early 1943. The idea of employing a stationary gas chamber was inspired by the example of the T-4 killing centers.75

The modus operandi of the Final Solution—gassing unsuspecting Jews in gas chambers disguised as shower rooms—was not the only continuity with Nazi euthanasia. At least ninety-two (and possibly as many as 100) T-4 operatives were assigned to the Operation Reinhard death camps. These individuals had been crematorium stokers, drivers, transport escorts and office personnel with T-4. Those without a military background were given a crash course in the Trawniki camp. All wore the field-gray uniforms of the Waffen-SS, receiving a rank no lower than Unterscharführer (a non-
commissioned officer rank within the SS); they were paid by the T-4 Accounting Office
in Berlin. The German prosecutor and expert on Nazi criminality, Adalbert Rückerl,
describes the interlocking relationship between T-4 and the death camps in Poland:

Almost all the German personnel of the death camps, including Inspector [Christian]
Wirth, the camp commanders and their deputies came from T-4 . . . Construction experts
from T-4 were extensively involved in building the camps. Leading functionaries from
T-4 (Bouhler, Blankenburg, Allers) frequently inspected the death camps. Functionaries
from T-4 delivered the eulogies for Germans killed during the prisoners’ rebellion at
Sobibor. Members of the camp staff applied to the T-4 offices in Berlin for leaves of
absence or recalls.6

T-4’s managerial staff was central to the efficient administration of killing centers in the
General Government. Christian Wirth, a former detective in the Stuttgart criminal police
(Kripo) and an active participant in the killing of mentally ill patients at Grafeneck,
Hadamar, Hartheim, and Brandenburg (where he carried out the first gassings of patients
and eventually became the institutional director), established the death camp at Chelmno;
thereafter, he was assigned to supervise with Odilo Globocnik the killing of 2 million
Jews at the Belzec, Sobibor, and Treblinka camps. Franz Stangl, the subject of Gitta
Sereny’s superb book Into That Darkness, was the “Police Superintendent” of Hartheim
before taking up duties as commandant of the Sobibor death camp in May 1942 (from
Sobibor, Stangl was transferred to Treblinka in September 1942). During one interview
with Gitta Sereny, he commented that the Sobibor gas chamber “looked exactly like the
gas chamber at Schloss Hartheim.”77 His successor at Sobibor was Wirth’s replacement
as office director at Hartheim, Franz Reichleitner. The first camp commandant at
Treblinka was Dr. Irmfried Eberl, director of the killing centers at Brandenburg and
Bemburg (in which he often signed correspondence with the pseudonym “Dr.
Schneider”).78
Gitta Sereny's study of Franz Stangl raises the question of why these 90-100 veterans of euthanasia killing were selected to carry out the Operation Reinhard liquidations in Poland. Sereny theorizes that they "were chosen very carefully from the ranks of the original four hundred T-4 personnel, for specific qualities observed during their 'apprenticeship' in the Euthanasia Programme." That the T-4 killers were chosen to administer the mass murders of Jews, Gypsies, and other victim groups should not be a surprise to us, especially in view of the history we have discussed. The T-4 employees were seasoned professional killers: they had proven their mettle in quietly disposing of nearly 80,000 German mental patients between September 1939 and August 1941 (a figure that does not include the death toll among handicapped children in the Kinderaktion). A rational person will choose the most effective means of accomplishing an important objective, whether it be appointing someone to argue an anti-trust case before a judge, perform delicate neurosurgery, pilot a sophisticated but experimental aircraft, or discreetly murder millions of people. The Nazis, rationalists using efficient means to achieve irrational ends, selected reliable and experienced killers to pursue their genocidal goals.80

In their work within Operation Reinhard, the T-4 killers must have surpassed their masters' expectations. In two years of operation (1941-42 and again in 1944), Chelmno murdered 152,000 people; in one year (1942), the Belzec camp killed 600,000. The Sobibor and Treblinka camps also required a single year (1942-43) to murder 250,000 and 900,000 people, respectively.81 By the time Operation Reinhard came to an end in November 1943, it had taken almost 2 million lives. Of the nearly 2 million people sent to Chelmno, Belzec, Sobibor, and Treblinka, only eighty-seven survived. Although
Auschwitz has become the infamous symbol par excellence of Nazi depravity, lethality among the four Polish death camps was actually much higher. Gerald Reitlinger has estimated that around 700,000 of the 851,200 Jews deported to Auschwitz were gassed at Birkenau (a mortality rate just over 82 percent);\textsuperscript{82} mortality rates at the four Polish killing centers, by contrast, were almost 100 percent. For efficiency in murder, the Nazis could not have made a better choice than the euthanasia killers.

When Operation Reinhard ended in November 1943, T-4 personnel (including Wirth and Stangl) were transferred to Trieste on the Adriatic coast to “make the provinces of Udine, Trieste, Görz and Pola Jew-free” (\textit{um die Provinz . . . judenfrei zu machen}).\textsuperscript{83} On the peninsula of San Saba, they converted a rice mill into a camp in which Jews (many of whom were either murdered on site or deported to Auschwitz) and Italian and Yugoslavian partisans were held. A T-4 bricklayer also constructed at San Saba a crematorium to dispose of corpses. The number of Jews, resistance fighters, and anti-fascists shot at the San Saba camp cannot be precisely calculated, but it is thought to be between 2,000 and 5,000 victims; the bodies were reduced to ashes in the makeshift crematorium, which were then stored in bags and thrown into the harbor of Trieste. As Nazi Germany drew its last breaths in April of 1945, the crematorium was dynamited. Regarding this terminal episode of T-4 mass murder on foreign soil, the \textit{Landgericht} (state court) Hagen in the postwar Sobibor trial commented that only the need to combat growing partisan action “prevented the ‘Final Solution’ in northern Italy.”\textsuperscript{84}
III. Some Conclusions: Between Structuralism and Intentionalism

“No, no, no. This was the system,” Franz Stangl, commandant of Sobibor and Treblinka, replied to Gitta Sereny’s question whether he could have used his command authority to reduce the rampant brutality in Treblinka. “Wirth had invented it. It worked. And because it worked, it was irreversible.” The metaphor that equates National Socialist mass extermination with a demonic and uncontrollable machine was repeated by a rare survivor of Treblinka, Richard Glazar:

This is something, you know, the world has never understood: how perfect the machine was. It was only lack of transport because of the Germans’ war requirements that prevented them from dealing with vaster numbers than they did; Treblinka alone could have dealt with the 6,000,000 Jews and more besides. Given adequate rail transport, the German extermination camps in Poland could have killed all the Poles, Russians and other East Europeans the Nazis planned eventually to kill.

One of the primary centers of “wild” euthanasia, the mental hospital at Kaufbeuren, seems to confirm Stangl and Glazar’s view of the killing process as an exquisitely designed machine of murder. When the American army occupied Kaufbeuren in April 1945, it did not immediately intervene in the day-to-day operations of the mental hospital. By July, rumors were trickling into U.S. army offices in Munich that patients were being killed at the Kaufbeuren facility. Army members sent to investigate these claims discovered that the staff had indeed continued to murder patients after Germany’s surrender. On May 29, 1945, the last T-4 victim, a four-year-old boy, was killed by the staff in the Kaufbeuren children’s ward, his death dutifully recorded by the institution’s director as resulting from “typhus.” Amidst the rubble of the Third Reich, environed by the soldiers of an enemy nation, the “euthanasia” machine, set in motion in 1939, still ground on.
The metaphor that equates Nazi killing with a machine would seem, however, to preclude individual agency and responsibility. A purely structural conception of Nazi criminality deprives perpetrators of autonomy and thus of legal and moral liability for their actions. Mass murder may have developed an internal dynamic that pushed the killing program outward from the “incurable” mentally ill to Jews, Gypsies, “asocials,” and eastern European workers; but in every case, it was a human hand that pulled the trigger or opened the gas valve, a human hand that incinerated the corpses or certified false causes of death. Human beings conceived these programs of destruction, issued the orders to implement them, and carried them out. “In the final analysis,” Gitta Sereny declares, “history is not made by organizations, but by individual men, with individual failings, and individual responsibilities . . . . everything that is done is done by individual men and women with individual powers of decision.”

The smooth, machine-like quality of the killing process described by Stangl and Glazar may reside less in a de-personalized system of destruction than in the system’s remarkable success in mobilizing the creativity and innovativeness of its participants. Adolf Hitler never delineated the specific form that the euthanasia program should take. Instead, he provided the general policy goal and left it to the ingenuity of his underlings to develop suitable instrumentalities to achieve it. The history of Nazi euthanasia vividly demonstrates the entrepreneurship of the genocide—its frightful ability to conjure and harness the creative strivings of its middle-level managers, all of whom, to borrow a phrase from Ian Kershaw, were “working towards the Führer” by deploying their own talents and initiative to fulfil Hitler’s wishes. The Nazis’ effectiveness in summoning and coordinating the entrepreneurial prowess of those charged with carrying out the
regime’s genocidal plans may lend the process of destruction an appearance of machine-like impersonality. In fact, the whole enterprise hinged upon the entrepreneurial zeal of individuals. At all levels, whether of upper-echelon policymakers, middle-management functionaries, or rank-and-file workers, men and women in Germany said “yes” to state-organized programs of mass homicide. The consensus among modern-day Holocaust researchers is that Nazi genocide evolved gradually through “cumulative radicalization,” culminating in late 1941 in the decision to annihilate the Jews of Europe. This widely-accepted thesis is a tenable one, but I believe it obscures the violence inherent within the National Socialist leadership as early as the 1920’s. We will recall Hitler’s grimly prophetic suggestion in 1929 that current fiscal problems associated with the care of the mentally disabled could be solved by wiping out a million of them. Violent speech of this stripe, as I aimed to show in chapter 1, has a history in Western thought independent of National Socialism. In Hitler, however, murderous violence toward “life unworthy of life” ceased to be mere verbal threat and became a matter of state policy.

“Cumulative radicalization” is a defensible theory to describe the idea of exterminating the European Jews as the product of a gradual evolution over time, rather than of a longterm plan realized at the first possible opportunity. In talking about the Nazis’ war on the disabled, however, it may be more illuminating to consider a process of “cumulative violentization” (i.e., socialization of specific individuals to resort to violence in pursuit of policy goals). On this theory, the views of proponents of eugenic violence against “unworthy life,” relegated to the periphery in earlier decades, moved into the
mainstream of socio-political discourse and praxis in the 1930's and 1940's. The term “violentization” is preferable to “radicalization” because it emphasizes the progressive invocation of violence—from sterilization to euthanasia—by a political movement that was from its very inception radical. The increasing acceptance—and approval—of violent solutions to the problem of mental illness was made possible by this “violentization” of German political culture, particularly the technocratic middle-level professionals within the state service.*

After the fall of Nazi Germany in the Spring of 1945, the forces of military occupation confronted the prodigious destruction this process of violentization had wrought. In the dingy confines of German mental hospitals, in the charnel houses of the concentration and death camps, the advancing armies had uncovered the corpse-strewn highway to the Nazis’ biological utopia. The awful tale of Hitler’s assault on the human race was told in the physical bodies of both the dead and the living. It could be read from the tumuli of emaciated corpses that had once been healthy human beings, or from the gaunt, disease-wracked frames of the survivors. Many of the men responsible, like Hitler, had already eluded justice through suicide. Others, like Himmler, Bouhler, Leonardo Conti, and Herbert Linden would take their lives in the months following the end of the war. It fell to the Allies, guided by international law and a nearly universal

* These include the bureaucratic organs complicitous in the regime’s killing projects, e.g., the various offices of the RSHA (SD, Sipo, Kripo, and the Gestapo), Linden’s office within the Interior Ministry, the SS, the military medical services, local provincial health ministries, the Führer’s Chancellery, and elements within the German army. My argument is not that all individuals within these organizations shared Hitler’s maniacal anti-Semitism and biologistic ideology. The point, rather, is that many of them were ready and willing to deploy murderous violence on behalf of the ideological goals of the Party elite—whether or not they were “true believers” in the Nazi world-view.
revulsion against the grisly handiwork of Nazi genocide, to reckon with the remaining
entrepreneurs of mass death. We take up the United States’ judicial encounter with the
euthanasia killers in the next chapter.

NOTES

1 Auszug aus dem Urteil gegen SS-Sturmbannführer Kurt Eimann vom 20.12.68 (2 Ks2/67), excerpted in
2 Klee. Dokumente, pp. 71-72. The procedure followed here by the Eimann Commando is hauntingly
similar to that of the Reserve Police Battalion 101 in the massacres of Polish Jews at Jozefow and Lomazy.
See Christopher R. Browning, Ordinary Men, pp. 55-87.
3 H. Friedlander, Origins, p. 137.
5 In 1941, 464 patients of the Psychiatric Hospital in Choroszcz (near Bialystok) were shot in a nearby
wooded area by German army soldiers. Hauptkommission zur Untersuchung der deutschen Verbrechen in
Polen, excerpted in Klee, Dokumente, p. 74.
6 Klee. Dokumente, pp. 72-73.
See also Klee. Dokumente, p. 69.
8 See H. Friedlander, Origins, pp. 137-138. Lange was another sinister character in the euthanasia
program, whose career merits comparison with that of the T-4 operative Christian Wirth. Both men were
commissars of detectives (Kriminalkommissare) heavily involved in murdering patients in the early years
of the war before assignment to the Third Reich’s death camps in occupied Poland. In late 1941, Lange’s
Kommando built and administered the first death camp at Chelmno in the Wartheland.
geisteskranker Polen,” excerpted in Klee, Dokumente, p. 80.
10 The Higher SS and Police Leader (Der Höhere SS- und Polizeiführer, or HSSPF) in Posen, Wilhelm
Koppe, was told in a conversation with Himmler’s personal advisor, SS-Standartenführer Rudolf Brandt,
that Brack was even then conducting experiments with carbon monoxide gas, and that Brack intended to
conduct a similar experiment in the Wartheland. One wonders if Lange’s gassings at Tienenhof may have
been the Wartheland “experiment” Brack desired. Aussage Koppe vor dem OstA in Bonn. am 2.2.60 (18
12 H. Friedlander, Origins, p. 140.
13 On the organization and structure of the RSHA, see Raul Hilberg, The Destruction of the European Jews.
Volume 1 (New York: Holmes & Meier. 1985), pp. 275-290. The concrescence of party members and
civil servants in the RSHA, represented by Sipo and the SD, respectively, was fatal for the eastern
European victims of the “Final Solution,” as Raul Hilberg writes: “The fusion of these two elements in the
RSHA was so complete that almost every man could be sent into the field to carry out the most drastic Nazi
plans with bureaucratic meticulousness and Prussian discipline.” Hilberg, p. 275.
14 Hilberg, Destruction, pp. 280-281.
16 Hilberg, Destruction, p. 286.
17 The conceptual difference between “Jews” and “partisans” was often elided in Nazi thought. Exhorting
his troops to deal more harshly with partisans, Field Marshall Reichenau ordered the Sixth Army to employ
“harsh but just countermeasures against Jewish subhumanity.” Such measures, he explained, would thwart
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Jewish efforts to foment uprisings against German troops behind the eastern front. The commander of the 11th Army, von Manstein, approved of Reichenau’s order, claiming that Jews were intermediaries between the Soviet Army and saboteurs in the army rear areas. Hilberg, p. 322.

22 Ereignismeldung Nr. 135, vom 19.11.41, quoted in “Euthanasie,” p. 368.
26 Quoted in Hilberg, Destruction, p. 332.
27 Supra, chapter 2, p. 128.
29 H. Friedlander, Origins, p. 142.
32 Hilberg, p. 334.
34 Klee, Dokumente, p. 283.
35 Klee, Dokumente, pp. 283-287.
37 Testimony of Karl Brandt, NARA, RG 238, M887, p. 2532.
39 On the theme of T-4’s continued involvement in killing after the alleged stoppage, see Klee, “Euthanasie,” p. 441; H. Friedlander, Origins, p. 155. While some T-4 defendants (such as Viktor Brack) insisted on a complete cessation of euthanasia as of August 24, other postwar defendants, like the T-4 doctor Walter Schmidt at Eichberg, conceded that the centrally planned murder of patients was in fact carried out after that date under the code name Aktion Brandt. See Klee, “Euthanasie,” p. 441.
41 Interrogation of Karl Brandt, NARA, M 1270, Roll 2, pp. 0285-0286. See also Direct Exam of Karl Brandt, NARA, RG 238, M 887, Roll 4, pp. 2315-2316.
42 Letter from Dietrich Allers to the Mental Institution Lüneburg, dated June 17, 1943, quoted in Klee, Dokumente, p. 284.
43 Aly, “Medicine Against the Useless,” p. 84; Klee, Dokumente, p. 284.
46 Aly, “Medicine,” pp. 57-58. While most of those present at the discussion dissented from this view, the euthanasia doctors agreed with Heydrich. Dr. Irnried Eberl, director of the killing centers at Brandenburg and Bernburg and commandant of the Treblinka death camp, remarked on the draft law that “of course, all criminals requiring institutional detention are also covered by this law.”
53. See supra, chapter 2, pp. 102-03.
58. NARA, RG 238, M 887, Roll 1, pp. 747-758.
62. NARA, RG 238, M 887, Roll 1, p. 61.
65. H. Friedlander, Origins, pp. 143-144.
68. H. Friedlander, Origins, p. 150. The gassings of concentration camp prisoners under Operation 14f13 resumed in 1944. At the Hartheim killing center, they continued until November of the same year.
70. Klee, Dokumente, p. 272.
77. Sereny, p. 109.
83. Statement of T-4 photographer Franz Suchomel, quoted in Klee, Dokumente, p. 263.

H. Friedlander, pp. 162-163.


The term “violentization” is a neologism coined by criminologist Lonnie Athens. I have borrowed the term without the specific content Athens attaches to it in his theories of violent criminal behavior.
CHAPTER 4
CONSTRUCTING MASS MURDER: THE UNITED STATES EUTHANASIA TRIALS, 1945-1947

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

Preamble to the 1907 Hague Convention (the “Marten’s Clause”)

In the face of the empire of corpses deeded to the Allied armies—and to history—by the Nazi killers, reactions did not take a contemplative turn. A nearly universal revulsion against the enormities of National Socialism characterized the temper of world opinion. In such a climate, nuanced arguments about the legality of punishing the offenders did not find a receptive audience. “All these arguments,” M. Cherif Bassiouni, the noted international law scholar, comments, “paled in comparison to what had happened. Indeed this was a case in which the facts drove the law; more specifically they drove the making of the law and its exclusive application to the vanquished, irrespective of what the victors had themselves done.” Atrocities on such a scale had never before been seen; their novelty in human history ensured that the international law in existence at the time of their commission had not anticipated them (nor could it have) with any
degree of specificity. This fact would dog the postwar trials for years to come, fostering the objection that prosecuting Nazi defendants in the absence of a preexisting statutory proscription of their actions was ex post facto law and "Victor's Justice."

Yet, the tidal wave of horror at the magnitude and cruelty of National Socialist mass murder overwhelmed legal niceties as demands for punishment mounted in the postwar period. Writing in 1947, the German jurist Hans Kelsen declared that "justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force." The perception that the Nazi perpetrators must be held legally accountable for their crimes was visceral, rather than reflective. In his Report to the President dated June 6, 1945, the chief U.S. prosecutor, Supreme Court Justice Robert H. Jackson, identified the "instincts" of the American people as the test for what constituted a Nazi crime: whatever conduct "outraged the conscience of the American people" would be deemed a prosecutable offense. The thirst for vengeance was particularly acute among the nations of Western and Eastern Europe that had experienced the unmitigated fury of National Socialist brutality. At the Yalta Summit in April 1945, Churchill had suggested to Stalin that a list of the "grand criminals" be compiled, who were to be arrested and shot after establishing their identity. Churchill had grounds for thinking his proposal would strike a responsive chord in Stalin: during their meeting at Teheran in November 1943, Stalin had proposed that after the war the Allies should decapitate the German army by executing 50,000 of its officers and technicians. While reasons for summary execution in both the Russian and the British cases were proffered—the Soviets favored it in order
to emasculate the German army, the British in order to avoid a costly and logistically formidable trial—there can be little doubt that a yearning for revenge informed their attitudes.

Summary executions, of course, did not take place. Instead, the Allies organized the world’s first international court to adjudicate charges that the “major war criminals” violated the basic principles of “civilized peoples” throughout the world. Much of this _jus cogens_—fundamental norms of behavior to which all nations are subject regardless of their positive law—remained implicit in the Allies’ assumption of personal jurisdiction over Nazi defendants. They tapped the centuries-old customs and usages of war, as well as international accords like the Geneva and Hague Conventions, to create a jurisdictional basis for adjudicating Nazi crimes.

In this chapter, we begin with an overview of the historical sources of U.S. jurisdiction at Nuremberg. For the non-lawyer, there would seem to be few obstacles to punishing Nazi war criminals. In many cases, the evidence of their guilt for abominable acts of racial and political murder was abundant. Why, then, bother with jurisdictional theories to justify prosecuting them? The answer is that the main planners of the postwar trials on the U.S. side were either practicing lawyers (Murray Bernays, Francis Biddle, Robert Jackson) or men attuned to legal principles of criminal liability (Henry Stimson, Edward Stettinius). While the layperson’s intuition does not regard jurisdiction as a problem, for the lawyer the soundness of a jurisdictional basis to support prosecution is an absolute precondition to trial. In Western (that is, primarily European) jurisprudence, in fact, criminal liability requires that a preexisting law define with specificity the prohibited conduct (_nulla crimen sine lege_). In the absence of such a law, no action, no
matter how offensive or odious, can be prosecuted and punished as a crime. It was thus
not enough that Nazi criminality deeply offended the moral conscience of the civilized
world; in order to hold Nazi war criminals legally accountable, a preexisting legal order
violated by the defendants had to be adduced. When the indictment against the
Nuremberg war criminals charged them with violating “the uses and customs of war,” it
was implicitly referring to a centuries-old collection of principles acknowledged by all
“civilized” peoples as binding on them, restraining them from the worst outrages in their
conduct of war. The gross flouting by the Nazis of this international corpus of laws,
customs, and practices established the ground for U.S. jurisdiction over National Socialist
crimes, including those of the euthanasia defendants.

In the first section of the present chapter, we review these “uses and customs of
war” as they evolved in the history of warfare. Without a basic understanding of the
“laws of armed conflict,” as they came to be known, we would be unable to grasp how
the American administrators of postwar justice conceived of their legal right to try and
punish Nazi offenders. Although the crimes of the euthanasia defendants had been
committed primarily on German nationals by the German government, hence falling
outside the traditional purview of international war crimes (which were typically
committed by one country on the soldiers and civilians of another), the Americans
grounded the euthanasia program in the Nazis’ plan to wage aggressive war. In this
manner euthanasia crimes, though technically styled “crimes against humanity” rather
than “war crimes,” were still considered violations of the Laws of Armed Conflict.

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We then consider the historical background of the American trials as they crystallized during the war. The road to the United States' participation in Nazi war crimes trials as *primus inter pares* was a long and tortuous one. In the years prior to World War II, the U.S. had long resisted international criminal tribunals as threats to its own national sovereignty. Paradoxically, the Americans emerged in 1945 as the most ardent champions of postwar trials to punish the crimes of the Third Reich. The process by which this inversion came about requires explanation. As we will see, the American Army's abrasive encounter with Nazi criminality, the extreme nature of that criminality, and the lobbying efforts of numerous central and eastern European emigres during the war all contributed to making the United States the foremost adherent of postwar trials. In the course of our discussion, we will also see how the early commitment of U.S. war crimes trial planners to a theory of conspiracy as the glue holding together its case against Nazi defendants came to dominate the Americans' approach to the regime's criminality in both the International Tribunal and the Doctors' Trial proceedings.

We next explore how the American judicial authorities constructed their ideas about euthanasia criminality in two proceedings: the Hadamar trial before a military commission (October 1945) and the Medical Case against doctors and high-ranking policymakers involved in the euthanasia program (December 1946-August 1947). The Americans early on viewed euthanasia as the direct result of the Nazis' efforts to launch aggressive wars to bring all of Europe under German hegemony. On the American theory, euthanasia was a way to free up medical resources for use by the German army in its conquest of Europe. By connecting the destruction of "life worthy of life" with the conduct of a criminal war, U.S. authorities were able to justify the prosecution and
punishment of acts that the Americans feared might otherwise be considered part of the Third Reich's domestic policy. In short, the war connection enabled the Americans to uphold the principle of sovereignty, and to do so as they passed judgment on a euthanasia program that, in its original design, targeted only German nationals. The linking of euthanasia with the waging of aggressive war is the most salient feature of the United States' approach to euthanasia criminality, and indicates the determinative impact of non-juridical factors on the American euthanasia trials, and indicates the determinative impact of nonjuridical factors on the American euthanasia trials.

Finally, we will consider the truthfulness of the American interpretation of Nazi euthanasia. Was it driven, as U.S. policymakers and jurists claimed, by the desire to reallocate material resources from "useless eaters" to German soldiers and bombed-out civilians? Or was discourse about hospital space empty rhetoric that both masked and legitimated the real reason for euthanasia—an ideological zeal to stamp out those who did not fit into the ideal of the people's community: the crippled, the ill, the biologically impure? I suggest in the chapter's conclusion that the latter interpretation best conforms to the evidentiary record. With reference to the work of German criminologist Herbert Jäger, I argue that identifying the needs of the war economy as the cause of euthanasia mistakes the legitimating shadow for the real substance of the crime. That substance is nothing less than the racial ideology of "valuable" and "worthless" human life.

I. The Historical Roots of the American Trials

For millenia, civilizations across the world have recognized the need to limit or forbid excessive force against combatants and non-combatants alike. The Chinese scholar Sun Tzu and the Indian Book of Manu both enjoined good treatment of war
captives during the 4th century B.C.E. Herodotus characterized the slaughter of Persian envoys by the Athenians and Spartans as “a transgression of the [laws of men], as a law of the human race generally, and not merely as a law applicable exclusively to the barbarians.” Nor was this only Herodotus’ own opinion; the Persian king Xerxes refused to retaliate against the Greeks by killing their envoys, since such action “violated the law of all nations, . . . and that he would not do the very thing which he blamed in them.” A similar conception of an overarching, transcendent law developed in the Roman Republic. The jus civile was a corpus of statutes and customs binding on Roman citizens, designed to protect their property and lives, adjudicate disputes, and indemnify victims. The inapplicability of the jus civile to foreigners and non-citizens within Rome’s jurisdiction forced Roman judges (praetors) to invent law in situations where no precedent existed to guide them. Consulting their own inward sense of justice, they forged a body of law that would govern cases involving Romans and foreigners, the jus gentium (law of the peoples), which laid the cornerstone for a universal theory of law binding on all peoples. The jus gentium culminated in the late Republic in the Stoic conception of jus naturale (natural law), apprehensible to the citizens of nations everywhere through the use of reason.

In the Medieval era, St. Thomas Aquinas invoked the jus gentium to condemn maltreatment of the sick, wounded, POWs, and civilian noncombatants. For Aquinas, as for the Roman natural law theorists, reason could deduce these principles from the “natural law.” Such ideas, scattered among the writings of iconic thinkers in the ancient world, resonate in the words of the eminent 18th century Russian diplomat and jurist,
Georg F. Martens (eponym of the “Martens Clause” in the Preamble to the 1907 Hague Convention):

But our right to wound and kill being founded on self-defense, or on the resistance opposed to us, we can, with justice wound or take the life of none except those who take an active part in the war. So that, children, old men, women, and in general all of those who cannot carry arms, or who ought not to do it, are safe under the protection of the law of nations, unless they have exercised violence against the enemy.⁸

Muslim civilization also condemned excesses committed in warfare. Basing his teachings on the Qu’rán and the Sunna, Caliph Abu Bakr adjured the Muslim Arab army in 634 C.E. to refrain from killing noncombatants, destroying productive trees or animals, or molesting monks in enemy territory. The writings of late Medieval and early modern canon law scholars reflect the influences of these Muslim prohibitions, suggesting that at least some Western notions of restricting martial violence are of Islamic provenance, imparted to the European culture of the Middle Ages during the Crusades and in the period of Muslim conquests in Spain, southern France, and southern Italy.⁹ The Medieval code of chivalry may also reflect such influence. Elaborated by heraldic courts and enforced by Christian princes in their own forums, chivalry was a set of injunctions and prohibitions designed to regulate a knight’s behavior in warfare. Its creators sought to protect noncombatants and POWs. The Oeuvres de Froissart describe one incident during the siege of Limoges in 1370 illustrative of chivalry in practical application:

Three French knights, who had defended themselves gallantly, seeing at length no alternative to surrender, threw themselves on the mercy of John of Gaunt and the Earl of Cambridge. “My Lords,” they cried, “we are yours: you have vanquished us. Act therefore to the law of arms.” John of Gaunt acceded to their request, and they were taken prisoner on the understanding that their lives would be protected.¹⁰

Shakespeare registers similar ideas in Henry the Fifth. Appalled by Henry’s decision to kill French POWs, the King’s Captain Fluellen complains: “Kill the poys and the
luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery . . . as can be offer'd."\textsuperscript{11}

As an heir and interpreter of this tradition of limiting the mayhem of armed conflict, Hugo Grotius believed it was possible to delineate the scope of permissible conduct in warfare with resort to natural law:

[Consider] both those who wage war and on what grounds war may be waged. It follows that we should determine what is permissible in war, also to what extent, and in what ways, it is permissible. What is permissible in war is viewed either absolutely or in relation to a previous premise. It is viewed absolutely, first from the standpoint of the law of nature, and then from that of the law of nations.\textsuperscript{12}

The notion that the "law of nature" (from which principles limiting the violence of war were said to be derived) could be divined through the use of reason was, as we have seen, a hoary one traceable to Classical Greece and the Roman Republic. It is little wonder, then, that the rationalist culture of the Enlightenment found such ideas attractive and compelling. Reason, Jean-Jacques Rousseau argued in \textit{The Social Contract}, proved the validity of these principles, requiring participants in armed conflict to heed them:

Since the aim of war is to subdue a hostile State, a combatant has the right to kill the defenders of that state while they are armed; but as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they become simply men once more, and no one has any longer the right to take their lives. It is sometimes possible to destroy a state without killing a single one of its members, and war gives no right to inflict any more destruction than is necessary for victory. These principles were not invented by Grotius, nor are they founded on the authority of the poets; they are derived from the nature of things: they are based on reason.\textsuperscript{13}

These sentiments notwithstanding, the "law of nations" did not achieve a programmatic expression until the mid-19\textsuperscript{th} century, when a Swiss businessman, Henry Dunant, witnessed with horror and pity the spectacle of wounded soldiers left to suffer and die on the battlefield after the Battle of Solferino (1859). Three years later, Dunant called for an international treaty on humane treatment of war casualties in a pamphlet, \textit{Souvenirs de Solferino}. Dunant's proposal met with broad-based acclaim, inspiring the
first in a series of Geneva Conventions—the Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field, ratified on August 22, 1864. Dunant’s ideas led to the formation of a Swiss committee to discuss how they might best be translated into practice. This committee became the nucleus of the International Committee of the Red Cross.¹⁴

Thus far, we have explored the intellectual history of "war crimes" as acts contravening the “law of nations,” a form of natural law, discoverable by reason, alleged to be recognized by—and binding on—the world's nations in their armed conflict with other countries. The gravamen of the charges against the euthanasia doctors at Nuremberg, however, was not war crimes per se, but another theory of criminal liability, one that had fewer precedents in world history than war crimes—viz. “crimes against humanity.” Although crimes against humanity are not synonymous with war crimes, they were firmly anchored to war crimes in the minds of the American judges and prosecutors at Nuremberg. In the mid-1940’s Robert Jackson, the U.S. Chief of Counsel for War Crimes who spearheaded the Americans’ prosecution of the major war criminals before the IMT, appropriated the term “crimes against humanity” from Hersh Lauterpacht, a professor of international law at Cambridge University and an early advocate of prosecuting crimes committed against the European Jews, to denote crimes of racial or religious persecution. The embryo of crimes against humanity as a distinct category of criminality, however, was imbedded in a landmark fin-de-siecle document: the Preamble to the First Hague Convention of 1899 on the Laws and Customs of War (enlarged in the Fourth Hague Convention of 1907) and the annexed Regulations Respecting the Laws and Customs of War on Land. The Preamble to the 1899 and 1907
versions refers explicitly to "laws of humanity" that afforded protection to "populations and belligerents" not specifically covered by the language of the Conventions. Thus, while the Hague Conventions of 1899 and 1907 dealt primarily with "war crimes," their jurisdiction over such acts derived from a larger, more capacious source called "laws of humanity." According to the framers of the Hague Conventions, this linguistically nebulous term would extend to "unforeseen cases" not anticipated in its enumerated instances of wrongdoing. The vital paragraph of the Preamble, reproduced as an epigraph to this chapter, contains the "Martens clause," named for its drafter, the Russian diplomat and jurist Fyodor Martens. The thrust of the Martens clause is that "general principles" may be used as a gap-filler to cover acts formally outside the delineated scope of the Conventions. Article 22 of the Hague Regulations presupposes these "general principles" in its assertion that "the right of belligerents to adopt means of injuring the enemy is not unlimited."

Crimes against humanity are therefore predicated on a transnational "law of humanity" observed among all civilized nations throughout history. The phrase "crimes against humanity," however, did not enter the vocabulary of international law until 1915, when France, Russia, and Great Britain jointly condemned the Turkish government's slaughter of its Armenian population, calling such killings "crimes against civilization and humanity" and warning that the perpetrators would be legally accountable for their acts. This language was not incorporated into the Treaty of Versailles ending the First World War in 1919, nor in any of the other treaties brokered between the Allies and the Central Powers (the Treaty of Neuilly-sur-Seine, the Treaty of St. Germain-en-Laye, and the Treaty of Lausanne), despite the recommendations of a special commission formed at
Paris to discuss the issue of war crimes, the Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties. The U.S. secretary of state, Robert Lansing, chaired the committee. Internal dissension fractured the Commission as it deliberated on how to deal with war criminals. The British and French members urged formation of an international tribunal to try war crimes cases. The U.S. Commission members, led by Lansing, vehemently opposed this suggestion, arguing that there was no precedent for such a tribunal. U.S. objections notwithstanding, the Commission issued its Majority Report on March 29, 1919, recommending that a “High Tribunal” be formed to adjudicate “violations of the laws and customs of war and of the laws of humanity.” This recommendation was qualified by objections attached to the Report by the U.S. and the Japanese. Other U.S. representatives in Paris made common cause with Lansing in his stand against an international tribunal; they demurred not only to the very idea of an international forum for trying war crimes cases, but also to charging defendants with offending “the laws of humanity.” The dissidents pointed out that the Commission of Responsibilities had been established only to discuss breaches of the law of armed conflict, not violations of the “vague” and dubious “laws of humanity.” Moreover, they scotched the idea of an international tribunal, arguing that national trials by countries prejudiced by infractions of the “laws and customs of war” would suffice to punish the guilty.¹⁶

The Americans did not at first get their way. In the teeth of their dissent, the drafters of the Treaty of Versailles included four articles on war crimes, which became an official part of the Treaty when it was signed in May of 1919. Articles 227, 228, 229, and 230 contemplated a trial of Kaiser Wilhelm by an international tribunal and the
prosecution of war crimes suspects by military courts in individual Allied nations. These trials proved to be still-born, since the Dutch government refused to extradite Kaiser Wilhelm in 1920. Prosecution also ran afoul of the growing backlash against the articles in Germany, fueling Allied fears that pursuing war crimes trials against German defendants would only further discredit and destabilize the precarious Weimar government—a government already accused by the political right of “stabbing Germany in the back.” The Allies accordingly agreed to allow the Germans to prosecute their own defendants in the Reichsgericht (German Supreme Court, forerunner to the present-day Bundesgerichtshof) in Leipzig, thereby scuttling the idea of an international tribunal.\textsuperscript{17}

If the spirit of the Versailles Treaty’s articles on postwar prosecution was sapped by compromise, a parallel fate befell the first treaty between the Allies and Turkey, the ill-starred Treaty of Sévres. The original version of this treaty, signed on August 10, 1920, required the Turkish government to acknowledge the Allies’ right to prosecute and punish Turks involved in the Armenian massacre. Article 228 reserved to the Allies the power to establish their own court for the purpose of trying such cases. Clearly, the Treaty of Sévres envisioned an international trial of defendants premised not on war crimes, but on crimes against humanity as they would later be defined in the London Charter (the document that would furnish the legal basis for the International Military Tribunal at Nuremberg). The distinction between the two is an important one: war crimes are violations of the “laws and customs of war” committed in connection with military operations on the persons or property of another nation; further, as stated in a draft directive on the subject prepared by the U.S. Joint Chiefs of Staff in August 1944, war crimes “do not include acts committed by enemy authorities against their own
nations. Crime against humanity, on the other hand, do extend to crimes perpetrated on one’s own citizens if deemed to be in violation of the law of nations. The distinction here is crucial, inasmuch as the Allies could not have prosecuted Turkish defendants for war crimes against the Armenians because the latter were nationals of the Turkish state. The fact that the Treaty of Sévres expressly entertained international trials of Turkish perpetrators of the Armenian genocide reveals the Allies’ willingness, as early as 1920, to consider crimes against humanity as a theory of criminal liability.

Regrettably (at least from the standpoint of justice), the Treaty of Sévres was not ratified; instead, a different peace treaty was signed with the Turks, the Treaty of Lausanne, which omitted Article 228’s reference to Allied trials of Turkish participants in crimes against humanity. Built into the Lausanne treaty was a “Declaration of Amnesty” for crimes perpetrated between 1914 and 1922. This provision effectively vetoed the very possibility of international trials. Not until the Nuremberg Tribunal in 1946 would crimes against humanity be entertained as a chargeable offense by an international court.

II. The Law of Conspiracy, the London Charter, and Control Council Law #10

When studying American attitudes toward Nazi criminality, it is important to note that Americans’ awareness of the criminal nature of National Socialism dawned only gradually. Prior to the Ardennes Offensive (Battle of the Bulge) in late 1944-early 1945, the focus of American rancor was fixed squarely on the Japanese, whose bombing of the United States’ Pacific fleet at Pearl Harbor had made them, and not the Germans, the epitome of Axis criminal aggression. Pearl Harbor ignited a latent anti-Asianism in the United States that feasted on bucktootheed, slant-eyed caricatures of the Japanese.
counting among its direct effects the expropriation and imprisonment of Japanese Americans living on the West Coast, an act of blatant expropriation upheld on constitutional grounds by no less an authority than the U.S. Supreme Court. The Malmédy massacre of 70 U.S. POWs by an SS panzer regiment, however, gave Americans a bitter taste—and a shocking preview—of Nazi criminality.

Although American popular opinion began to recognize Nazism for what it was only late in the war, European nations suffering at the hands of the Nazis had long since made this discovery. Fugitives from occupied Europe (such as the Polish government in exile and the Free French Committee) related tales of German atrocities committed on their civilian populations. In January of 1942, refugees from German-occupied Europe gathered at St. James' Palace in London, where they jointly denounced a Nazi “regime of terror characterized amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres.” Their denunciation was reduced to writing and signed by the participants, who called themselves “The Inter-Allied Conference on War Crimes.” They condemned the Nazis’ actions as violations of “the laws and customs of land warfare” as described in the Hague convention of 1907, vowing to prosecute and punish the perpetrators at the earliest opportunity.

In the spring and summer of 1942, the first reports of the Nazi annihilation of European Jews began to trickle out of occupied Europe. These were not ephemeral rumors, but soundly documented accounts from first-hand witnesses. The Inter-Allied Conference besought the Allies to do something. Moved by their plea, Winston Churchill warned in a speech delivered in the House of Commons on September 8, 1942 that “those who are guilty of the Nazi crimes will have to stand up before tribunals in
every land where their atrocities have been committed in order that an indelible warning
may be given to future ages.” Franklin Roosevelt echoed this commination in his
statement that the U.S. would ensure, once the war ended, that war criminals were
delivered up to the United Nations for trial. At the same time, the Soviet Union
declared against “the barbaric violation by the German Government of the elementary
rules of international law.” Soviet Foreign Minister Molotov spoke of a “special
international tribunal” that would try German leaders after the war.23

The brio of their public statements masked the Anglo-Americans’ fears of acting
hastily in the matter. Their concerns were several: assigning too much clout to
governments-in-exile; provoking reprisals on Allied POWs in German hands; and a
growing disquietude at the prospect of cooperating with the Russians on war crimes
trials. Less inhibited than the Anglo-Americans, the Russians proceeded with
investigating Nazi crimes on Soviet territory, beginning their own national trials of
German defendants as early as 1943. Moving more slowly, the Anglo-Americans
established a United Nations War Crimes Commission (UNWCC) to commence
investigations into alleged Nazi crimes. The UNWCC, however, never matured into an
effective vehicle for dealing with war criminals—chiefly because the USSR refused to
join it (on the ground that the Commission would not allow independent representation of
7 Soviet republics). It remained to a meeting of the U.S., British, and Soviet foreign
ministers in Moscow in November of 1943 to formulate a concerted policy on war crimes
trials.24
The immediate result of this meeting was the "Moscow Declaration," a joint resolution announcing the Allies' intention to return Nazi war criminals to the countries where they had perpetrated their crimes for prosecution by national tribunals. The Moscow Declaration went on to exempt "the major war criminals whose offences have no particular geographical location" from these national trials. Instead, the major war criminals would "be punished by a joint decision of the Governments of the Allies." The phrase "joint decision" was tendentiously vague; its wording left open the possibility—although the Moscow Declaration made no explicit mention of it—of an international tribunal convened to adjudicate the crimes of the major war criminals. Less than a month later in Teheran, Churchill and Stalin bantered about summary executions of German officers. Although Churchill claimed after the war that he had opposed Stalin's half-facetious, half-serious proposal to liquidate the German General Staff and execute 50,000 German officers, the irony is that by the end of 1943 the Soviets favored a trial (even if a "show trial") of Nazi war criminals, while the British government inclined toward summary executions.

The British were not the only ones wishing to deal punitively with Nazi war criminals. Roosevelt's Secretary of the Treasury, Henry Morgenthau Jr., was an assimilated Jewish American whose father had served as U.S. Ambassador to Turkey during the Armenian massacre. We can speculate about the role the father's experiences in Turkey played in molding the son's sensibilities—Senior noted in his diary that the Turkish authorities were perfectly aware "they were merely giving a death warrant to a whole race," and "made no particular attempt to conceal the fact" in their conversations with him—but one thing is certain: Morgenthau Jr. was deeply moved and angered by
reports concerning the mass destruction of the European Jews. On September 5, 1944, he reduced his thoughts to a memorandum for Roosevelt. In it, he argued for the de-industrialization of Germany after the war—a plan that would "pasturize" Germany by utterly destroying its capacity to wage war in the future. The memo went on to sketch the outline of a postwar reckoning with Nazi war criminals. Striking a balance between the Moscow Declaration and the British proposal for summary executions, Morgenthau recommended that military commissions be established to prosecute second-tier war criminals. If the governments of countries in which criminal acts were committed requested extradition of a defendant, these military commissions would relinquish jurisdiction to the requesting government. First-tier war criminals, dubbed by Morgenthau the "arch-criminals," would on the other hand not be accorded their day in court. Since their "obvious guilt has generally been recognized by the United Nations," the formalities of a trial could be dispensed with in their cases. Morgenthau recommended that they be arrested, identified, and shot by a U.N. firing squad.28

Morgenthau’s plan found a doughty opponent in Secretary of War Henry Stimson. He objected that Morgenthau’s "pasturization" of Germany by dismantling its industrial base would raise the specter of starvation for millions of Germans, sowing the seeds for yet another future war. The German economy should be rebuilt, not eviscerated, Stimson countered, and war crimes trials would be a seminal force in pursuing this end. In a memorandum to Roosevelt opposing the Morgenthau plan, dated September 9, 1944, Stimson proposed that the major war criminals be prosecuted before an international tribunal assembled for that purpose. It would be an authentic trial, not a kangaroo court in which guilt was a foregone conclusion; a war crimes defendant would enjoy
American-style legal rights, "namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense." According to Stimson, defendants would be charged with violating the "laws of the Rules of War." He pointedly discounted the notion of prosecuting anything other than war crimes, implying by analogy that a military commission had no more jurisdiction over a crime unconnected to the conduct of war than a non-American court would have to prosecute defendants involved in lynchings in the American South. Stimson's argument by analogy ruled out the possibility of trying Nazi defendants for crimes against humanity.

In the immediate aftermath of Stimson's memorandum, President Roosevelt still favored Morgenthau's draconian approach on the issue of Nazi war criminals, a preference he made clear at his meeting with Churchill at the Quebec conference in mid-September 1944. Thereafter, however, Roosevelt's endorsement of Morgenthau's plan wavered. His indecision may have stemmed from his inveterate role of arbiter between the British and Soviets, each of whom, as we have seen, had conflicting visions of how war crimes suspects should be treated. Furthermore, members of FDR's own administration were outspokenly opposed to Morgenthau's plan. FDR's hesitancy afforded Stimson and like-minded Pentagon officials the opportunity to formulate a concrete alternative to the Morgenthau scheme. A New York lawyer, Colonel Murray C. Bernays of the Pentagon's "Special Projects Branch," was tasked with developing this alternative plan. He prepared a six-page memorandum ("Trial of European War Criminals") setting forth the details of a comprehensive postwar prosecution of Nazi war criminals. Historian Bradley Smith has characterized Bernays' memorandum as "the
most important single source for the ideas that shaped the subsequent prosecutions at Nuremberg." Foremost among Bernays' influential ideas was the strategy of making the Anglo-American theory of conspiracy the cornerstone of war crimes prosecution.\textsuperscript{30}

The history of the common law doctrine of conspiracy is a long and complicated one, stretching back into the 13\textsuperscript{th}-century reign of Edward I. To recapitulate this history here would take us far afield with little profit for the digression.\textsuperscript{31} For our purposes, a definition of the law of conspiracy as understood by American jurists in the 1930's and 1940's and its significance to U.S. approaches to Nazi criminality will suffice. Simply put, a conspiracy is an illegal agreement between two or more persons for the purpose of committing an unlawful act. The power of conspiracy as a theory of criminal liability is manifold, but its chief attraction for Bernays was its extension of liability to all members of the conspiracy for the crimes of any individual member, where such crimes were the foreseeable results of the conspiracy and furthered its goal. Thus, if A and B conspire to commit armed robbery, and B kills a bank teller in the course of the robbery, then A is also criminally liable for the teller's murder—even though he did not pull the trigger. All that matters is that the murder of the teller was a foreseeable outgrowth of the conspiracy of which A was a member. The law of conspiracy, Bernays realized, would solve one of the vexing problems of Nazi war crimes prosecution that had haunted the British—that is, the logistical difficulty involved in prosecuting the enormous number of defendants in individual trials.\textsuperscript{32}

Bernays proposed trying the Nazi Party and assorted government organizations (e.g., the Gestapo, the SA, and the SS) \textit{corporately} for violations of the laws of war before an international tribunal. Although individual defendants would be prosecuted on
the merits of their cases, each accused would represent an organization charged with participation in the criminal conspiracy: thus, once the accused was convicted and punished by the court, his confederates within the organization would as co-conspirators be subject to arrest, a summary trial, and sentencing by the Allies. In this way, the need to try unmanageable numbers of defendants individually would be obviated. There are glaring due process problems in this scheme, but Bernays was less concerned with giving Nazi defendants American constitutional guarantees than was Stimson. Nor were Bernays’ superiors in the War Department disturbed by these considerations, any more than they were troubled by building a prosecution plan around the Anglo-American doctrine of conspiracy, a charge that had never before surfaced in international law. For the pragmatic minds in the War Department, Bernays’ approach both responded to public calls for an articulate policy to deal with Nazi atrocities and challenged the Morgenthau plan at its root.33

As it moved upward through the hierarchy of the War Department, Bernays’ memorandum won adherents, among them Henry Stimson. Eventually, it won over other figures in the government, including Secretary of State Cordell Hull and Secretary of the Navy James Forrestal. In January of 1945, Stimson, Edward Stettinius Jr. (the new Secretary of State), and Francis Biddle, the U.S. Attorney General and later the American judge at Nuremberg, developed a war crimes trial program along the lines suggested by Bernays. Central to the plan was the charge of conspiracy. It also followed Bernays in recommending that both Nazi leaders and organizations like the SA, SS, and Gestapo be charged with war crimes and with conspiracy to carry them out. Once the major war
criminals and the organizations they represented had been tried and convicted before an
international court, it would remain to arrest and prosecute smaller cogs in the Nazi
criminal conspiracy. These lesser defendants would be prosecuted in "subsequent trials,"
in which "the only necessary proof of guilt of any particular defendant would be . . .
membership in one of these organizations."^4

The Stimson/Stettinius/Biddle plan, based on Bernays' conspiracy schema, did
not immediately carry the day. The meeting of the Big Three at Yalta in February 1945
added little to Allied plans for dealing with Nazi war criminals. When FDR died on
April 12, however, his successor, Harry Truman, wasted little time in adopting the
Stimson plan as official U.S. policy. On May 2, 1945, Truman appointed Supreme Court
Justice Robert H. Jackson "chief of counsel for the prosecution of Axis criminality."
After his appointment, Jackson had effective control of war crimes planning. His task in
the ensuing months was to persuade other nations to endorse the American plan. At
roughly the same time as Jackson became chief of counsel, the Americans presented a
sketch of their plan to representatives from other countries assembled in San Francisco
for the U.N.'s founding conference. On May 3 Stettinius and Judge Sam Rosenman,
whom FDR had appointed as his personal representative on Nazi war crimes, met with
envoys from Great Britain and the USSR. The Americans dilated on their proposed plan
for trying Nazi war criminals before an international tribunal consisting of a
representative judge from each of the four Control Council powers (Great Britain, the
U.S., France, and the U.S.S.R.). Each of the four powers would also designate a
representative (as Truman had already done with Jackson) to serve on a committee to
gather evidence for the trials. In addition to the "top Nazis," war criminals to be
extradited to the countries where they had perpetrated their crimes, and criminals "whose crimes were not geographically located," the Americans identified a final group of defendants, whose prosecution would be more problematic—i.e., those involved in crimes in which all the witnesses were dead or evidence was not extant. To solve this problem, Rosenman proposed to "place on trial the Nazi organizations themselves rather than the individuals and . . . convict them and all their members of engaging in a criminal conspiracy to control the world, to persecute minorities, to break treaties, to invade other nations and to commit crimes." After an organization had been "convicted," every member shown to have joined it freely "would ipso facto be guilty of a war crime."^3^5

The British, Soviet, and French delegates assented to the American plan. In the wake of the San Francisco conference, legal representatives from Great Britain, the U.S., France, and the U.S.S.R. met in London to prepare an accord regarding the trials of German war criminals, containing a charter that, in its detailed enunciation of the charges against the major offenders, would subsequently become the governing instrument of the tribunal, as well as the touchstone of both the prosecution and the defense. Article 6(c) of the Charter, dealing with "crimes against humanity." would later serve as the primary charge against the euthanasia specialists in the U.S. Doctors' Trial. The American approach to Nazi criminality in the Charter stayed remarkably faithful to Murray Bernays' original conspiracy plan. Conspiracy, in fact, was the axle around which the wheel of the 3 primary charges—crimes against peace, war crimes, and crimes against humanity—revolved, as reflected in the Charter's statement that "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts
performed by any persons in execution of such plan.” In brief, this meant that defendants would not only be charged with the substantive charge, but also with conspiracy to commit the illegal act. Articles 9 and 10 extended the Americans’ conspiracy theory of liability even further by authorizing the tribunal to criminalize German organizations, thus enabling any signatory nation of the London Charter to prosecute former members of such organizations solely on the basis of their membership. In this manner, state authorities in subsequent national trials would need only submit proof that the International Military Tribunal (IMT) had declared the organization in question criminal; once this was done, a defendant indicted for membership in it was collaterally estopped (i.e., prevented) from challenging the court’s findings on the issue.\(^{36}\)

The centrality of Bernays’ conspiracy theory to the Americans’ conception of Nazi criminality is also evident in Jackson’s Report to President Truman of June 6, 1945. In his report, Jackson stated with lapidary clarity the U.S. intention to prosecute only those crimes committed in furtherance of a “master plan” to wage aggressive war against other nations:

> Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.\(^{37}\)

This paragraph—particularly the language in the first sentence, excluding the prosecution by the Allies of “individual barbarities and perversions which occurred independently of any central plan”—makes clear the Americans’ refusal to proceed against the so-called Exzesstaten, that is, crimes arising from motives unrelated to the larger plan to attack Germany’s European neighbors. For Jackson and his compatriots, the IMT would only
try and punish those Nazi defendants whose crimes promoted Hitler’s imperial war of domination. The IMT would do so primarily as an object lesson to deter future aggressors.\(^{38}\)

Based on Jackson’s report, one would think the charge of crimes against humanity as a separate count would find cold comfort in the Americans’ conspiracy-based approach, inasmuch as they are not technically war crimes. This was not, as we have seen, the case. The Americans’ decision to push for including crimes against humanity in the indictment against the major war criminals was influenced by anti-fascist German, Austrian, and Czechoslovakian refugees (many of them Jewish) from Nazi Germany, who, fearful that the Nazis’ brutalization and mass murder of German nationals and stateless persons would not be redressed in a postwar trial, implored the Allies to render justice for these outrages. The American delegate to the U.N. War Crimes Commission in 1944, Herbert Pell, championed their cause, arguing that “crimes committed against stateless persons or against any persons because of their race or religion” must be punished after the war. The American representatives in London carried this commitment to crimes against humanity with them into their negotiations with the other Allies. In their drafts of crimes potentially chargeable against the Nazis, the Americans cited “wars of aggression,” violations of the “laws and customs of war,” and, in support of a count based on crimes against humanity, “atrocities and persecutions,” whether or not German law at the time had recognized their legality. These same drafts used language that would eventually filter into Article 6(c) of the Charter, particularly the phrase “persecutions on racial or religious grounds.”\(^{39}\)
The Americans' interests in prosecuting crimes against humanity received sympathetic responses from the other Allies. Like Jackson and the American team in London, the British had been implored by Jewish groups to prosecute racially and religiously-motivated crimes perpetrated by the Nazis. The French and Soviet representatives, whose civilian populations had experienced firsthand the barbarism of National Socialist racial policy, readily agreed to include a reference to such crimes in the Charter. In 1943 Professor Hersh Lauterpacht, an eminent international legal scholar, had called upon the Allies to prosecute Nazi war criminals for their murderous treatment of European Jews that did not formally qualify as war crimes. He used the phrase "crimes against humanity" to describe such crimes. Influenced by Lauterpacht, Robert Jackson adopted the phrase to denote crimes of racial or religious persecution. The term "crimes against humanity" thereafter was incorporated into a final draft of the London Charter, which later served as the legal basis for Article 6 of the Nuremberg charter and the Allies' indictment. The text of Article 6 of the IMT Charter defined "crimes against humanity" as follows:

... murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

There is more to the Charter's definition of crimes against humanity than meets the eye. According to scholars like Bradley Smith and M. Cherif Bassiouni, one of the Allies' paramount concerns at the London Conference was to avoid the appearance that the Allies' trials of German war criminals were instances of ex post facto law—i.e. holding a defendant legally accountable for an action that, at the time it was performed,
was not specifically proscribed by law. Prior to the outbreak of war in 1939, there was no statute that forbade genocide or racial persecution; hence, prosecuting Nazi defendants for crimes against humanity as an independent theory of criminal liability would be a flagrant example of ex post facto law. For this reason, Smith and Bassiouni contend, the drafters made crimes against humanity an “auxiliary category” of the two other charges in the Charter, “crimes against peace” and “war crimes.” The operative inkblot in the Charter’s definition of “crimes against humanity” is the comma after the phrase “before or during the war.” The original draft had inserted a semi-colon after this phrase. The Berlin Protocol of October 6, 1945 changed the semi-colon to a comma in the final version. This alteration effectively bound crimes against humanity to any act under the Tribunal’s jurisdiction—i.e., to war crimes and crimes against peace. The change meant that crimes against humanity could be prosecuted only where they were proven to further the Nazis’ conspiracy to wage aggressive war on its neighbors or commit war crimes.

While Smith and Bassiouni’s argument about the Allies’ concern for the principles of legality may be true enough with respect to the French and the Soviets, I believe it has less merit as applied to the Americans and British. The Anglo-Americans had more scruples about principles of sovereignty than the principles of legality, and it was these concerns that caused them to insist on mooring crimes against humanity to war crimes and crimes against peace. In his address to the members of the Tribunal on this issue, the British prosecutor, Hartley Shawcross, made clear the British concern not to infringe purely domestic matters in Germany in prosecuting crimes against humanity:

... The considerations which apply here are... different to those affecting the other classes of offense, the crime against peace or the ordinary war crime. You have to be satisfied not only that what was done was a crime against humanity but also that it was not purely a domestic matter but that directly or indirectly it was associated with crimes...
against other nations or other nationals, in that, for instance, it was undertaken in order to
strengthen the Nazi Party in carrying out its policy of domination by aggression, or to
remove elements such as political opponents, the aged, the Jews, the existence of which
would have hindered the carrying out of the total war policy.

That the principles of legality, in contrast to the principle of sovereignty, were of
relatively minor importance to the British and Americans is proven in other Anglo-
American primary source documents. In an article published in German in 1947
defending the national trials of Nazi war criminals under Control Council Law #10, the
English jurist and University of London professor, R.H. Graveson, admitted that crimes
against humanity under Law #10 was an example of retroactive legislation, that is, an ex
post facto law. He pointed out, however, that retroactivity was only one interest to be
protected in criminal law, and by no means the only one. A more compelling interest
within the scope of Nazi criminal prosecution was the need to punish these abhorrent and
monstrously unjust crimes. This need overrode the ban on retroactive prosecution, as the
IMT itself had recognized. For Graveson, as for the IMT, the principles of legality were
subordinate to the demands of justice.

American Chief of Counsel Robert Jackson was adamant about the overriding
imperative to sanction Nazi war criminals. In his Report to the President in June of 1945,
Jackson posed the rhetorical question of how the Allies should treat the Nazi perpetrators:

What shall we do with them? We could, of course, set them at large without a hearing.
But it has cost unmeasured thousands of American lives to beat and bind these men. To
free them without a trial would mock the dead and make cynics of the living.

Jackson’s report foreshadows language he would use a few months later in his Opening
Address at Nuremberg: “The wrongs which we seek to condemn and punish have been so
calculated, so malignant, and so devastating, that civilization cannot tolerate their being
ignored, because it cannot tolerate their being repeated.”

Given the moral ardor of
Jackson’s words, it is hard to imagine how the formalistic principles of legality could have guided his decision to make crimes against humanity dependent on recognized principles of international law (war crimes and crimes against peace).

We have already observed the reticence of some U.S. policymakers to violate the perceived sovereignty of the Nazi government. Secretary of War Henry Stimson denied the jurisdictional authority of an international court to try any offense unrelated to the conduct of war. In his memo to Roosevelt, Stimson appeared to believe that wielding jurisdiction over crimes independent of war would open the door to international violations of territorial sovereignty. (He stated, we will recall, that this legal rationale would justify foreign courts in prosecuting U.S. citizens involved in lynching African Americans.) Nor is Stimson’s position unrepresentative of ideas about the inviolability of sovereignty in American history—and the fear that foreign powers will trench upon it. Much of the curious 19th century American bigotry toward Catholics and Freemasons was rooted in irrational but real concerns that the Papacy, or some other foreign agency, would insinuate itself into American political life and sabotage the Republic. Woodrow Wilson’s failure to gain Congressional approval for the League of Nations after World War One was largely due to apprehensions that an international body with superordinate jurisdiction would compromise American sovereignty. Arguably, U.S. opposition to an international war crimes tribunal after the Great War was premised on the sovereignty principle. When seen in historical context, the attitudes of U.S. policymakers toward crimes against humanity as an independently actionable species of criminality seem more intelligible. One cannot but marvel, given this context, that the U.S. emerged as the primary advocate of international trials following World War II.48
Furthermore, by focusing on crimes related to the war, Jackson could better redeem the Americans' all-encompassing theory of Nazi criminality: a conspiracy among virtually all sectors of German society (the Nazi Party, the German government, the military, and business) to wage aggressive war against other countries. In the American schematism, crimes against humanity, including the murder of the mentally ill and European Jews, were byways along the highway of imperialistic war. They were not, in the Americans' view, the animating force behind Nazi criminality, but incidental byproducts of the Germans' implacable urge to wage war and thereby expand Germany's borders at the cost of its European neighbors. This conception of Nazi criminality was embodied in the London Agreement and the IMT Charter; it dominated the Americans' approach to Nazi criminality, both during the IMT proceedings and the Doctors' Trial.

The hinge joining the IMT Charter and the legal instrument that served as the basis for the 1947 Doctors' Trial (Control Council Law #10) was a document issued by the U.S. Joint Chiefs of Staff, "JCS 1023/10." JCS 1023/10 was a directive approved by the U.S. Joint Chiefs of Staff on July 15, 1945 setting forth what its authors hoped would be the model for war crimes policy throughout occupied Germany. It was heavily influenced by Jackson's Report to the President of July 1945, reproducing almost word for word his definition of the crimes chargeable against Nazi defendants. Like the IMT Charter, JCS 1023/10 envisioned prosecuting both principals and accessories, as well as "members of groups or organizations connected with the commission of such crimes." These included Nazi party and SS officers, members of the General Staff, and the legal staffs of the Nazi "Peoples' Courts" (Volksgerichte), who were to be detained by theater commanders and tried if evidence warranted trial; theater commanders, however, were
instructed to delay trial of higher ranking officials until it was decided whether they would be prosecuted before an international tribunal. Jackson’s Office of the U.S. Chief of Counsel at Nuremberg was chosen as the administrative office, charged with implementing the terms of the directive. In late November 1945, the Legal Adviser to the Office of the Military Government U.S. (OMGUS) approached Telford Taylor (at the time involved in prosecuting members of the German General Staff before the IMT) about heading the project.49

The Control Council, which served as the Allied occupational government of Germany, meanwhile prepared a draft of its own law on Nazi war crimes prosecution. Modeled on JCS 1023/10, it was approved by the Coordinating Committee of the Control Council on November 1, 1945 and enacted as Control Council Law #10 on December 20, 1945. The framers of Law #10 defined its purpose as threefold: first, to implement the terms of the Moscow Declaration (specifically, those portions of the Declaration that envisioned the return of minor war criminals to the countries where their crimes were committed and a separate proceeding to deal with the major war criminals); second, to implement the London Agreement and Charter; and finally, “to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the IMT.” Further, Law #10 delimited the scope of crimes for which Nazi defendants could be held criminally liable. In defining such crimes, the drafters of Law #10 drew explicitly on the charges sketched in Jackson’s Report to the President (and embodied in JCS 1023/10), as well as those propounded in the London agreement. These included “crimes against peace,” “war crimes,” and “crimes against
humanity”—all virtually the same as the charges in the London Charter and JCS 1023/10. Consistent with these two antecedent documents, Law #10 also provided the charge of membership in organizations deemed criminal by the IMT.30

To assert that Law #10’s definition of crimes against humanity was substantially the same as that described in the Charter and JCS 1023/10 is not to say they were identical. In fact, the wordsmiths who fashioned Law #10’s version of crimes against humanity introduced a crucial amendment—or, rather, a crucial omission—in its version.

Consider again the Charter’s Article 6 version defining crimes against humanity:

. . . murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.* (emphasis added)

Law #10’s definition, on the other hand, defines crimes against humanity as “atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”52 The critical omission from Law #10’s version is the phrase in the Charter’s definition above, “before or during the war.” With this elision, the drafters of Law #10 dissolved the link between crimes against humanity and war crimes, transforming the former into its own self-contained, independently chargeable offense.

The odor of ex post facto law would cling to the prosecution of the major war criminals in front of the IMT. Defenders of these trials, however, could always rebut charges of retroactivity by pointing to specific written documents that expressed an
international condemnation of war crimes before Hitler came to power in 1933; in some cases, as with the Kellogg-Briand Pact (1928). Germany had been among the signatories. By connecting crimes against humanity to war crimes, defenders of the IMT trials could at least make a plausible case that prosecuting crimes against humanity was in keeping with prior law, and thus did not violate the principles of legality. This argument became less convincing once the linkage with war crimes was annulled. The American jurists presiding over the subsequent trials under Law #10 deflected the ex post facto objections of defense counsel with various justifications. In the Justice Case (Case Number 4), which prosecuted 16 defendants charged with perverting the judicial process (particularly its involvement in so-called “racial defilement” cases), the judges first pointed out that ex post facto law is not an absolute bar to prosecution in international law, then added that in any event the defendants must have known their actions were wrongful (an odd piece of legal reasoning, since it assumed that the principle of analogy, which the Allies had condemned in Nazi jurisprudence, was a legitimate means of establishing criminal liability). In the Einsatzgruppen and Krupp cases (Cases 9 and 10, respectively), the judges defended their jurisdiction on the grounds that international law had criminalized the defendants’ conduct well before they had perpetrated their crimes. These justifications were often made by way of ex cathedra statements with little analysis or sustained argumentation. Ultimately, as M. Cherif Bassiouni has concluded, all of the subsequent trials have in common the automatic assumption that Law #10, insofar as it was decreed by the Control Council as a successor to the sovereignty previously exercised by the Third Reich, was a valid authorization of the subsequent trials.54
To a certain extent, we are jumping ahead of ourselves in discussing the subsequent trials under Law #10. The first of these proceedings, the Doctors’ Trial, would bring U.S. judicial authorities face to face with the Nazis’ campaign of annihilation against “life unworthy of life.” Even before the Doctors’ Trial, however, American military officials presided in judgment over German medical personnel charged with murdering hundreds of Russian and Polish workers at the Hadamar killing center. As we will see, the U.S. Hadamar trial in the fall of 1945 foreshadows many of the obsessive themes of the later Doctors’ Trial.

III. The U.S. Hadamar Trial, October 1945

Americans first glimpsed the Nazi euthanasia program through the fogged lens of sensationalized accounts in hometown newspapers. The unvarnished truth of what happened at the Hadamar euthanasia center in Hessen-Nassau, however, was more horrible than any of the embroidered newspaper stories. When the U.S. Army stumbled across the killing center and relayed news of it to U.S. war correspondents in March 1945, journalists embellished the appalling reality of Hadamar with layers of lurid exaggeration. One newspaper writer, influenced perhaps by too many Universal Studio monster movies, described the chief doctor, Adolf Wahlmann, as a ghoulish figure stalking the “dim recesses” of Hadamar with his grim witch-like nurse (Irmgard Huber). Around every corner in this subterranean torture chamber couched “300 babbling insane creatures,” allowed to haunt the dark corridors of Hadamar in an effort by the authorities to present the institution as a mental hospital, rather than the “murder institution” it actually was. An article in The Evening Star from April 10, 1945 described the killers as “Berlin SS men” who used the skulls of their victims as “drinking cups.”
quotes a U.S. Army captain to the effect that “sadistic SS men” celebrated the carnage
with orgiastic parties. The alleged presence of SS men at Hadamar is a common theme
in these hometown newspaper accounts, as is the unsubstantiated claim that the
institution’s authorities were starving sick eastern workers to death there.\textsuperscript{55}

In fact, there were no skull cups, no gibbering lunatics lurking behind corners, and
no starving \textit{Ostarbeiter} at Hadamar. These sensational trappings were unnecessary to
portray Hadamar in a notorious light; the reality was grotesque enough. Yet, the
distortions in the newspaper stories are emblematic of the fumbling early efforts by the
Americans to understand the National Socialist destruction of “life unworthy of life.”
Although that understanding improved with time, it never wholly overcame the tendency
to squeeze Nazi euthanasia into misleading \textit{a priori} categories and questionable
interpretive frameworks. The effect was to falsify, however inadvertently, the nature of
the Germans’ war on the mentally disabled. This tendency was intrinsic to the
correspondence and memoranda generated in the planning stages of the Nuremberg
International Military Tribunal. It manifested itself for the first time in an American
criminal proceeding in the case of \textit{U.S. v. Alfons Klein et al.}, the American Hadamar trial
held from October 8-15, 1945.

Hadamar was a town of 6,000 people in the German state of Hessen-Nassau, 27
miles south of the city of Wiesbaden. From 1939 until 1940, the institution at Hadamar
served both as a mental hospital and a hospital for German soldiers and POWs. In late
1940, it was selected as a replacement killing center for the euthanasia institution at
Grafeneck, which, along with Brandenburg, was closed in December 1940. In the next
nine months, until it temporarily closed in August 1941, the T-4 medical staff at Hadamar
gassed at least 10,000 mentally disabled German nationals. In his interrogation by the U.S. Army in 1945, the director of Hadamar, Alfons Klein, claimed that “euthanasia” at Hadamar ceased from August 1941 until August 1942, at which time the killing of mental patients resumed, this time by means of narcotics overdoses. During this second phase, children’s wards were established at Hadamar to murder two distinct groups of children: mentally disabled German youngsters and so-called Mischlingkinder, or half-Jewish children (many of whom were healthy before they were killed). Also during the second phase, Hadamar personnel killed concentration camp prisoners as part of the “14f13” operation. It is unclear whether another group of victims, the “asocials,” was murdered at Hadamar; although a witness at the German Hadamar trial in 1947 testified about plans to exterminate the inmates of workhouses there (i.e., beggars, the homeless, and prostitutes), the evidence—much of it destroyed in the waning months of the war—is not definitive on the issue. The final victim group killed at Hadamar, hundreds of Polish and Russian forced laborers ill with tuberculosis, was the subject of the U.S. Hadamar trial by American Army personnel in October 1945.56

American jurisdiction over the Hadamar defendants was premised on JCS 1023/10, which assigned authority for war crimes trials to military theater commanders. Under its terms, responsibility for conducting the trials was reserved to the Office of Military Government for Germany (OMGUS) and the Deputy Judge Advocate for War Crimes, European Command. In a letter of August 25, 1945 from Headquarters, U.S. Forces European Theater to the commanding generals of the Eastern Military District (administered by the 7th Army) and the Western Military District (administered by the 3rd Army), authorization was given to indict and prosecute German defendants suspected of
war crimes. The trials would be conducted before a “military commission” formed by the commander of an army in the field. The legal foundation of these commissions was not statutory in nature; rather, it was the “common law of war,” which did not specify the kind of trial to be given a war criminal—only that the procedure be a fair one. In trials before military commissions, the commission itself was free to fashion rules of procedure ad hoc, although, to facilitate the proceeding, the forms of General Courts-Martial (such as the use of charge sheets) could be adopted. Significantly, the rules of evidence observed in General Courts-martial were not binding on military commissions. Rules of evidence were to be applied only to expedite the trial and to prevent irrelevancies “lacking probative value.” The principle governing admissibility was whether the proffered evidence “has probative value to a reasonable man” as determined by the president of the commission.

The U.S. Army’s early intramural correspondence about the Hadamar killing center set the tone for the American Hadamar trial. In a memorandum from HQ V Corps, Office of the Inspector General, dated April 6, 1945, Col. John W. McCaslin described Hadamar as part of the “mercy killing program” established in Germany “in accordance with the existing laws of Germany, which permitted mercy killings and which became effective in 1939.” McCaslin was no doubt referring to the Hitler decree of September 1, 1939 (actually signed on October 1 and backdated to September 1), a document that empowered Philip Bouhler of the Führer’s Chancellery and Karl Brandt to authorize doctors to “grant a mercy death” to so-called “incurable” patients. According to McCaslin, the Nazis employed Hadamar to murder political enemies and foreign laborers. He then declares that under international law the Army was “only concerned
with the murder of these foreign forced laborers, and the fact must be established that the forced laborers were in good health at the time of extermination, otherwise no war atrocity has been committed under the existing laws of the German government."

The claimed legality of the euthanasia program under German law appears in other army correspondence from the spring and summer of 1945. In a War Crimes Branch Summary Worksheet, an anonymous Army officer portrays the killings at Hadamar as “systematic murder in which 20,000 political prisoners, Jews, and slave laborers are estimated to have been put to death by unidentified SS men on orders from Berlin at a concentration camp at Hadamar, Germany under a 1939 statute.” Revisionist historians would have a field day with the inaccuracies in this statement: Hadamar was not a concentration camp, but a mental institution devoted to ridding Germany of “unworthy life;” little if any evidence exists that “political prisoners” were killed there; the killers were not, for the most part, SS men but employees of the Führer’s Chancellery and, later, rank-and-file staff members of the institution; and, finally, the Hitler decree was not a statute, but an unpublished decree—no law, as we saw in chapter 2, was ever published formally legalizing euthanasia in Germany. These mistakes recur in an office memo to Lt Col Leon Jaworski (appointed decades later as the special prosecutor in the Watergate scandal) from a Major Burton, dated May 31, 1945, who depicted the Hadamar killings as “the wholesale massacre and murder of thousands of political prisoners, Jews, and slave laborers at Hadamar concentration camp, Germany, by Gestapo and SS men.” The factual errors in these documents suggest that the American military authorities regarded the euthanasia killings through the optic of their prior traumatic encounters with Nazi brutality—particularly the discovery of concentration
camps in Germany by the U.S. Army and of the death camps by the Red Army in Poland, as well as the Malmédy massacre on December 17, 1944. The inextricable association of these events with the SS may account for the Army’s predisposition to (mis)interpret other instances of National Socialist violence in light of them.  

Most significantly for our purposes, these documents reveal the degree to which the Army had assumed a legal basis in German law for the euthanasia program. Their presumption of legality meant that Army officials would only consider prosecuting those defendants who had killed mentally healthy victims at Hadamar. To prosecute these same defendants for killing the mentally disabled would breach the principle of sovereignty, according to which foreign powers are not legally permitted to intervene in the domestic affairs of another country. This is amply demonstrated in a memo to a Lt Col Mize, dated July 28, 1945. Stating that the Hadamar staff had carried out the killings pursuant to a 1939 German law, the memo’s author denies that the Army has any business prosecuting the accused for killing mentally ill German patients, “because there appears to be no substantial evidence that those Germans who were killed were not, in fact, incurably insane.” On the other hand, the author continues, “there is an abundance of evidence that many of the Russians and Poles were neither insane nor incurably ill from any other disease. . . . it matters little whether the law itself, which permitted the killings under certain circumstances, would be a good defense if those circumstances were complied with because they were not, in fact, complied with insofar. . . as the Russians and Poles were concerned.”  

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It is clear from these excerpts that U.S. Army officials were concerned above all else with preserving the principle of sovereignty. Technically, the Americans could have prosecuted the Hadamar defendants for killing mentally ill Russian and Polish Ostara beiter; their mental capacity had no material bearing on their protection by the Geneva and Hague Conventions. In the pre-trial Army correspondence, however, the option of trying the Hadamar staff for murdering the mentally ill of any nationality was ruled out ab initio. As Col McCaslin asserted, only if the Americans could prove the murdered eastern workers were healthy at the time of their death could they obtain a conviction under international law. If, on the contrary, the Ostara beiter were incurably insane, then they were covered by German law—or so the Americans presumed. For the U.S. Army officials, to prosecute the defendants for performing an act legal under German law at the time of its commission would be an impermissible incursion into the domestic affairs of the Third Reich. The internal sovereignty of the Nazis, who mocked in word and deed the very notion of other nations’ sovereignty, could not be violated.

The aversion of American military officials to prosecuting acts considered legal under then existing German law structured the Army JAG lawyers’ approach to the Hadamar killings during the trial. The Americans’ commitment to focus only on the murders of mentally healthy eastern workers is abundantly clear in the Prosecution’s opening statement before the military commission. In it, the Prosecution portrays Hadamar as a mental hospital that cared for the mentally disabled until the summer of 1944, when it was converted into a killing center for Poles and Russians. This depiction of Hadamar ignores the thousands of German adults, disabled children, and half-Jewish youngsters murdered at Hadamar long before the summer of 1944. The
Prosecution not only neglected to mention this prior history, but strove in every way possible throughout the trial to counteract the defense’s attempts to locate the murders of the Ostarbeiter within the context of the euthanasia program. Inasmuch as this contextualization was the defendants’ best chance of escaping the hangman’s noose, the struggle over the degree to which it should be foregrounded became the central theme of the trial.

From the outset, the basic theory of the defense was straightforward: the defendants may have been involved in killing through lethal injections the tubercular eastern workers, but they had believed at the time their actions were sanctioned by a 1939 German law, and thus lacked the necessary *scienter* (i.e. legally incriminating knowledge) of illegality. Of course, to raise this defense required the presentation of evidence concerning the alleged law and the program of mass killing developed under its aegis. Attempts by defense counsel to do just that led to the trial’s most important legal clashes. During the presentation of its case in chief, the prosecution called a former nurse at Hadamar, Minna Zachow, to recount how Polish and Russian forced laborers were given lethal injections there during the summer of 1944. On cross examination, defense counsel asked the witness to estimate how many German mental patients were killed at Hadamar between August 8, 1942 (i.e., the date when killings resumed after the “pause”) and March 3, 1945. This line of questioning drew an objection from the Prosecutor, who argued:

> ... the charge doesn’t cover any Germans at all. We could be here a month trying that. Counsel’s clients are not on trial for any German nationals they may have killed. This is confined entirely to the Russian and the Polish. ...”

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Defense counsel responded that "there was no distinction made between the Russians and Poles and . . . thousands of Germans were killed at the same hospital by the prosecution's witnesses and they thought it perfectly proper." The prosecution retorted that defense counsel's exploration of the euthanasia program as it affected German mentally disabled patients at Hadamar was irrelevant, since the defendants were not charged with murdering German nationals. Defense counsel defended the relevance of the questioning on the grounds that "it goes to the heart of the defense, i.e. the action against the Poles and Russians was part of the larger program of euthanasia authorized by the 'law of the land.'" While admitting the commission had no jurisdiction over the murders of the mentally disabled German victims, the defense insisted that their deaths were relevant "in order that we get a complete history and picture of this institution at Hadamar. . . . [The court] must consider the picture as it was at Hadamar and become acquainted with the state of mind of the accused and all other personnel at the institution."^64

Defense counsel had logic, law, and the military rules of evidence on its side in this argument. Military Rule of Evidence 401 is the general rule of relevancy in courts-martial, embodying a fundamental maxim of American jurisprudence that only relevant evidence may be considered by triers of fact. It reads:

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.65

The widely recognized doctrine of "mistake of law" was relevant to the Hadamar proceedings, inasmuch as it could have been interpreted to negate defendants' intent to commit murder, an element necessary to finding the defendants guilty of the offense. A
mistake of law occurs where a defendant reasonably relies on the legitimacy of a law, judicial decision, or administrative ruling later declared to be invalid. Further, where a defendant has received incorrect advice about a law or administrative ruling from a person charged with administering it, the defendant may raise his or her reliance thereon as a valid defense.°° Given the prosecution’s admission that a euthanasia law was in existence, according to which mentally ill Germans were put to death at Hadamar for years prior to the murders of the eastern European forced workers (Ostarbeiter), evidence of the degree to which defendants reasonably relied on the euthanasia statute was relevant and material to the “determination of the action” under Rule 401 (or its 1945 version). As we will see when we take up the German euthanasia trials in chapter 5, characterizing the secret Hitler order as a “law” is dubious; yet, the U.S. government’s puzzling willingness to assume the legality of the Hitler order certainly opened the door to examining the impact of that order—and the program conceived pursuant to it—on the defendants’ state of mind.

Incredibly, the military commission hearing the case sustained the prosecution’s objection on the grounds of relevance. Defense counsel did not quietly accept the commission’s ruling, but sought at several junctures in the trial to reopen the issue of whether the defendants believed their actions were legal based on the existence of the Hitler “statute.” Each time the defense revisited the issue, the military commission slammed the door on its efforts, holding this line of questioning “irrelevant” to the case at bar.°° Only when the defense presented its case in chief did the commission grant some leeway to raise the issue of mistake of law.

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In its direct examination of Alfons Klein (the director of Hadamar from 1939-1945) and Adolf Wahlmann (assigned to Hadamar as chief doctor in August 1942), defense counsel elicited information about the institution's function within the T-4 euthanasia program. Replying to the question whether Hadamar personnel were aware of the Hitler decree that "permitted the killing of . . . incurable and mentally diseased patients," Klein testified that they were informed in 1940 of the euthanasia "law," and were instructed that "the Reich Government decided upon this law, that all incurable, mentally diseased should die."

On re-direct exam (i.e., direct exam following cross examination), he related that a Gauleiter Sprenger had told him the Polish and Russian workers would fall under the same euthanasia "law;" for this reason, he claimed, "I didn’t doubt to any extent that it was not correct." In a sworn statement, Adolf Wahlmann claimed that both Klein and Landesrat (State Councillor) Fritz Bemotat, who was in charge of all mental hospitals and nursing homes in Hessen-Naussau, had assured him the eastern workers brought to Hadamar in the summer of 1944 were covered by the Hitler euthanasia order. Other defendants charged with the murders alluded to the connection between the "mercy deaths" of mentally ill German patients under the Hitler decree and the killing of sick Ostbeiter.

The prosecution's discomfiture regarding this testimony is evident in the trial transcript. On Klein's re-direct examination, his defense counsel invited him to talk about the refusal of the German legal authorities to intervene in the killing process at Hadamar, despite their awareness of its existence. The prosecution balked at this line of questioning. Although the matter was relevant to the defendants' perception of the illegality of their conduct, the military commission sustained the objection (without
specifying its grounds for doing so). The prosecution had less success in objecting to the testimony of Dr. Hans Quanbusch, the former public prosecutor of Wiesbaden, called as a witness for the defense. He testified that all the prosecutors and presidents of the state courts (Oberlandesgerichte) throughout the Reich were summoned to a meeting in the Berlin state court, during which a photostatic copy of Hitler's euthanasia decree of 1939 was shown to the participants. Quanbusch described the decree as an administrative order, rather than a law. Nonetheless, the chief prosecutors were instructed to inform their subordinates that “under no circumstances were they to do anything about charges that were being filed.” In the event a relative of a patient killed in the euthanasia operation insisted on filing criminal charges against a mental hospital, the case was to be sent to the Ministry of Justice “as a secret state matter” (geheime Reichssache). Quanbusch concluded that “through this [quashing of legal action] the physicians were protected from any suing, and it was impossible for the prosecutor to start any proceedings.” The prosecution moved to strike Quanbusch’s testimony (that is, to have it excluded from consideration by the commission in its findings of fact) on the grounds of relevance, arguing that the testimony dealt with the euthanasia of German mental patients—which was not properly before the court—and not with the eastern workers. The commission overruled the objection, perhaps because defense counsel claimed it was offering Quanbusch’s testimony as evidence of the duress under which defendants had acted.70

The government’s pertinacious efforts to restrict the case to mentally healthy Polish and Russian forced workers were consistent with the views expressed in the pre-trial legal memoranda we have previously examined. The Americans’ commitment to
the principle of sovereignty gravely skewed their conception of Nazi criminality at
Hadamar, leading to a number of misrepresentations. First, by excluding the mentally ill
from the picture, the prosecution entirely discounted Hadamar's connection with the
euthanasia program directed at "unworthy life," in the service of which Hadamar played a
pivotal role. A regrettable ahistoricism informs the prosecution's theory of the case.
There is little in its portrayal of Hadamar to suggest the progression of cumulative
violence as it spiraled outward from "incurable" mental patients to include Jews, half-
Jewish children, disabled children, and the eastern workers. In the illusory image of
Hadamar invented by the prosecution, the institution "cared" for the mentally ill until the
moment when the tubercular Ostarbeiter arrived in 1944.

The Americans' second misrepresentation concerned the erroneous assumption
that the Hitler decree of September 1939 was a valid law affording a legal basis for the
euthanasia of mentally disabled Germans. The first newspaper accounts about Hadamar
in April 1945, based on information provided by Army public relations, referred to the
decree as a "German law" or "statute." Intramural Army communiqués leading up to the
trial in October 1945 at no time questioned the legality of the Hitler order. The U.S.
prosecution team's theory of the case during the trial demonstrated an unreflective
acceptance of this belief, steering the prosecution away from any conception of Hadamar
that might place in jeopardy the cherished principle of sovereignty. In this fashion, the
Americans virtually provided a ready-made defense to the lawyers representing the
defendants. By connecting the killing of the Ostarbeiter to an alleged euthanasia "law,"
defense counsel could persuasively argue that Klein and his co-defendants lacked the
knowledge that what they were doing was illegal. That local law enforcement authorities were aware of the killings but did nothing to prevent them or to hold the perpetrators legally accountable for them only strengthened defense counsel's argument.

A third misrepresentation concerned the Americans' application of the Anglo-American doctrine of conspiracy to the Hadamar killings, a doctrine that portrayed euthanasia criminality as the offshoot of Nazi warmaking and the Hadamar defendants as jointly and equally liable for the crimes. We have seen the degree to which the law of conspiracy dominated the thinking of American policymakers within the government in the years preceding the Nuremberg trials. On this theory, the Nazis' plan to wage an aggressive imperialistic war was a criminal conspiracy from which all of the regime's criminality flowed. There can be little question of the genetic devolution of the conspiracy approach from Bernays' memorandum "Trial of European War Criminals," which influenced Henry Stimson and Robert Jackson, to JCS 1023/10, the document that formed the immediate legal basis for the U.S. Army's Hadamar trial. In its closing argument before the military commission, the prosecution laid out its theory of vicarious liability, wherein all distinctions between principal and accomplice, based on their varying contributions to the criminal conspiracy, are completely annulled:

In the cases that are carefully schemed and plotted, you will find that there may be some 10 or 15 who participated in various stages in the matter laying the preparations and the foundation for the... commission of the act of murder itself. Every single one of those who participated in any degree toward the accomplishment of that result is as much guilty of murder as the man who actually pulled the trigger. That is why under our federal law all distinctions between accessories before the fact and accessories after the fact have been completely eliminated. Any who participate in the commission of any crime whether formerly called as an accessory or what are now co-principals and have been so for several years.
The prosecution cited U.S. Code Title 18, sec. 550: "Whoever directly commits any act constituting an offense defined in any law or aids, abets, counsels, commands, induces, or procures its commission is a principal." It then applied this notion of vicarious liability to the Hadamar killings:

Now, talking about the facts of this case, why with each of them being a principal, considered a co-principal, one is equally as guilty as the other... When you do business on a wholesale production basis that they did at the Hadamar murder factory it means that you have several people doing different things of that illegal operation in order to produce results and you cannot draw a distinction between the man that may have initially conceived the idea of killing them and those that participated in the commission of those offenses.

When, in the course of its closing argument, the prosecution referred to the abolition of distinctions between principals and accomplices in the Digest of Opinions of The Judge Advocate General (JAG), it was describing a facet of the American law of conspiracy as it existed in the mid-1940's. According to this feature of conspiracy law (called the "equivalence theory" or "vicarious liability"), where two or more individuals conspire to commit a crime, each is liable for offenses committed by his or her confederates in furtherance of the conspiracy. In an illustrative U.S. Supreme Court case from 1946, a man arrested for participation in a conspiracy was held liable for crimes done by his co-conspirators while he was in jail. The American law of conspiracy, predicated on this theory of equivalence, essentially did away with the common law distinctions between principals and accomplices/accessories. This approach culminated in the American doctrine of felony murder, which holds that two or more persons who commit a dangerous felony (such as robbery, burglary, rape, arson, and mayhem) are equally liable for any death caused to a third party during the felony. The felony murder
doctrines do not try to sort out the relative degrees of complicity of each conspirator in
the death; each is equally liable for first-degree murder. The American legal scholar
George Fletcher clarifies the felony murder doctrine with a hypothetical:

... Suppose D and R and several others agree to rob a liquor store and they also agree in
advance that though they will carry guns there should be no violence. While D is waiting
in the car, he sees a pedestrian approach, he gets nervous and fires a warning shot at him,
which unexpectedly hits him. Under the doctrine of felony murder, D and R and all the
other accomplices are liable for murder in the first degree.74

Fletcher believes the crime of felony murder was developed for utilitarian reasons: it
imposes an additional burden on those involved in dangerous felonies to do everything in
their power to avoid killing others. This burden may be a "cost" borne by the felon, but it
is more than justified by the "benefit" for society in deterring would-be offenders.75

The crime of felony murder is just one ingredient in the larger stew of conspiracy
theory, which abrogates the traditional breakdown of collective criminality into
perpetrators/principals, accessories, and aiders-and-abettors. The functional justification
of felony murder may apply a fortiori to criminal conspiracies. As Fletcher notes,
traditional criminal law was unequipped to deal with large criminal combinations. The
most devastating and grievous instances of criminality in the 20th century have not been
committed by lone individuals, but by groups acting in concert to accomplish a
destructive goal. Fletcher writes:

Only groups engage in genocide and ethnic cleansing, impose dictatorships, force the
"disappearance" of citizens, control the drug trade, develop systems of money laundering,
and manufacture defective, dangerous, and polluting products. The "groups" in question
range from governments, to ruling cliques, to organized criminal organizations, to
respectable corporations.76

The vastness of many such organizations makes assessing individual contributions to the
crime at best difficult, at worst impossible. Further, the very nature of modern
bureaucracies, by parceling out different functions in a criminal scheme to various actors
(e.g., one conspirator initiates the idea, another drafts the plan, a third appoints the agent to carry it out, a fourth executes it), disperses responsibility across a spectrum of individuals, no one of whom fits neatly into a traditional category of offender. No single conspirator can be blamed for consummating the offense; yet, each is responsible for the final result. The pragmatic need to hold all of them accountable for the sometimes ruinous consequences of their actions, it is held, justifies the theory of criminal conspiracy.

The initial impetus behind the Americans' decision to apply the law of conspiracy to the prosecution of Nazi criminality was functional in nature. By obtaining judicial declarations that certain German organizations were criminal conspiracies, U.S. war crimes planners hoped to avoid the intractable problem of trying the tens of thousands of potential defendants on the merits of each case. There are, however, obvious drawbacks to vicarious liability, chief among them its tendency to efface the distinctive contribution of each conspirator to the crime. Moved by this concern, the English parliament abolished the doctrine of felony murder in 1957. In the U.S., the drafters of the Model Penal Code urged state legislatures to follow Parliament's example—a plea that till now has fallen on deaf ears. In the Hadamar trial, the prosecution successfully argued for the conviction and punishment of the defendants as perpetrators/principals—even though they were all subsidiary actors in the Nazi scheme to destroy "life unworthy of life," which constitutes the Americans' third serious misrepresentation of the Hadamar killings.

A brief recapitulation of what each defendant actually contributed to the Hadamar murders demonstrates the infirmities in the prosecution's understanding of the crime. There were seven defendants indicted at the Hadamar trial: Alfons Klein, the director;
Adolf Wahlmann, the chief doctor; Heinrich Ruoff, the head male nurse; Karl Willig, the Ward male nurse; Irmgard Huber, the head female nurse; Philip Blum, the institution's cemetery attendant; and Adolph Merkel, the Hadamar registrar and bookkeeper. Despite the defendants' self-exculpatory representations during their Army interrogations and at trial, the real and testimonial evidence presented allows us to recreate the killing of the Ostarbeiter with a reasonable degree of certainty. Sometime in the summer of 1944, Klein met with Landesrat Bemotat, who informed Klein he had received a letter from the Gau Employment Office concerning the large numbers of tubercular eastern workers in Nazi labor camps. According to Klein's testimony at trial, the letter stated that these workers were incurably ill, and inquired "whether any building or institution could be used to shelter these sick people." Bemotat then allegedly asked Klein whether the sick workers could be accommodated at Hadamar. We have reason to doubt Klein's innocuous portrayal of Bemotat's request; it seems highly unlikely that at this critical moment in the war, having already murdered millions of Jews, Poles, and Russians in Eastern Europe, the Nazis would have transferred "incurable" Ostarbeiter to a killing center for the purpose of sheltering them. Our skepticism is bolstered by events that ensued after this meeting. Two weeks later, Bemotat visited Hadamar and supposedly informed Klein there was a change of plans: the "incurable" eastern workers were now to be killed at Hadamar. Bemotat, Klein alleged, had been told by Gauleiter Sprenger that all the workers were incurable and thus "it wouldn't pay to transport them any more." Wahlmann, on the other hand, declared that the workers were earmarked for killing in order to free up hospital space for war-related casualties. Klein claimed that Wahlmann was present at this meeting with Bemotat, an assertion Wahlmann denied. Wahlmann
does admit that Klein informed him during that summer that Hadamar would receive transports of eastern workers suffering from incurable tuberculosis. These individuals were to be given “mercy killing,” using the same techniques refined in the euthanasia of mentally ill Germans. 78

The first transport of 75 sick eastern workers arrived at Hadamar in July or August 1944. Contrary to the statements of Klein and Wahlmann, postmortem exams of the corpses revealed that very few were terminally or gravely ill before their deaths. 79 They were housed on the first floor of the institution in two modest rooms that had been cleared of their occupants by Nurse Huber prior to their arrival. Subsequent transports consisted of between one to 10 eastern laborers, and continued from late summer 1944 until March 1945. Once Huber had settled them in their beds, the eastern workers were attended by Ruoff and Willig. Both men had been briefed by Klein and Wahlmann before the workers’ arrival on the need to kill them. Wahlmann prepared the overdoses of narcotics (chiefly veronal, trional, and chloral tablets and morphine/scopolamine injections) that were to be given to these patients and handed them to Ruoff and Willig. The two nurses administered the “medication” to the eastern workers, who died shortly thereafter. The corpses were taken by Philip Blum (Klein’s cousin) to the Hadamar cemetery for burial. Adolph Merkle recorded their names and phony causes of death in the hospital patient registry, which was later conveyed to the Office of Statistics (Standesamt) for the town of Hadamar. After the first transport, morning conferences involving Wahlmann, Huber, and Ruoff (or sometimes Willig) were regularly held to sign falsified death certificates and to prepare the lists of patients to be killed. 80

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Clearly, each of the defendants in this scheme discharged a specific function: Klein relayed the order from Bernotat and Sprenger. Wahlmann organized and set in motion the means of producing death through narcotics overdoses, Huber prepared space for and situated the victims, Ruoff and Willig administered the deadly cocktails, Merkle covered up the crime with false entries on patient lists, and Blum disposed of the bodies. Their roles in the plan to exterminate the ill eastern workers—reprehensible though they are—were subordinate to the higher authorities in Wiesbaden (Bernotat and Sprenger). Klein, Wahlmann, et al. did not contrive the plan themselves; they loyally carried out the wishes of those who had personally designed the plan. To treat them all as principals or co-perpetrators under a totalizing theory of conspiracy distorts their ancillary position in a much larger, much more nefarious program to annihilate individuals branded by the Nazis as “surplus” people.

From time to time, the truth behind the killings of the Ostarbeiter bursts through the cloud cover thrown over the proceedings by the self-serving protests of the defendants and the tendentious theories of the prosecution. One such example occurs during Wahlmann’s interrogation by the U.S. Army prior to the trial. After rehearsing the familiar—and bogus—defense that the killings were motivated by a humane desire to end the suffering of incurable patients, Wahlmann makes a remarkable admission: the eastern workers were killed at Hadamar to clear hospital space for “the wounded.” Presumably German soldiers and civilians injured in air raids: “My primary consideration was, that through this mercy killing, beds would be made available for the wounded.
friend and foe alike. Wahlmann opined that putting to death incurable mentally ill Germans, Russians and Poles was justified, since “they are a handicap to us . . . when they take up room in our institutions.”

The case of Hadamar ward nurse Karl Willig lends credibility to Wahlmann’s statement. From 1938 to July 1941, Willig worked at the Herborn asylum, where in mid-1941 he assisted in evacuating Herborn’s mental patients, presumably to make possible the conversion of the facility into a hospital. After a brief stay at Hadamar, he was assigned to the mental hospital in Lubeck; here, in his own words, he “cleaned out the hospital of sick people,” again for the purpose of transforming the institution into a hospital for the German army. From Lubeck he traveled to Neustadt, “clean[ing] out hospitals all the time,” until, at the close of 1941, he returned to Hadamar, serving first as a telephone operator and later as a Ward Nurse under Heinrich Ruoff. Insofar as we know, in these earlier clearings of patients in mental hospitals Willig did not pursue the violent solution of killing as a way to free up hospital space. Instead, the evacuated patients were relocated to other institutions in Germany. Not until he reached Hadamar in late 1941 was he introduced to mass murder as a radical means to the end of creating hospital space for “valuable” Germans:

They always told me before that they put them away with gas. When I came up there [to Hadamar] they told me that the hospital had to be cleaned out for use for soldiers and that there was no use in those people [i.e. the mentally ill] living. I was only a little man and had to do what people told me to do.  

With the exception of the self-exculpatory final sentence, Willig’s confession rings true to what we know of the euthanasia program in late 1941-early 1942. This was the period of intense aerial bombing of German cities, as well as alarming reversals on the Eastern Front. Operation Brandt, as described in Chapter 3, was developed to
evacuate mental hospitals for use by bombed-out civilians and Wehrmacht soldiers. The mentally disabled evacuees (including shell-shocked Hamburg women in July 1943) were sent to places like Hadamar, Meseritz-Obrawalde, and Eichberg to be starved to death or killed with overdoses of medication. In this brutalizing atmosphere Willig cut his teeth. By the time the tubercular Ostbeiter arrived in Hadamar during the summer of 1944, he was an experienced and efficient killer.

This economistic strand of the Hadamar trial raises one of the most provocative and important questions about National Socialist genocide: to what extent was Nazi killing motivated by modern utilitarian considerations of creating hospital space and transferring scarce resources to “productive” members of the Volksgemeinschaft? Or, as the German Holocaust historian Ulrich Herbert has recently posed the question: “What was the relationship between ideological factors, such as racism and hatred of Jews, to goal-related, ‘rational’ motives, such as economic modernization and solving food shortages?” In other words, to what degree can we account for the Nazi assault on “valueless life” in terms of modern cost-saving measures? On the other hand, how significant were ideological factors—e.g., anti-Semitism, anti-Slavism, and pejorative images of the disabled—in the Nazis’ killing projects? We will take up these questions at far greater length in the conclusion to our study; for now, it is enough to observe the apparent consonance of this “modernity” interpretation of Nazi euthanasia with the data from the U.S. Hadamar trial. It seems to be supported by the veracious statements of Wahlmann and Willig, as well as the supererogatory remark of the former cook and “caretaker” at Hadamar, Agnes Schrankel: “In my opinion, all the patients were weak and undernourished.... I still think that when a person is sick and incurable, is useless
to the community, it is a good thing to help him to die, and in my opinion the other personnel [at Hadamar] shared this belief." In subsequent chapters, I will argue that the surface plausibility of the modernity theory of Nazi genocide is insightful to an extent but ultimately misleading, for without a prior devaluing of marginal groups like the mentally ill, decisions to end their lives for the advantage of more "valuable" people would never have been made.

The American prosecutors presented a different theory of the Hadamar defendants' motives in their closing argument before the military commission: the motive of careerism, or "personal preferment." On this interpretation, Wahlmann, Klein, and Huber were gamblers playing with human lives as poker chips. Their gamble was that Germany would win the war and that they would be rewarded for their work by a triumphant National Socialist state: "They were seeking personal preferment, and there is no doubt in the mind of anyone here but they would have received personal preferment had Germany won the war." A crass, self-regarding careerism was the force behind their descent into mass killing, the prosecution argued. It also scoffed at the defendants' claims that they were unaware their actions were anything but legal. If this were the case, defendants would not have been at pains to falsify the death records in an attempt to conceal the killings from the public. Further, Huber and Wahlmann spoke openly to each other of the harsh retribution they could expect if the U.S. won the war. The Commission hearing the case agreed with the prosecution's version of the Hadamar killings; on October 15, 1945, after a one-week trial, it found all the defendants guilty of murder in
violation of the Geneva Conventions and the Laws of War. It sentenced Klein, Ruoff, and Willig to death and the remaining defendants to hard labor for terms varying from life to 25 years.86

What emerges from the Hadamar trial when we focus on the prosecution’s case in chief and the verdicts of the commission is the following image of euthanasia at Hadamar: the defendants were involved as perpetrators/principals in a conspiracy to kill Polish and Russian workers suffering from tuberculosis, with full knowledge that these murders were not sanctioned by the German euthanasia law of 1939, and for the purpose of furthering their careers in a postwar National Socialist Germany. By disconnecting the murders from the larger context of the Nazi campaign against "life unworthy of life," including the mass extermination of Jews, Gypsies, asocials, Soviet POWs, and the mentally disabled, the Americans presented a historically dessicated rendering of the mass murder at Hadamar. I have suggested that the Americans’ initial commitment to upholding the principle of sovereignty, even as they assumed a legal basis for euthanasia in German law, tilted their case toward a simplifying distortion. Karl Willig, speaking in tears before the military commission that would sentence him to death, complained: "It is a hard fate, that we the smallest ones who never had anything to say and only had to obey have to be here accused of such a charge." When Willig uttered these words in October 1945, there was certainly truth in them. The primary designers of Nazi euthanasia had yet to be tried; many would never be held accountable for their actions in a legal proceeding. By the time of the Medical Case (or Doctors’ Trial) one year later, however, two of the leading figures in the program to murder "valueless life" stood accused of crimes against humanity in the dock at Nuremberg. The U.S. Doctors’ trial would depart
from the restrictive and inadequate understanding of Nazi criminality that characterized the Army's prosecution at Hadamar. At the same time, it would be encumbered with its own problematic conceptions of National Socialist euthanasia.

IV. The U.S. Doctors' Trial, November 1946-August 1947

A. The Artful Seque: from the IMT to the NMT's Medical Case

Scarcely a month after judgment was pronounced on the Hadamar defendants, the International Military Tribunal (IMT) convened to try the "major war criminals" under the terms of the London Charter. Consistent with the earlier recommendations of Stimson and Jackson, the Americans at Nuremberg equated Nazi criminality with a tentacular conspiracy to wage aggressive war. Their approach was summed up by Jackson during the London conference:

[O]ur view is that this isn't merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace ... and the other atrocities were all preparatory to it or done in execution of it.*

On this theory of Nazism, the Final Solution and the euthanasia program were mere byproducts of the Nazis' military conquests throughout Europe. Telford Taylor perceived the danger of this reductionist understanding of Nazi criminality. In his memoirs he wrote that "the conspiracy case ... bid fair to swallow the greater part of the entire case."** Yet, Taylor and his associates remained loyal to the conspiracy theory of Nazi criminality. In his address before the IMT, Jackson's assistant prosecutor, Sidney Alderman, identified as the "heart of the case" the "planning, preparation, initiation, and waging of illegal and aggressive war." Alderman continued:

All the dramatic story of what went on in Germany in the early phases of the conspiracy—the ideologies used, the techniques of terror used. . . . and even the concentration camps and the Crimes against Humanity, the persecutions, tortures, and
murders committed—all these things would have little juridical international significance except for the fact that they were the preparation for the commission of aggressions against peaceful neighboring peoples. Even the aspects of the case involving War Crimes . . . are aspects which are merely the inevitable, proximate result of the wars of aggression launched and waged by these conspirators . . .

Alderman conceded that the defendants were involved in this conspiracy in varying degrees. However, the law of conspiracy rendered them all jointly and severally liable for the acts of each participant in the plot to wage aggressive war: “All the parties to a Common Plan or Conspiracy are the agents of each other and each is responsible as principal for the acts of all the others as his agents . . .”

At the London Conference, the Soviets and the French had regarded the conspiracy charge in Article 6 of the Charter with consternation. The Anglo-American theory of conspiracy was foreign to the tradition of continental law in which France, the USSR, and Germany were steeped. Although continental jurisprudence had laws to prosecute group criminality, the charge of criminal combination was absorbed into the substantive offense at trial; there was no separate conspiracy charge once a defendant’s guilt for a crime was established. Interestingly, the historical adviser to the British Foreign Office, E.L. Woodward, shared the French and Soviets’ misgivings about conspiracy, arguing that no such scheme to wage aggressive war existed. Like the French and Soviets, too, he believed the prosecution’s case—and historical truth—would best be served by focusing on war crimes and crimes against humanity. The prosecutors at Nuremberg dismissed these concerns, committing themselves instead to the monolithic theory of a Nazi conspiracy to wage aggressive war, the central hub around which the spokes of war crimes and crimes against humanity revolved.
During deliberations on the evidence at the end of the trial, the French judge, Donnedieu de Vabres, revived French uneasiness about the conspiracy charge. Vabres was worried that it would undercut the responsibility of the German people for the crimes of Nazism “by shifting the blame to the secret plots of a small group.” The judges struck a compromise in their verdicts on the conspiracy count: they affirmed the existence of a conspiracy (or several conspiracies) dating back to the time of the Hossbach memorandum in November 1937, but restricted the conspiracy solely to the plan to wage aggressive war, not to the commission of war crimes or crimes against humanity. Further, they set forth an expansive conception of Nazi criminality that implicated far more than Hitler and the ideological Party elite:

Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they are doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

The language of extensive criminality in the excerpt above, as we will see in subsequent chapters, was insufficient to convince many Germans in the aftermath of the IMT that a malignant cabal was indeed not wholly responsible for the crimes of National Socialism.

Prosecuting German doctors in a separate proceeding for medical crimes was an idea that evolved gradually as the trial of the major war criminals unfolded. At first, the Americans had no intentions of prosecuting the Nazi doctors. Control Council Law #10, enacted in December 1945, had furnished the basis for “zonal trials” (national trials conducted by each of the four occupying powers in its own zone, as opposed to the joint 4-power prosecution of the major war criminals at Nuremberg). Until January 1946
Telford Taylor, appointed to succeed Robert Jackson as U.S. Chief of Counsel, was embroiled in the Allied prosecution of the Wehrmacht High Command, and hence could not focus on organizing the subsequent trials under Law #10. Beginning in mid-January, he turned his attention to the successor trials, envisioning another international tribunal to try German industrialists and financiers and an American trial of “other major criminals” in the U.S. zone of occupation. In a memorandum to Jackson dated January 1, 1946, Taylor reported that France, Great Britain, and the USSR also desired one more IMT to try the industrialists and financiers. In this memo, he sketched the proposed shape of future trials, which included, in addition to a second IMT and trials by American courts in the U.S. zone, trials of “local criminals” by military courts-martial, trials of other “major war criminals” in the courts of “allied powers” or in countries formerly occupied by the Nazis, and de-Nazification proceedings to deal with “organizational cases.” Taylor makes no mention at this stage of plans to prosecute German doctors for medical crimes.95

Although plans to hold a second IMT went forward during the first half of 1946, the Americans and British soon reconsidered their support of this plan. In a memo to Taylor dated February 5, 1946, Jackson expressed his concerns that a second IMT would lack political support in the U.S. He also presciently warned that the Russians would insist on holding a second IMT in the Russian zone of occupation, with a Soviet judge presiding over the trial. Taylor and his staff continued to entertain the possibility of a four-power tribunal, especially for the purpose of trying the German chemical conglomerate, I.G. Farben. By the summer of 1946, however, they had developed their own misgivings about a second IMT. Taylor had apprehensions about “continental and
Soviet law principles unfamiliar to the American public," as well as the negative impact in the U.S. of a Soviet judge presiding over a second IMT. In June the Americans adopted a "zonal courts policy," and by August 1946 Taylor had informed the War Department *inter alia* of his plan for an American medical case based on criminal experiments performed on concentration camp inmates.96

The stimulus to prosecute German doctors for medical crimes in a subsequent trial arose during the IMT proceedings against Reichsmarschall Hermann Göring, in which evidence came to light about the participation of German *Luftwaffe* doctors in heinous medical experiments on concentration camp prisoners. The complicity of the German medical profession in Nazi criminality was further revealed at the IMT by SS-Standartenführer Wolfgang Sievers, former General Secretary of the Ahnenerbe Society and director of its Institute for Military Scientific Research. In his Army interrogation, Sievers alerted the Allied investigators to the existence of a "Jewish skeleton collection" at the University of Strasbourg, to create which Jewish concentration camp prisoners were murdered. As early as May 1946, when the issue of a second IMT was still unresolved, Taylor's office (the "Subsequent Proceedings Division") had assigned to an investigative group under James McHaney the task of gathering evidence about the leaders of the SS and of the German health and medical service. The plethora of evidence on medical crimes gathered by McHaney's group and the IMT prosecution team, as well as the presence of potential medical defendants in American and British custody, influenced Taylor in August 1946 to begin the U.S. subsequent proceedings with
its case against the German doctors. In a letter to Secretary of War Howard Petersen in late September 1946, Taylor opined that the medical case would be “a rather easy one to try and to decide, and therefore I think a good one to start with.”

As we examine American judicial approaches to Nazi euthanasia in the Doctors’ trial, it is important to note that the case was designed primarily around the barbarous medical experiments performed in German concentration camps during the war. Participation in National Socialist euthanasia, charged against only four of the 23 defendants as a crime against humanity in violation of Control Council Law #10, was an incidental subplot in the trial. Taylor and his team chose to prosecute 20 German doctors and three non-doctors involved in medical crimes. Their criterion of choice in all 12 of the subsequent trials was to find “those highly placed individuals who bore the greatest responsibility for formulating and ordering the execution of the criminal policies which directly led to and instigated the aggressive wars and mass atrocities . . . committed under the authority of the Third Reich.” In conformity with this overarching principle, Taylor enunciated in his opening statement at the Doctor’s Trial the prosecution’s aim to try the preeminent figures within the Third Reich’s “state medical services,” in order to demonstrate the criminality of the German medical system, and not just the crimes of individual perpetrators. Regrettably, a considerable number of potential defendants was unavailable for trial. Many had either been killed or, like Dr. Ernst Robert Grawitz, the highest ranking SS and Police doctor, had committed suicide; the whereabouts of others, such as Dr. Erich Hippke, the chief of the combat medical system of the Luftwaffe, was unknown.
Already in July 1946, American war crimes investigators were aware that the British had assembled substantial evidence against the so-called "Hohenlychen group," a group of German doctors involved in lethal and disabling human experiments at the SS sanatorium of Hohenlychen. These included Karl Gebhardt, Fritz Fischer, Karl Brunner, Hertha Oberheuser, Percy Treite, Rolf Rosenthal, and Karl Brandt. Taylor's deputy James McHaney initiated negotiations with the British to have these individuals delivered to the Americans with an eye toward prosecuting them for criminal medical experiments on concentration camp prisoners. Around the same time as the U.S. investigators became aware of the Hohenlychen Group, the American neurologist Leo Alexander, tasked with researching the complicity of German neuropsychiatrists in medical crimes, submitted reports on hypothermia experiments and the sterilization and killing of the mentally disabled. The prosecution at the IMT offered these reports in evidence against the major war criminals. Identified in Alexander's reports as perpetrators of crimes against humanity were fifteen of the twenty-three defendants eventually prosecuted in the Medical Case: Kurt Blome, Karl Brandt, Fritz Fischer, Karl Gebhardt, Karl Genzken, Siegfried Handloser, Joachim Mrugowsky, Adolf Pokorny, Helmut Poppendick, Hans-Wolfgang Romberg, Konrad Schäfer, Oskar Schröder, and Georg-August Weltz, as well as SS bureaucrats Rudolf Brandt and Wolfram Sievers. Thus, several months before the commencement of the trial in November 1946, the issue of Nazi medical experiments had come to dominate the thinking of the American prosecution team in its approach to a future trial of German physicians once the IMT had concluded.¹⁰⁰
One name that stood out conspicuously in both the Hohenlychen group and Alexander's reports was the Reich Commissioner for Health and Sanitation and Hitler's personal physician, Dr. Karl Brandt. Brandt had been under investigation by both the British and Americans since early June 1946 for his role in medical crimes at the Dachau concentration camp. The highest ranking defendant among those indicted at the Doctors' Trial, Brandt was an especially inviting target. His personal relationship with Hitler, his irrefutably leading role with Philip Bouhler in the euthanasia program, and his ties to both the Hohenlychen group and to medical atrocities performed at Dachau rendered Brandt a veritable poster-child of Nazi medical criminality. By early September 1946, the American prosecution team had decided to add Brandt to a list of defendants that included, among other names, the Hohenlychen group, Sievers, Rudolf Brandt (the Personal Administrative Officer to Himmler), and the top bureaucrats in the Führer's Chancellery, Viktor Brack and Philip Bouhler. By September 9, another cut had been made that set the number of medical defendants at twenty-three. The list comprised the defendants arraigned before the American National Military Tribunal (NMT) when the court opened on November 21, 1946.

The indictment against the defendants charged them with four counts: (1) conspiring to commit war crimes and crimes against humanity ("common design or conspiracy"); (2) war crimes; (3) crimes against humanity; and (4) membership in a criminal organization. Count Two (war crimes) subsumed criminal medical experimentation (experiments to gauge the effects on the human body of high altitude, extreme cold, malaria, mustard gas, sulfanilamide, sea-water, epidemic jaundice,
sterilization, typhus, poison, and incendiary bombs). Paragraph 9 of Count Two charged four of the defendants, Karl Brandt, Kurt Blome, Viktor Brack, and Waldemar Hoven, with complicity in euthanasia. The indictment describes it as a program to murder “hundreds of thousands of human beings, including nationals of German-occupied countries,” as well as “the aged, insane, incurably ill, . . . deformed children, and other persons, by gas, lethal injections, and diverse other means in nursing homes, hospitals, and asylums.” The indictment goes on to offer a laconic theory of why these people were killed: “Such persons were regarded as ‘useless eaters’ and a burden to the German war machine.” The closing sentence of paragraph 9 affirms a link between National Socialist euthanasia and the Holocaust: “German doctors involved in the ‘euthanasia’ program were also sent to Eastern occupied countries to assist in the mass extermination of Jews.”

In paragraph 8, Count Two charged Rudolf Brandt and Kurt Blome with “the murder and mistreatment of tens of thousands of Polish nationals,” who “were alleged to be infected with incurable tuberculosis.” Again, the authors of the indictment briefly theorized on the reasons for the killings: “On the ground of insuring the health and welfare of Germans in Poland, many tubercular Poles were ruthlessly exterminated while others were isolated in death camps with inadequate medical facilities.” To an extent, Count Three (crimes against humanity) was redundant with Count Two. It enumerated the same charges of euthanasia against Karl Brandt, Blome, Hoven, and Brack in its paragraph 14 and the murder of tubercular Poles in the Warthegau against Rudolf Brandt and Blome in its paragraph 13. Count Three, however, also charged Rudolf Brandt and Wolfram Sievers with involvement in the plot to murder Jews in order to supply a skeleton collection for the University of Strasbourg (paragraph 12).
In the remainder of this chapter, we will focus on the U.S. prosecution team’s conception of euthanasia as reflected in the cases of Karl Brandt and Viktor Brack. Blome and Hoven were relatively minor figures in Nazi euthanasia, and thus did not engross the attention of the Americans to the extent that Brack and Brandt did. In its closing argument before the court, the prosecution described Brandt as the “first link” in the euthanasia chain, Philip Bouhler as the second link, and Brack as the third. By the time of the Doctors’ Trial, Bouhler was beyond the reach of American justice, having committed suicide with his wife at Zell-am-See in May 1945. Hence, the two preeminent figures in Nazi euthanasia available for trial—at least in the estimate of the prosecutors—were Brandt and Brack.

B. The Dubious Humanitarian: Dr. Karl Brandt

By his own account given in an interrogation with Leo Alexander, Karl Brandt enjoyed a peaceful and uneventful upbringing until the outbreak of the Great War in 1914. He was born on January 8, 1904 at Mühlhausen, Alsace (at the time part of German territory). Brandt’s father was a policeman; his mother hailed from a “medical family” (his maternal grandfather and uncle were both doctors, and a second uncle was a pharmacist). The Brandts were expelled from Alsace in 1919, sealing Karl’s membership in a class of Germans peculiarly susceptible to the allure of Nazism—i.e., ethnic Germans from “lost territories” and “threatened borders.” A “turbulent” period ensued for the Brandt family, marked by Brandt’s transfer to different schools and his father’s detention in a French prison until 1921. In 1924 he arrived at the University of Jena to begin his medical studies. During his internship (and until the outbreak of World War Two), Brandt pursued his athletic talents in mountain climbing and skiing. He
confided in Alexander that he also had a keen interest in architecture, cultivating friendships during the interwar years with painters and sculptors. His affinity was not with music, as one "usually finds among doctors," but "more with the optical." Brandt shared with many other Nazis a self-confessed interest in visual aesthetics. The influence of this aestheticism on his participation in the destruction of "unworthy life" is a matter for speculation.

Brandt served as a surgeon in Bochum for a time before working in the Surgical University Clinic in Berlin in 1934, where he became chief doctor (Oberarzt) in 1936. While his medical career burgeoned, Brandt climbed the ranks of the Nazi Party, which he joined in January 1932. In 1933 he became a member of the SA. Shortly after the Night of the Long Knives in June 1934, Brandt joined the "General SS," receiving a rank of Untersturmführer. Around the same time, he became Adolf Hitler's "Escort Physician" (Begleitarzt), a job that required him to accompany Hitler during his travels away from Berlin. In 1938, Hitler sent Brandt to examine the Knauer child in Leipzig. After confirming the attending physicians' diagnosis and giving the green light for its killing, Brandt received a commission from Hitler to dispose of all similar cases in the future in the same manner—a commission he held jointly with the chief of the Führer's Chancellery, Philip Bouhler. Bouhler authorized his deputy Viktor Brack (chief of Main Office II of the Führer's Chancellery) to work with Hans Hefelmann (director of Office II b) and Herbert Linden (minister within Department IV of the Interior Ministry and later the Reich Commissioner for Mental Hospitals) in establishing a planning group of pro-euthanasia physicians. This group, which included Karl Brandt, developed the children's
euthanasia program. His early involvement in National Socialist violence against the disabled earmarked him as a trustworthy accomplice when Hitler extended the program to handicapped adults.

Described by T-4 Obergutachter Werner Heyde as a “conscientious man” who, being entrusted with the task of organizing the killing project, “had to see with his own eyes which killing method should be employed,” Brandt participated with Viktor Brack in the carbon monoxide gassing experiments at Brandenburg in late 1939. Along with Brack, he approved the carbon monoxide method of producing death—a method that would serve as the paradigm for the five other euthanasia centers in Germany. In late 1941, Brandt became Commissioner for the Health Care System. In this office, he ordered the evacuation of mental patients from German psychiatric hospitals, allegedly in order to free up hospital space for wounded soldiers and civilians. The evacuees were transferred to other sites like Meseritz-Obrawalde, Hadamar, Eichberg, and Kaufbeuren, where they were often murdered through starvation or overdoses of narcotics. Both in his interrogations by the OCCWC and in his testimony before the NMT, Brandt portrayed euthanasia as motivated by high-minded ideals. He conveniently—and mendaciously—claimed his role in the killing of the mentally disabled ended with the first phase of euthanasia; after the official stop in August 1941, Brandt averred he had nothing further to do with it. He portrayed the first phase of euthanasia as a benign program targeting the so-called Endzustände, or “terminal cases,” that were refractory to rehabilitation or therapy. Their deaths were a “deliverance” from immedicable pain and suffering. In a bizarre appeal to natural law, he told Dr. Meyer, McHaney’s German interrogator, that he saw in euthanasia “the law of nature and . . . the law of reason.”
This “law of nature” called into question, in Brandt’s eyes, the Hippocratic oath; were Hippocrates alive, Brandt maintained, he would himself urge its “modification.” During his direct examination, Brandt emphasized that “purely humane considerations” actuated Hitler’s decision to euthanize “incurably ill persons.” Of his own actions within the killing program, Brandt was adamantly unrepentant, as he made clear in answer to the question whether he felt guilty for what he had done:

No. I do not feel that I am incriminated. I am convinced that what I did in this connection, I can bear the responsibility for it before my conscience. I was motivated by absolutely humane feelings. I never had any other belief than that these poor miserable creatures, that the painful lives of these creatures were to be shortened. The only thing that I regret in this connection is that external circumstances brought it about that pain was inflicted on the relatives. I am convinced that these relatives have overcome this sorrow today and that they themselves feel that their dead relatives were freed from suffering. 107

The American prosecuting team’s theory of Nazi euthanasia is discernible in its interrogations of Brandt, and remained remarkably consistent throughout the trial. Not surprisingly, the Americans’ view of euthanasia was at odds with Brandt’s. Yet, even Brandt admitted that the second (or “wild”) phase of euthanasia was not primarily guided by humane considerations. In his interrogations by Dr. Meyer in November and December 1946, Brandt took pains to distinguish the first “humane” phase of euthanasia from the second “wild” phase. He cited as an example two instances of euthanasia locally initiated by Gauleiter in Saxony and Pomerania that had come to his attention. Brandt claimed he informed Bouhler, Martin Bormann, and Hitler about these episodes: Hitler’s reaction was to demand the immediate cessation of the killing. Brandt believed that these examples of wild euthanasia were driven by the need to reduce the “overpopulation” of mental patients in the two regions. In other words, he advanced an economistic interpretation of the second phase of killing: mental patients were put to
death to conserve scarce resources. The economistic interpretation of Nazi euthanasia has an echo in Taylor's opening statement before the tribunal, in which he identified the murderous threefold teleology of the program: to kill Jews, “useless people,” and “enemies of the state.” Taylor quoted directly from the IMT’s description of the Nazis’ campaign against the mentally disabled:

Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane and incurable people, “useless eaters,” were transferred to special institutions where they were killed. . . . The victims were not confined to German citizens, but included foreign laborers, who were no longer able to work, and were therefore useless to the German war machine.108

The prosecution revisited the economistic theory of Nazi criminality in its closing argument before the NMT, where it quoted word problems from post-1933 German high school math textbooks:

Problem 95. The construction of an insane asylum required 6 million R.M. [sic] How many settlement houses at 15000 R.M. each could have been built for this sum? Problem 97. An insane person costs about four R.M. daily, a cripple five-and-a-half R.M., a criminal three-and-a-half R.M. In many cases a civil servant only has about 4 R.M., an office employee barely three-and-a-half R.M., an unskilled laborer not even 2 R.M. per head of his family. (a) Illustrate these figures graphically. According to cautious estimates there are in Germany 300,000 insane persons, epileptics, etc. under institutional care. (b) What is their total annual cost at a figure of 4 R.M.? (c) How many marriage allowance loans at 1000 R.M. each . . . could be paid out from this money yearly? 109

In its assessment of Brack’s complicity in the killing program, the tribunal endorsed the prosecution’s economistic interpretation, identifying as one of the program’s “prime motives” the aim “to eliminate ‘useless eaters’ from the scene, in order to conserve food, hospital facilities, doctors and nurses for the more important use of the German armed forces.”110

The interrogations and judicial testimony of other participants in the euthanasia program share this tension between “humanitarian” and economistic interpretations.

Hermann Pfannmüller, director of the mental institution Egling-Haar and a T-4 medical
expert (Gutachter), emphasized in his September 1946 interrogations that euthanasia was “only a war measure” to free up mental institutions for use as military hospitals. In his own defense, however, he took the moral high ground, asserting that “deliverance of a patient from incurable suffering” was his only motive for acting. The interrogator challenged Pfannmüller’s magnanimous portrayal of euthanasia:

Question: What was the final goal of the euthanasia killings?
Answer: The deliverance of a patient from incurable suffering. That was the only reason.
Q. That was not the only reason.
A. That was the only reason for me.
Q. What, in your opinion, was the reason for the [Hitler] order?
A. At the top, economic reasons may have been decisive, cleaning out institutions. I do not know.
Q. In other words, in order to free up beds for military hospitals?
A. Maybe to clear out mental hospitals in the occupied territory for military purposes, however, I do not know . . . .
Q. Euthanasia was implemented according to a plan. This you have already admitted in your last statement.
A. I thought of it primarily as a war measure till the enactment of a law. But Bouhler once told me that an order supported it.
Q. What kind of a war measure? In order to free up beds for military uses?
A. Because the wartime emergency made it necessary.111

At the Doctor’s Trial, Pfannmüller was called as a defense witness by Brack’s lawyer, Dr. Froeschmann. By this time, Pfannmüller’s testimony had been polished to accentuate the humanitarian interpretation of the euthanasia program and downplay economistic rationales for the killing. At times, his description of euthanasia shades over into the mawkish, as when he relates about his murder of handicapped children that “a very little dose [of Luminal] was sufficient in order to relieve the suffering of these pitiful little beings.” Pfannmüller, whose real attitudes toward the mentally disabled during the war were calloused, cynical, and brutal,112 claimed at trial that he was moved by the “horror” of their condition to do something for “relieving those poor creatures and their relatives of pain and the child of suffering . . . .” Like Brandt, Kurt Blome, and Brack.
Pfannmüller strove to portray the euthanasia program as separate from Nazi ideology. To the charge that he had once characterized mentally ill children as burdens on the health of the nation, he responded:

I can say even if this child was to be charged from the point of view of euthanasia, I never looked at this child from the point of view of national socialism [sic]. Euthanasia and the affairs of the Reich Committee in my opinion had nothing to do with national socialism [sic]. It is like the law for the prevention of diseases of progeny and the Marriage Laws, which are laws, legal measures, which happened to arise under the National socialist regime [sic]. The cause, however, goes back for centuries.

In keeping with this preposterous representation of the Nazi euthanasia program, Pfannmüller denied any knowledge of the term “useless eaters” as applied to the mentally ill: “The expression ‘useless eaters’ I heard for the first time while being here. I never heard this expression when dealing with any agencies with which I was in contact. You may believe me that if any serious minded person had heard that expression he would have thrown everything away and would have said ‘I am not going to cooperate.’”

Kurt Blome, the Deputy Reich Health Leader charged with participating in the murder of tubercular Poles in the Warthegau, also wavered between humanitarian and economistic conceptions of the killing program during the trial. Blome wrote a book in 1940 entitled Doctor in Battle (Arzt im Kampf), portions of which were used by the prosecution to impeach his claim that he supported euthanasia for humane reasons. On cross-examination, Blome was obliged to read the following excerpt from his book to the court:

We considered it to be nonsensical that, for instance, insane people who threatened their own life as well as others, or idiots of a high degree who perhaps cannot even keep themselves clean or eat by themselves, were brought up and kept alive with great effort and expense. In free nature these creatures would not be able to exist and would be exterminated according to the Divine law. We also did not understand that persons inferior in character and spirit, asocial creatures, who had murdered were, it is true, condemned to death, but were then pardoned on principle and kept alive in penitentiaries at the expense of the public; but also in quite different cases where it is not a question of putting an end to inferior life, we wondered whether the physician should not be given
the legal possibility to end an unhappy life prematurely. We are thinking of seriously suffering, incurable sick persons, who until their death had to expect only enormous mental and physical suffering and who themselves asked the physician to free them from suffering.

After reading this incriminating passage to the court, Blome tried to neutralize its effect by stressing the benevolent impulses that underlay his commitment to euthanasia. The physician's own "sense of responsibility," rooted in "deeply humanitarian reasons," was a "higher law" than the statutory ban on granting a mercy death to suffering people.114

As these examples demonstrate, the euthanasia component of the Doctors' Trial is imbued with a tension between humanitarian and economistic conceptions of the Nazis' murder of the mentally handicapped. Typically, defendants and defense witnesses stressed the compassionate aim of "delivering" incurably ill patients from their agony, while the prosecution focused on the crass utilitarian goals that euthanasia served. For Brandt and Pfannmüller, the euthanasia program was a benignly inspired initiative hermetically sealed from the genocidal abuses of wild euthanasia, Operation 14f13, and the Final Solution. The tension between an alleged "real" euthanasia based on pity and a perverted mass murder disguised as euthanasia persists in the case of Viktor Brack. Brack, however, faced not only the charge of euthanasia, but of setting in motion the most notorious crime in history—the destruction of the European Jews.

C. The Cynical Saboteur: Viktor Brack

Viktor Brack was born in 1904 in Haaren, the oldest of three children. Before the First World War, he spent a period of his childhood (approximately 2-3 years) with his mother, an ethnic German from Russia, visiting her relatives in Russia. After the war, Brack related that his family was informed by his mother's brother, who emigrated from Russia to Germany in 1920, that Brack's grandmother had been murdered by the
Bolsheviks. His mother's sister had also reportedly died there of typhus brought on by starvation. These revelations, Brack alleged, extinguished in him any further desire to revisit the vast, sprawling country of his mother's family.\textsuperscript{115}

After finishing his *Abitur* (college preparatory study) in 1923, Brack studied agriculture for a time, until the loss of his parents' property (his father, a doctor, owned a pediatrics sanatorium with a substantial estate) and the poor agricultural conditions in the Rhineland Palatinate caused him to switch majors to economics. He studied economics in a technical school in Munich (the same school from which Heinrich Himmler received a degree in agriculture in 1922). He graduated in 1928 and worked thereafter in different roles: as an assistant to his father farming a small plot of land the family had acquired, as a racer with BMW in Munich, and as a chauffeur of the future head of the SS, Heinrich Himmler, a personal friend of his father. In 1932, Brack was employed as the personal adviser to Reichsleiter Philip Bouhler, at the time the Economics Director of the Nazi Party. When Bouhler established the *Führer's Chancellery* (KdF) in 1934, he became its chief, and Brack became his staff director (*Stab-Leiter*). In 1936, Bouhler appointed Brack the head liaison officer with the Department of Health, despite his lack of medical training. Thereafter, Brack became Bouhler's deputy and the chief (*Oberdienstleiter*) of Section II of the *Führer's Chancellery*. It was in this office that Brack became a major figure in organizing the euthanasia program in 1939 and the Final Solution in late 1941.\textsuperscript{116}

Unlike the Army prosecutors in the Hadamar case, in the months preceding the Doctors' Trial Taylor's prosecution team was interested in the links between the euthanasia program and the larger Nazi assault on groups deemed "unworthy of life."
This interest is evident in Brack’s pre-trial interrogations, in which his interlocutors confronted Brack with their theory that the euthanasia program, rather than ending, as Brack contended, in 1941, was extended to the “extermination program” by the end of 1943. According to the interrogators, Nazi euthanasia was little more than a “general test” (Generalprobe) for the expanded killing program in the last four years of the war. Brack adamantly denied a link between the two events, claiming that Hitler was not thinking of the Final Solution when he ordered euthanasia to proceed. Brack’s default position was the concept of “mercy death:” the “higher purpose” of euthanasia was to afford incurably ill patients a legal means of ending their lives “at their own wishes.”

The issue of the motives behind the euthanasia program became the primary ground of contestation between Brack and his interlocutors. The struggle centered on how to characterize the euthanasia program at its inception. The interrogators began with a definition of “true” euthanasia: “Euthanasia is, according to the jurisprudence of all states governed by the rule of law, as well as according to German law, the act of assisting a patient transition from an immediately occurring and extremely painful death to a less painful one. That is, in the last stage, the administration of a dose of morphine.” Brack countered with the language of the Hitler order, which specified that only “incurable” cases were to be given a “mercy death.” Brack’s interrogators replied that the actual euthanasia program launched by the Hitler decree in 1939 had nothing to do with real euthanasia: “If we assume the fiction that the Hitler order gave a certain legitimacy to this killing, do you not know that the scope of the Hitler order was grossly exceeded in the form of the execution? That not only those people who were, according to the Hitler
order, ripe for euthanasia, but also others were killed?” The “other” victims referred to were “useless eaters,” whose consumption of hospital beds and medical resources impeded Germany’s conduct of aggressive war.117

The interrogators’ conception of euthanasia was not uniform, but contained at least two separate views of the Nazis’ assault on “unworthy life.” The first was economistic/utilitarian. On this theory, the mentally ill were killed to free up hospital space and health care personnel for the German Army as it waged aggressive war on Germany’s neighbors. The second was the “general test” theory, according to which euthanasia served a probative role in testing both equipment and personnel for a future, more inclusive killing of other groups of people. When confronted with each of these theories of euthanasia by the psychologist Leo Alexander, Brack vehemently denied them, resorting to his default position that euthanasia meant solely “helping a person who is suffering.” The neurologist Leo Alexander conceded to Brack that “we could argue about euthanasia,” but maintained that the Nazi variant was not true euthanasia. Rather, Alexander told Brack he was “entirely convinced that the actual cause was the preparation for the eastern people. Furthermore, the Jews were not directly attacked, but [euthanasia] was only a preliminary step. The beginning was made with the mentally ill, and that is the danger.”118

Alexander was an arch-proponent of the “general test” theory of euthanasia. He believed Brack was selected to guide the euthanasia program because he was “a little soft,” and needed “to be toughened up.” (Man hat den Brack genommen, um ihn zu härten.) With explicit reference to Himmler’s Posen speech of 1943, in which Himmler commended his SS-Gruppenführer for carrying out the “extermination of the Jewish
people,” a disagreeable but necessary task that “made us tough” (*Dies durchgehalten zu haben . . . das hat uns hart gemacht*), Alexander suggested to a protesting Brack that the euthanasia program was “an experiment in toughness,” (*Härteexperiment*), designed to callous “soft” SS men like Brack for the massive extermination of eastern European peoples.  

Alexander’s “general test” understanding of euthanasia presupposes indoctrination of the perpetrators in Nazi ideology in order to transform them into hardened killers of the Reich’s enemies. On this account, euthanasia was less a means of transferring scarce medical resources from the mentally ill to the German Army than a long-term preparation for the mass annihilation of Jews, Gypsies, Poles, Soviets, and other “worthless” groups, facilitated by immersing the perpetrators in the Nazi thought world and coarsening their moral sensibilities through acts of programmatic violence against the mentally ill.

The “general test”/ideological interpretation, along with the economistic theory previously discussed, became a polestar of the U.S. prosecution’s conception of Nazi euthanasia throughout the trial. In his opening statement, Telford Taylor previewed the prosecution’s view that Nazi euthanasia sprang from “a perverted moral outlook in which cruelty to subjugated races and peoples was praiseworthy,” instilled in the perpetrators in Nazi medical training centers like the Führer School of German Physicians. For Taylor and the U.S. prosecution team, the defendants were not motivated by “hot blood” or by the desire for “personal enrichment,” but by the National Socialist hierarchy of biological value. Their commitment to Nazi ideology eventuated in a unique phenomenon in the history of technology, the “macabre” science of “thanatology:”
Mankind has not heretofore felt the need of a word to denominate the science of how most rapidly to kill prisoners and subjugated people in large numbers. This case and these defendants have created this gruesome question for the lexicographer. For the moment, we will christen this macabre science “thanatology,” the science of producing death. The thanatological knowledge, derived in part from these experiments, supplied the techniques for genocide, a policy of the Third Reich exemplified in the “euthanasia” program and in the widespread slaughter of Jews, Gypsies, Poles and Russians. This policy of mass extermination could not have been so effectively carried out without the active participation of German medical scientists.  

The Americans pursued this theory of euthanasia in their cross-examination of Brack at trial. Brack had taken the stand in his own defense to address the two most damning charges against him: his involvement in the plot to murder the European Jews, and his proposal to sterilize a remnant of the surviving Jewish population with X-rays. By comparison with these charges, his role in the early stages of planning the euthanasia program paled into relative insignificance.

Brack and his attorney wasted little time in addressing each of the issues on direct examination. Their strategy could not be a policy of denying everything, since the documentary evidence against Brack was overwhelmingly incriminating. Instead, Brack and his lawyer concocted a defense that later defendants in the German euthanasia trials would advance with far greater success. Under German law, it is referred to as the “collision of duties” defense (*Pflichtenkollision*), and consists of the argument that the defendant committed the crime only in order to avoid greater harm. Ernst Kaltenbrunner, Heydrich’s successor as head of the Reich Security Main Office, had raised this defense at the IMT in Nuremberg, where he claimed he had done everything in his power to work at crosspurposes with the Final Solution, a “system I could only seek ways of mitigating, but whose intellectual and legal foundations I could do nothing to change.” Whether Brack had Kaltenbrunner’s defense in mind as a model is unclear. He did, however, stake his life on this “sabotage” theory of criminal wrongdoing.
According to Brack, it had become clear to him by the end of the 1930’s that “a struggle was underway here against an entire segment of the people [i.e. German Jews] and I did not consider this struggle to be a good one.” Brack claimed he had marveled at the prospect of “depriving” humanity of the works of Jews like Mendelssohn and Heine. In view of the cultural richness of Jewish life, Brack felt it necessary “to repudiate such a policy of hate, and that is what happened.” When he later learned of the Final Solution, he resolved to make “the effort if possible to help,” to “do anything I could to prevent [the destruction of the Jews].” Brack’s claim that he was forced to give the glad hand to all around him as he secretly devised his sabotage of the Final Solution was a forerunner of defenses in later euthanasia proceedings:

If I had raised the least objection to [the Final Solution] openly I would have aroused great suspicion of myself and would have aroused an altogether [sic] and false reaction in Himmler. Therefore, I had to make the best of a bad matter and had to pretend that I agreed with Himmler. Therefore, I pretended to be willing to clarify the question of mass sterilization through X-ray methods.122

The “question of mass sterilization through X-ray methods” that Brack refers to was a matter broached in a letter from Brack to Himmler, dated 23 June 1942, regarding “using European Jews as laborers.” The text of this letter reads in part:

Among 10 million Jews in Europe are . . . at least 2 to 3 million men and women who are fit enough for work. Considering the extraordinary difficulties the labor problem presents us with, I hold the view that these 2 or 3 million should be specially selected and preserved. This can be done, if at the same time they are rendered incapable of propagating. About a year ago I reported to you that agents of mine have completed the experiments necessary for this purpose.123

The letter goes on to recommend “castration by X-rays” as a “relatively cheap” solution to the problem.
On direct exam, Brack was faced with neutralizing the incriminating power of this document. He tried to do so with the argument that "the real purpose of that letter [was] not to exterminate the Jews, but to preserve them." The letter's reference to sterilizing the Jewish remnant was a sham calculated to buy time for at least some of the Jews until the war ended. His "strategy" was to induce Himmler to impose a moratorium on exterminating the Jews long enough to conduct X-ray experiments on Jewish guinea pigs and to evaluate the results. Himmler did, in fact, accede for a brief time to Brack's recommendation. On Himmler's order, Bouhler commissioned two euthanasia doctors, Dr. Horst Schumann (director of the Grafeneck and Sonnenstein killing centers and a T-4 Gutachter) and Dr. Irnfried Eberl (director of the Brandenburg and Bernburg killing centers and commandant of the Treblinka death camp), to commence sterilization experiments with X-rays, a program later abandoned as impracticable. Brack told the American court he was "convinced that by performing these experiments, hundreds of thousands . . . of Jews were saved."124

In addition to his sterilization plan, Brack claimed he sought to derail the Final Solution by persuading Hitler to use the Jews as a source of labor rather than kill them. Again, his alleged aim was to temporize until the war had ended. Implicit in Brack's defense is the view that the murder of the Jews was caused by the war: remove the war, and the Jews survive. Ironically, Brack's assumption in this regard parallels that of the American prosecutors, who maintained throughout the trial that the Nazis' destruction of "life unworthy of life" was the result of their waging aggressive war—a theory of Nazi criminality common to both the IMT and the American NMT. There are serious problems with this conception of Nazi genocide, as we will consider in subsequent
chapters. For now, it should be noted that the tendency to regard the crimes of National Socialism as the reflexes of a nation at war reduces their abhorrent quality by identifying them with excesses characteristic of war conditions. At the same time, it diminishes the centrality of these crimes to the Nazi movement, insofar as it suggests they would never have happened but for the occurrence of the war.

Ultimately, Brack’s efforts to invoke a “sabotage” defense could not overcome the mountain of documentary evidence amassed against him. That evidence proved Brack had assigned euthanasia personnel from T-4 to the virulent anti-Semite and Higher SS Police Leader for the Lublin district, Odilo Globocnik, whom Himmler had entrusted with carrying out the liquidation of Polish Jewry. The T-4 staff Brack detailed to Globocnik helped organize and administer the Final Solution in Poland. As if this were not sufficiently damning, the prosecution also offered into evidence one of the most notorious documents in the sordid history of the Final Solution, the “gassing letter” from the Reich Ministry for the Occupied Territories to the Reich Commissar for the Ostland, dated October 25, 1941. In it, Brack is mentioned as volunteering to supply both “accommodations as well as the gassing equipment” for use in killing Jews incapable of work. Brack apparently had misgivings about manufacturing the needed equipment in the Reich proper; instead, the letter relates that Brack had offered to send his own chemist, Dr. Helmut Kallmeyer, to Riga to work on the problem. The hardier Jews would be used as slave labor; those unable to work would be disposed of using the “Brackian devices.” As we saw in chapter 3, these “devices” were gas vans, which had
already been deployed since late 1939 in murdering mentally ill patients in the Wartheland. In the face of such evidence, Brack’s portrayal of himself as a well-intentioned saboteur of the Final Solution shriveled like leaves in a bonfire.

This did not, of course, deter Brack from striking the pose of a humanitarian. In his discussion of the first phase of euthanasia, he rejected the prosecution’s theory that the assault on the mentally ill was a pretext for politically and racially motivated killing. “When euthanasia was introduced, we welcomed it,” Brack testified, “because it was based on the ethical principle of sympathy and had humane considerations in its favor, of the same sort that the opponents of euthanasia claim for their own ideas.” He admitted “imperfections” in the way it was performed, but he added “that does not change the decency of the original idea, as Bouhler and Brandt and I myself understood it.” How, then, did euthanasia degenerate into a comprehensive program of mass murder? Brack’s counsel blamed Himmler for perverting the program by “distorting” it for “reasons of hatred and bigotry, and used it for the murder of the Jews.” Brack himself readily agreed with his lawyer’s interpretation, stating that “what was done here has nothing to do with euthanasia as a benefit to the person who is living a life unworthy of living... Only my helpfulness toward everyone and especially towards the sick made me an advocate of the idea of euthanasia.” Like Brandt and Pfannmüller, Brack resisted the prosecution’s theory that euthanasia at its inception was inspired by economistic, political, or racial motives; like them, he denied ever hearing the phrase “useless eaters.”

The U.S. tribunal hearing the case was not persuaded by Brandt and Brack’s humanitarian argument. It endorsed the prosecution’s depiction of National Socialist euthanasia as a program “to eliminate ‘useless eaters’ from the scene, in order to
conserve food, hospital facilities, doctors and nurses for the more important use of the
German armed forces.” At first, the court held, it was confined to “incurable” mental
patients, but gradually “the program was extended to Jews, and then to concentration
camp inmates.” The dilation of Nazi euthanasia into wholesale mass murder transpired
during the second, or “wild,” phase of the program. In a remarkable admission, the
tribunal noted in dicta that the “original aim of the program”—i.e., to end the lives of
“persons hopelessly ill, whose lives are burdensome to themselves and an expense to the
state or to their families”—may have been humane and, by implication, even permissible,
as Brandt, Brack, et al. had claimed. The program’s “purposes,” however, had been
“prostituted” by the defendants and used to murder not only incurable mental patients but
Jews and concentration camp inmates who were perfectly healthy.128

On this basis, the court found Brandt, Brack, and Hoven guilty of war crimes and
-crimes against humanity under Control Council Law #10. (Blome, who raised a
sabotage defense of his own for his alleged role in the murder of tubercular Poles, was
acquitted.) They were sentenced to death by hanging. After fruitlessly pursuing their
appeals, including a writ of habeas corpus filed with the U.S. Supreme Court, the three
defendants were hanged at Landsberg prison on June 2, 1948.

V. Conclusion: On Euthanasia, War, and Genocide

To its credit, the U.S. tribunal presiding over the Doctors’ Case saw through the
fake humanitarianism affected by the likes of Brandt and Brack. But how true were the
Americans’ theories of National Socialist euthanasia? Was euthanasia primarily designed
to exterminate “useless eaters” whose incapacity for work burdened the German war
effort, as the prosecutors argued and the court accepted? Or was Nazi euthanasia
primarily rooted in an ideological worldview that divided human beings into groups of
greater and lesser value, as the prosecution also suggested? These two accounts of
National Socialist criminality, the economistic and the ideological, are discrete but not
antithetical theories. This being said, which of the two affords us the best interpretive
tool for understanding euthanasia? Was Nazi euthanasia designed to free up material
resources for use by the German Army? Or was the language of economics a mere cover
for a deeper motivation originating in Nazi ideology? The tension between the
economistic and ideological theories of Nazi violence underlies some of the leading
debates in contemporary Holocaust studies, most recently surfaced in the dispute
between the German historians Ulrich Herbert and Götz Aly.¹29 We will examine their
disagreement more fully in the conclusion to the present study.

The United States' approach to the crimes of the euthanasia specialists stayed
remarkably consistent from the early views of Bemays, Stimson, and Jackson through the
theories and arguments of the American prosecutors at the Doctors' Trial. The armature
around which charges of war crimes and crimes against humanity were constructed was
Nazi Germany's launching of aggressive war. Even though the drafters of Control
Council Law #10 had annulled the linkage between war crimes and crimes against
humanity, the American prosecutors at the Doctor's Trial continued to assume that
euthanasia-related crimes were the excrescence of Hitler's imperialistic war—an
assumption that punctuates their indictment, opening statement, cross-examinations, and
closing argument. The tribunal implicitly endorsed this conception of the prosecution by
amalgamating Count Two (war crimes) and Count Three (crimes against humanity) and
treating them as a single count. Henceforth, euthanasia crimes were equated in the
court's mind with war crimes—that is, as crimes secondary to and contingent upon the
waging of aggressive war.\textsuperscript{130} I earlier suggested that the tenacious commitment to
viewing Nazi criminality through the lens of German war policy is traceable to the
Americans’ concern for the principle of sovereignty in international law. Nazi
euthanasia had to be connected somehow to the war; if it were not, the Allies would be
setting a dangerous precedent for intervening in the domestic affairs of a sovereign
country.\textsuperscript{131}

The problem with this understanding is one of causality. Hitler had confided to
Adolf Wagner in 1935 his intention to inaugurate euthanasia if and when war broke out.
Clearly, Hitler had the scheme to annihilate “unworthy life” in mind well before the
actual start of the war in September 1939. Furthermore, although we have no
compelling evidence that Hitler had planned to murder European Jewry before 1941,
vio\ntient persecution of German Jews was by no means uncommon in pre-war Germany.
As Herbert Jäger correctly observed more than 30 years ago, Nazi genocide was not the
product of the war; rather, “the war was the instrument for implementing genocide.”
What Jäger said about the destruction of the Jews during the war may be applied equally
to other groups targeted by the Nazis:

The life of the Jews in Germany was for a long time repressed by the totalitarian regime
and undermined through growing defamation and degradation, before we can even speak
of genocide in the verbal and actual sense: the mass killing represented only the
organization and carrying out of that which was systematically prepared in the state
system, and was already perfected in the spirit, when the bonds of human solidarity were
ruptured and the illusory picture of the Jew as a parasitic Untermensch injurious to the
Volk was established. If a minority is first equated with vermin, then the step to the
intention to “eradicate” it is no longer so great. Human dignity and life were taken from
the victims long before the gas chambers were opened to them: a process of development
over many years only needed to be pushed ahead to its final consequence.\textsuperscript{132}
For Jäger, identifying Nazi genocide with war crimes has the effect of misrepresenting genocide as something qualitatively different from—and less odious or reprehensible than—ordinary criminality. It emerges as the byproduct of ordinary men in extraordinary times, as periods of war always are. For this reason genocide seems to be a part of the natural order of things, and thus all the more excusable. General Sherman’s famous phrase that “war is all hell” captures a common belief that acts deemed enormities during peacetime become the common coin of the realm during times of war. Sherman’s aphorism was intended as a critique of the heroic conception of armed conflict. Yet, the hell unleashed by war is different from the inferno of Nazi criminality.

In the postwar era prominent German intellectuals have realized the importance of distinguishing between these two orders of hell. The German existentialist philosopher Karl Jaspers emphasized the conceptual divide between war crimes and Nazi crimes: a “completely different principle,” he argued, distinguished the two kinds of criminality. Similarly, Hannah Arendt insisted on the singularity of crimes against humanity, warning that they should not be conflated with war crimes. Lumping them together in one criminological hotchpot can nonetheless be tempting, not least because the language of National Socialism seduces us into drawing questionable inferences about the motives behind these crimes.

When German documents speak of evacuating mental patients from psychiatric hospitals to free up space for wounded soldiers, we may tend to accept this representation on its face, chalking up the murder of the patients to a war-related exigency. A similar conclusion—equally flawed—might be extrapolated from Einsatzgruppen after-action reports describing the shooting of Jewish “partisans” in the eastern territories. Jäger
rightly warns us not to fall prey to the specious language of National Socialism—a language created and deployed as much to hide the Nazis' acts from themselves as from outsiders. Instead, we should focus on "what [the extermination action] was designed to achieve." In these reports, Jews and the mentally ill are listed as separate categories of victims from partisans and communists. Meticulous recordkeepers, the Nazis counted coup and left us a documentary trail of their butchery. Applying Jäger's rule of thumb to their crimes, we find that the murder of Jews and the disabled was designed to blot them out *en masse* from the face of the earth. We will do well to bear Jäger's caveat in mind when we consider the claim, made time and again in both the American and German euthanasia trials, that Nazi euthanasia was driven primarily by the desire to conserve resources.

**NOTES**

5 Bassiouni, *Crimes*, p. 49.
6 Quoted in Bassiouni, *Crimes*, p. 50.
7 On the *Jus Civile* and the *Jus Gentium*, see Rainer Schröder, *Rechtsgeschichte* (Münster: Alpmann & Schmidt, 1992), p. 5. For now, I will bracket historical discussion of natural law theory until chapter 6, when we take up the subject of postwar German efforts to revive natural law as a means of justifying prosecution of Nazi defendants.
9 Bassiouni, *Crimes*, p. 52. Canonists who may have been influenced by Islamic ideas of warfare include Franciscus de Vitoria (1548-1584) and Alberico Gentile (1552-1608). One modern scholar, Charles S. Rhyne, has traced the influence of these Muslim tenets through the canonists to Hugo Grotius, the father of international law, who drew liberally on their writings. See Charles S. Rhyne, *International Law: the Substance, Processes, Procedures and Institutions for World Peace with Justice* (Washington: CLB Publishers, 1971), p. 23.
11 The Life of Henry the Fifth, act 4, sc. 7.
12 Quoted in Bassiouni, Crimes, p. 54.
14 Bassiouni, Crimes, pp. 55-56.
15 Bassiouni, Crimes, pp. 61-62; see also the 1907 Hague Convention at secs. 6-8 of the Preamble.
17 Marrus, The Nuremberg War Crimes Trial, pp. 11-12. The decision to relinquish jurisdiction to the Germans led to a debacle: of the 900 defendants the Allies proposed for trial, the Germans agreed to try only 45 of them. Of this number, only 12 were ever indicted. 6 of them were convicted, and these individuals were either released without punishment or given lenient sentences.
18 Cited in Telford Taylor, Final Report to the Secretary of the Army.
19 Bassiouni, Crimes, p. 68.
22 The quotations from the Inter-Allied Conference are in Marrus, The Nuremberg War Crimes Trial, pp. 18-19.
26 Churchill, supra at note 4.
27 Quoted in Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience (Lawrence, Kansas: University Press of Kansas, 1999), p. 29.
For legal discussions of the law of conspiracy, see *American Tobacco Co. v. U.S.*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Blumenthal v. U.S.*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947); *Marino v. U.S.*, 91 F.2d 691 (9th Cir. 1937). In the civilian world, Bemays had worked as a lawyer with the Securities and Exchange Commission (S.E.C.), a federal regulatory body established in June of 1934 to enforce compliance with the Truth in Securities Act of 1933 (a New Deal law requiring corporations to provide the public with complete and accurate information about securities issued by them). In their criminal prosecutions of Wall Street financiers for grand larceny and fraud, S.E.C. attorneys often included charges of conspiracy in the indictments. Bemays' conspiracy-based analysis of how Nazi war criminals should be prosecuted was no doubt influenced by his experiences with the S.E.C. in these high-profile cases.

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37 "I think also that through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization . . . ." Excerpted in Marrus, *The Nuremberg War Crimes Trial*, p. 42.
40 Charter of the IMT, Article 6, p. XII.
41 In the continental tradition of jurisprudence, the requirement that criminal laws be specific, clear, and non-retroactive is part of the "principles of legality," discussed in chapter 6, infra, p. 370 ff. According to Bassiouni, "the drafters of the Charter found it necessary to establish a link between ‘war crimes’ and ‘crimes against humanity’ in order to meet the minimum threshold of the ‘principles of legality.’" Bassiouni, *Crimes*, p. 49. Smith makes a similar observation about the linkage of crimes against humanity and war crimes. Smith, *Reaching Judgment*, p. 14.
42 See Marrus, *The Nuremberg War Crimes Trial*, pp. 187-188.
43 International Military Tribunal (IMT), *Trial of the Major War Criminals before the International Military Tribunal*, 19:470-472, excerpted in Marrus, p. 188.
44 R.H. Graveson, "Der Grundsatz "nulla poena sine lege" und Kontrollratsgesetz Nr. 10," *Monatschrift für deutsches Recht* (1947), p. 279. Acknowledging that the U.S. Constitution (Art. I, sec. 10) explicitly proscribed ex post facto laws, Graveson denied that the Americans had fetishized this prohibition. Rather, he maintained, the American approach was entirely pragmatic—willing to subordinate the ban on retroactive laws to the demands of justice where needed. In support of his claim, he cited the comments on ex post facto law by the American law professor Jerome Hall: "And why should a person who has committed an obviously immoral crime not be punished on the basis of a law decreed after the fact? In such a case, where a punishment is threatened already at the time the crime was committed, why should the punishment not be increased in a just measure? Does not substantive justice demand that this question be answered in the affirmative?"
47 Since Nuremberg, the U.S. has often relapsed into its long habit of resisting international initiatives that could in the remotest sense be interpreted as a threat to American sovereignty. For decades, the U.S. government refused to sign the U.N. Convention on Genocide (perhaps because it feared its own operatives
would be tried and convicted of such crimes), and until recently it has moved heaven and earth to oppose
the establishment of an International Criminal Court—all of this in spite of the U.S.'s claim to be the moral
leader of the "Free World." Such preoccupations with sovereignty may also have contributed to the
government's refusal to acknowledge the recent machete genocide in Rwanda, where nearly 1 million
people were hacked to death while U.S. officials held press conferences to deny the event.

54 Telford Taylor, Final Report to the Secretary of the Army.

55 Taylor, Final Report. See also Control Council Law #10, excerpted in Trials of War Criminals Before
the Nürnberg Military Tribunal under Control Council Law No. 10 (The Green Series), 1: XVI-XVIII.

56 Charter of the International Military Tribunal, Trials of War Criminals, 1: XII.

52 Control Council Law #10, Trials of War Criminals, 1: XVII.

51 The Einsatzgruppen Case prosecuted Otto Ohlendorf and twenty-three other commanders of mobile
killing units; the Krupp case tried the munitions magnate Alfred Krupp and eleven of his directors for
plunder and using Jewish slave labor.


54 See the collection of American newspaper articles on the Hadamar institution in United States of America

55 JuNSV, Lfd. Nr. 017.

56 National Archives Microfilm Publications Pamphlet Describing M 1078, United States of America v.
Alfons Klein et al. (Case Files 12-449 and 000-12-31), October 8-15, 1945, p. 2; Letter from Col H.F.
Newman, Acting Adjutant General, to Commanding Generals of the Eastern and Western Military

57 See supra, chapter 2, pp. 129-30.

58 NARA, RG 338, M 1078, Roll 1, p.572.

59 NARA, RG 338, M 1078, Roll 1, p. 652. See also Gerhard L. Weinberg, A World at Arms: A Global

60 NARA, RG 338, M 1078, Roll 1, p. 665.

61 NARA, RG 338, M 1078, Roll 2, p. 35.


63 NARA, RG 338, M 1078, Roll 2, p. 54.

64 NARA, RG 338, M 1078, Roll 2, p. 58. See supra, chapter 2, pp. 129-30.


66 See, e.g., Bowie v. Columbia, 378 U.S. 347 (1964); Model Penal Code sec. 2.04(3)(b); Wayne R. Lafave

67 See the direct and cross-examinations of witnesses Judith Thomas, Margaret Borkowski, and Emmy
Bellin, NARA, RG 338, M 1078, Roll 2, pp. 58-120.

68 In military courts-martial, a defendant may elect to make either a sworn or unsworn statement to the
court. If the statement is sworn, the defendant is subject to questioning by the trier of fact, as well as by
opposing counsel.

69 See the testimony of Alfons Klein, NARA, RG 338, M 1078, Roll 2, pp. 175-227; testimony of Heinrich

70 Testimony of Alfons Klein, NARA, RG 338, M 1078, Roll 2, p. 215, pp. 261-68. Much of my
interpretation in this paragraph is derived from my own trial experience before military courts as both a
prosecutor and defense counsel.

71 NARA, RG 338, M 1078, Roll 2, pp. 393-394.

72 NARA, RG 338, M 1078, Roll 2, pp. 393-394.

73 Pinkerton v. United States, 328 U.S. 640 (1946).

Fletcher continues: "Under California Penal Code sec. 189, D is liable for first-degree murder for causing
death in the course of a robbery. It does not matter whether in the absence of the doctrine of felony murder,
D could be liable for criminal homicide at all. D's liability is imputed to other participants under the
accepted criteria of 'vicarious liability.'"
English Homicide Act 1957, c. 11, sec. 1.


Testimony of Major Herman Bolker, pathologist for the War Crimes Investigating Team No. 682, NARA, RG 338, M 1078, Roll 1.

NARA, RG 338, M 1078, Roll 2, pp. 209 ff. (Statement of Alfons Klein); pp. 341 ff.; p. 647 (Statement of Heinrich Ruoff).

NARA, RG 338, M 1078, Roll 1, p. 53 (Statement of Adolf Wahlmann).

NARA, RG 338, M 1078, Roll 1, pp. 523-26 (Interrogation of Karl Willig).

See supra. chapter 3. pp. 181-84.


Telford Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir (Boston: Little, Brown, 1992), p. 80. Taylor’s retrospective assessment of the wisdom of placing conspiracy at the center of the prosecution’s case clashes with his 1949 Final Report to the Secretary of the Army, wherein he recounts how he charged the defendants in the Medical Case with conspiracy to commit war crimes and crimes against humanity despite the IMT’s holding on the issue. In this report, he expresses his disagreement with the IMT’s decision to restrict conspiracy to crimes against peace. See Telford Taylor, Final Report to the Secretary of the Army, p. 200.


Smith, Reaching Judgment, p. 72. Woodward wrote: “There was indeed no plot... the other Great Powers knew in 1937 that German military preparations were on a scale to make Germany stronger... It is therefore unreal—and it will seem unreal to historians—to speak of a German ‘plot’ or ‘conspiracy’ [merely because the Powers were ready] to condone all German breaches of faith and to make agreements with the German Government.”

The description of French qualms about the conspiracy charge is taken from the words of the American judge, Francis Biddle, in Francis Biddle, In Brief Authority (Garden City, N.Y.: Doubleday, 1962), pp.466-467, quoted in Marrus, The Nuremberg War Crimes Trial, p. 231.


Memorandum from Telford Taylor to Robert Jackson on Further Trials, 30 January 1946, NARA, RG 260, box 2.

Memo from Jackson to Taylor, 5 February 1946, NARA, RG 238; Taylor’s letter to Howard Petersen, 22 May 1946, NARA, RG 238; Memo from Taylor to Secretary of War, 29 July 1946, NARA, RG 153/84-1, box 1, folder 2.


Telford Taylor, Final Report to the Secretary of the Army, p. 155.

NARA, RG 238, M 887, Roll 1, pp. 13 ff. (T. Taylor’s Opening Statement)


Weindling, “From International to Zonal Trials,” pp. 380-381. The tentative list of defendants compiled on September 9, 1946—just one-and-a-half months before the indictment was filed—included “Dr. Karl BRANDT, Dr. Siegfried HANDLOSER, Dr. Paul ROSTOCK, Rudolf BRANDT, Dr. Joachim MRUGOWSKY, Dr. Helmut POPPENDICK, Wolfram SIEVERS, Dr. Karl GEBHARDT, Dr. Fritz FISCHER, BRUNNER, HINGST, Dr. Siegfried RUFF, Dr. D.H. [H.W.] ROMBERG, Viktor BRACK, Dr.
Prior to filing the indictment on October 25, 1946, the U.S. prosecution team substituted Ravensbrück doctor Hertha Oberheuser and Waldemar Hoven, the Buchenwald camp doctor, for Brunner and Hingst.


On the details of Brandt’s life, see Interrogation of Karl Friedrich Brandt. 26 November 1946, NARA, RG 238, M 1091, Roll 9, pp. 18-20; Interrogation of Karl Friedrich Brandt. 1 March 1947, NARA, RG 238, M1091, Roll 9, pp. 6-12.

See supra, chapter 2, p. 112.

See supra, chapter 3, pp. 183-84.

For Brandt’s self-serving and fraudulent claims about the humanitarian motives behind Nazi euthanasia and his view of the Hippocratic Oath, see the following interrogations: 26 November 1946, pp. 16-17 and 1 March 1947, pp. 2-3, NARA, RG 238, M 1091, Roll 9. For his invocation of the “law of reason” to justify euthanasia, see interrogation of Karl Brandt, August 13, 1947, RG 238. M 1091, Roll 9, p. 2.

For his defense of euthanasia on humanitarian grounds on p. 7315: “Gentlemen, I have a positive attitude toward the idea of euthanasia. I am an advocate of the subject . . . I became an advocate of it as a practicing psychiatrist, after a sight of the misery in the mental institutions and the distress of the mothers and fathers of these children. That is why I looked at euthanasia positively.”

Like many other young Germans attracted to Nazism, including Karl Brandt, Brack came from an ethnic German background; his family, moreover, experienced violence at the hands of a group later demonized by the Nazi government—the Soviets. We should bear this in mind when we consider Brack’s instrumental role in preparing the Final Solution for the Soviet territories—a plan foiled only by reversals on the eastern front. The Polish General Government was the fallback position. See chapter 3, supra, p. [__].

Interrogation of Viktor Brack, 4 December 1946, NARA, RG 238, M 1091, Roll 8, pp. 7-8. Like many other young Germans attracted to Nazism, including Karl Brandt, Brack came from an ethnic German background; his family, moreover, experienced violence at the hands of a group later demonized by the Nazi government—the Soviets. We should bear this in mind when we consider Brack’s instrumental role in preparing the Final Solution for the Soviet territories—a plan foiled only by reversals on the eastern front. The Polish General Government was the fallback position. See chapter 3, supra, p. [__].

Interrogation of Viktor Brack, 4 December 1946, NARA, RG 238, M 1091, Roll 8, pp. 2-5; Interrogation of Brack, 19 June 1947, NARA, RG 238, M 1091, Roll 8, p. 4.

Interrogation of V. Brack, 4 September 1946, NARA, RG 238, M 1091, Roll 8, pp. 8, 14-17, 22.

Interrogation of V. Brack, 19 June 1947, NARA, RG 238, M 1091, Roll 8, pp. 16-17.


NARA, RG 238, M 887, Roll 1, pp. 23-24.

Quoted in Jörg Friedrich, *Die kalte Amnestie*, p. 58.

Raul Hilberg assesses Brack’s humanitarian pose with acerbic succinctness: “Brack was deeply implicated in the euthanasia program, of course, and in March 1941 he proposed mass sterilizations of Jews. Furthermore, by early fall 1941, he offered to send his chemical expert, Dr. Kallmeyer, to Riga, which at that moment was a place considered for the establishment of gas chambers. Some humanitarian.” Letter to the author from Raul Hilberg, 28 September 2000 (author’s private collection).

NARA, RG 238, M 887, Roll 8, p. 7520.
Brack's *Einzeltäter* ("lone perpetrator") theory of Nazi criminality resembles Julius Streicher's defense during the IMT that Hitler alone was to blame for the Final Solution. "The German people did not want killing, neither individually nor collectively," he averred on cross examination. Such a statement is difficult to reconcile with the following exhortation from Streicher's newspaper *Der Stürmer*: "The Jewish Question is not yet solved when the last Jew has left Germany. It will first be solved when world Jewry is annihilated." Quoted in Friedrich, *Die kalte Amnestie*, p. 57.

The tribunal's discussion of the "original aim of the program" implies agreement with the general proposition that some lives are indeed unworthy of being lived. The court's dicta read: "The abstract proposition of whether or not euthanasia is justified in certain cases of the class referred to, is no concern of this Tribunal. Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens, is likewise a question which does not enter into the issues. Assuming that it may do so, the Family of Nations is not obliged to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenseless and powerless human beings of other nations." NARA, RG 238, M 887, Roll 11, p. 11395.

For Jaspers, crimes against humanity were also crimes against humankind. On this ground he objected to the Israeli Supreme Court's jurisdiction to punish Adolf Eichmann, arguing that since the Final Solution, as a crime against humanity, was a crime against the human race, only an international tribunal could mete out punishment to him.

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1977), pp. 268-69. Arendt wrote: "Expulsion and genocide, though both are international offenses, must remain distinct: the former is an offense against fellow-nations, whereas the latter is an attack upon human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning."
CONFRONTING MEDICAL MASS MURDER:
THE U.S. AND WEST GERMAN EUTHANASIA TRIALS, 1945-1965

Volume II

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree of Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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* * * * *

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ABSTRACT - VOL. II

The second volume of the dissertation explores how West German courts approached Nazi criminality associated with the Nazi government's so-called "euthanasia" program, a state-organized initiative to exterminate the mentally ill and disabled during World War II. The time period covered by the study is 1945-1965—a crucial 20-year period after the war that witnessed both the beginning of the Cold War and the United States' efforts to reintegrate West Germany into the pro-Western community of nations as a bulwark against Soviet communism in Europe. Ultimately, the dissertation reveals the fragility of the law as a refuge for justice. The second volume of the study focuses on 17 primary West German euthanasia cases tried in the 20 years following the war, exploring how German courts conceived of Nazi medical criminality and the ramifications of these conceptions for other forms of National Socialist genocide.

Volume II of the dissertation also examines two further issues—the modernity of Nazi genocide and the perpetrators' awareness of wrongdoing. The dissertation considers whether Nazi genocide was driven primarily by "modern" concerns or by a hierarchy of biological value, arguing that the creed of racial and biological worth was the motive force behind Nazi killing projects. It goes on, however, to affirm a connection between modernity and Nazi genocide, consisting in the ends-means rationality of the middle-tier bureaucratic killers. Although Nazi leaders were not motivated by modern concerns, their efforts to create an identity through the destruction of human life was a
response to an unstable sense of self, a hallmark of the modern experience. Hence, the dissertation concludes that the events chronicled in the postwar euthanasia trials are relevant to the post-modern age. Finally, the study argues that many perpetrators prosecuted after the war were conscious that the mass killing of patients was both morally and legally wrong, but they nonetheless collaborated in the program. It is suggested that the division of the Nazi state into two domains of authority, the normative and the extranormative, may have contributed to their collaboration.
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CHAPTER 5

TERRIFYING NORMALITY: THE GERMAN EUTHANASIA TRIALS, 1946-1947

We were not a bunch of criminals who meet in the forest in the dark of night in order to hatch mass murder, like characters in a ten-cent novel.

Hermann Göring

It would have been very comforting indeed to believe that Eichmann was a monster . . . The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment this normality was much more terrifying than all the atrocities put together, for it implied—as had been said at Nuremberg over and over again by the defendants and their counsels—that this new type of criminal, who is in actual fact hostis generis humani, commits his crimes under circumstances that make it well-nigh impossible for him to know or feel that he is doing wrong.

Hannah Arendt

Many of the "virtue philosophers" feel that good and evil reside mainly in the "moral agent": they are qualities in the soul of a person. They believe that decency or viciousness has little to do with what that person does to other persons. For them ethics is a matter of character. Kant once said that a good will is the only thing truly and purely good, and a person’s will is good "not because of what it performs or effects," but because of what is going on inside the mind of that person.

Philip Hallie

. . . intentions—including even my own—exist as an aspect of what is done. Intentions may emerge in the process of acting—and, in fact, it is in the context of acting that corroboration of the existence and character of the intentions is possible. Intentions, in other words, are not only impossible to ascertain independently, they do not exist independently or apart from the actions with which they are "subsequently" associated. In themselves, as "external" to the actions, intentions have no claims; not only are they not "things in themselves," they are not "things" at all.

Berel Lang
“Earlier dictatorships required collaborators at the lower tiers of leadership with stalwart qualities, men who could think and act independently.” Hitler’s favorite architect, Albert Speer, told the Nuremberg Tribunal in his concluding remarks. “The authoritarian system in the period of technology dispenses with this. The means of communication alone makes it possible to mechanize the work of the lower leadership tiers. As a result, the new type of uncritical recipient of orders emerges.” For Speer, the modern technocratic era with its hyperspecialization and dispersal of authority meant that each leader within an organization shared in a “collective responsibility” for the crimes of the group. The corollary to this principle, however, was the dissolution of personal responsibility for these crimes; in a quasi-Hegelian sublation of individual culpability in collective guilt, the contributions of the individual to mass atrocity disappeared. This is Speer’s “new” type of criminal in the modern technocratic dictatorship—the professional perpetrator who acts without a sense of personal guilt for criminal wrongdoing.⁵

The Americans, as we saw in chapter 4, were willing to hold the most prominent members of the Nazi leadership accountable for the acts of their co-conspirators. Contrary to Speer and his notion of divided responsibility, the Americans did not dissolve individual responsibility in collective guilt—nor did the Germans in their first judicial encounters with National Socialist euthanasia. The early German euthanasia trials, in fact, shared with their American counterparts an intransigent retributivism toward the violence inflicted by individual Germans on the mentally disabled during the war. For
these courts, the arrival on history’s stage of the new professional killer, claiming ignorance that his actions were criminal and morally abhorrent, did not stymie conviction and punishment. In the two years following the end of the war, German courts convicted the “small fry” among the euthanasia killers of murder as perpetrators and sentenced them to death. Although these attitudes toward individual participants in the euthanasia program would change after 1947, little quarter was given to defendants prosecuted in the immediate postwar period. In this chapter we will examine the western German euthanasia trials in the two-year period after World War II. We will find that western German courts punished doctors (and sometimes nurses) as perpetrators of murder under the German Penal Code, sec. 211 and sentenced them to either death or imprisonment. The initial rigor of these trials, however, would be short-lived. By 1948, as the horizon of international events lowered into what would become the Cold War, German courts began to relent in their assessment of euthanasia defendants. The trend started with characterizations of euthanasia doctors as accomplices rather than perpetrators and reduced sentences based on their subjective state of mind when the crimes were committed. As we will see in chapter 6, the trend would culminate in the late 1940’s-early 1950’s in the acquittals of proven killers.

I have chosen to provide the reader with extensive summaries from the court opinions of the defendants’ actions on behalf of the T-4 program. Although several first-rate studies in English (such as those of Henry Friedlander and Michael Burleigh) have recounted the history of Nazi euthanasia criminality, few have included richly detailed accounts of the particular acts committed by the defendants tried in the postwar era.
Since my chief aim in chapters 5, 7, and 8 is to reconstruct West German judicial conceptions of euthanasia criminality, I feel it necessary to provide the reader with a “thick description” of the defendants’ conduct, on the basis of which they were indicted, prosecuted, and judged. Among the English monographs on the subject, only Dick de Mildt has set forth the kind of detailed analyses of the defendants’ actions required for an assessment of how German courts understand their participation in the euthanasia program. Dick de Mildt’s summaries, much like my own, are gleaned almost entirely from the court opinions. For any study dedicated to exploring how the courts developed their views of both Nazi mass killing and the people who carried it out, an extensive recital of the defendants’ actions as reconstructed by the courts can scarcely be avoided.

I. The Flail of Justice: the Beginnings of the German Euthanasia Trials, 1946-1947

The rigor of the first German euthanasia trials is remarkable when one considers the context of western German popular attitudes toward the crimes of the Third Reich. While 70 percent of the population supported the trials of the major war criminals in 1946, German attitudes toward the successor trials (of which the euthanasia prosecutions were a part) were highly critical. Trying and punishing a criminal subculture that had rained misery on Germans and foreigners alike was acceptable to most of the population. To move beyond the top Nazis to indict lawyers, doctors, businessmen, industrialists, and military officers, however, was an entirely different matter. To prosecute these representatives of the best in German society, to arraign them as the depraved murderers
of children, was an indigestible bone that stuck in the throat of the German people. Where in 1946 70 percent favored the trials, an equal number by 1950 opposed them as “victors’ justice.”

Fortunately for the cause of justice, the first German courts called upon to adjudicate euthanasia-related killings did not share such sentiments. Article III of Allied Control Council Law #4 (promulgated on October 30, 1945) on the “Reorganization of the German Judicial System” granted German courts jurisdiction over civil and criminal matters except for “criminal offenses committed by Nazis or any other persons against citizens of Allied nations and their property, as well as attempts directed towards the reestablishment of the Nazi regime, and the activity of the Nazi organizations.” In this excepted category of crimes, Allied tribunals would enjoy exclusive jurisdiction. The terms of Law #4 were superseded in December 1945 by Control Council Law #10, which permitted German courts to exercise jurisdiction over “crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons.” The practical import of this law was to restrict German courts—until Law #10 was repealed on August 31, 1951—to cases involving denunciations (so-called “grudge informers”), killings related to the terminal stages of the war (“end phase crimes”), deportations of Jews and Gypsies, concentration camp crimes on German soil, and euthanasia cases. Law #10, in effect, excluded the German courts from placing under the judicial microscope the most heinous atrocities of the Nazi government—the million-fold murder of Jews in the eastern territories.6

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What was an impediment to prosecuting the crimes of the Final Solution was a windfall to euthanasia trials. Since most of the euthanasia crimes were committed by Germans on German citizens, they fell squarely within the bounds of permissible jurisdiction as defined by Law #10. In prosecuting these and other Nazi offenses, the German courts could apply either Law #10's definitions of war crimes and crimes against humanity or the German law of murder (sec. 211 of the German Penal Code). Although some latitude was given German prosecutors about how they could style an indictment, it was not uncommon in euthanasia-related cases for defendants to be charged with both crimes against humanity under Law #10 and a variant of homicide (murder, aiding and abetting murder, or manslaughter) under the German criminal code. Where the two sources of law were in conflict, Law #10 would be supreme—at least in theory. The provisions of Law #10 were more favorable toward the prosecution than was the law of homicide under the German Penal Code. Unlike the Code, Law #10, grounded in the Anglo-American law of conspiracy, did not recognize a distinction between perpetrators and accomplices: all participants in the crime were jointly liable as perpetrators for any acts carried out in furtherance of it. Under the German law of homicide, by contrast, a killer could be convicted as a murderer (i.e., a perpetrator, or "principal") only if he fulfilled all the statutory elements of the offense, controlled the circumstances of its commission (Tatherrschaft), or subjectively identified with the murder while assisting the main perpetrator (Haupttäter) commit the crime—that is, if he embraced the murder "as his own" (als eigene gewollt). Another significant difference between Law #10 and the German law of murder was the former's relative disregard of subjective factors in its
deliberations on a defendant's guilt. Under Law #10, issues that would tie the German courts in knots, like the defendant's consciousness of wrongdoing, developmental background, or interior state of mind at the time of the offense, were immaterial. All that mattered was that the defendant intentionally committed or assisted in committing an act proscribed by the terms of Law #10, namely murder, extermination, enslavement, deportation, or political, racial or religious persecution, all directed against "any civilian population." If the defendant were found to have committed any of these acts, regardless of the degree of his participation, then he was guilty as a perpetrator of a crime against humanity.7

German criminal law, on the other hand, was far more interested in the subjectivity of its defendants. Much of German criminal law is a riff on the Kantian idea that virtue (or its lack) has to do not with actions in the world but with intentions in the mind of the actor. In an epigraph to this chapter, the late American philosopher Philip Hallie sums up the core of the Kantian moral theory: "[Virtue philosophers like Kant] feel that good and evil reside mainly in the 'moral agent;' they are qualities in the soul of a person. They believe that decency or viciousness has little to do what that person does to other persons. For them ethics is a matter of character." Influenced by the Kantian tradition of moral reflection, German criminal law evinces a far greater concern for the subjectivity of the offender than does Anglo-American law. It is not that the Anglo-Americans are disinterested in subjective factors like intent. Rather, they tend to "read" the external act as an index of the actor's state of mind. As one American court put it in 1918, "the law presumes that a man intends that which he does, and it is from the
statements made and the acts done that this intent is to be determined. German law, by contrast, spares no pains to excavate an actor's subjective intent from the facts of a criminal case. Where the Anglo-Americans infer intent from objective acts in the world, the Germans peer into the dim hyperspace of the human mind in search of a phantom, the actor's will. In this connection, two legal decisions of the German Supreme Court (Bundesgerichtshof, or, prior to 1945, the Reichsgericht) demonstrate the primacy of subjective analysis in German criminal law, especially in the two decades after the war: the so-called “Bathtub” case (1940) and the Staschynskij case (1962).

The “Bathtub” case came on appeal from the state court (Landgericht) to the German Supreme Court six months after the outbreak of the war, and involved a woman who had drowned her sister’s illegitimate newborn in a bathtub. Her motive was to remove from her sister the stigma of having a bastard child. The lower court found the woman guilty as a perpetrator of murder under sec. 211 of the German Criminal Code. On appeal, the Supreme Court reversed this decision, on the theory that the woman, although she had killed the baby with her own hands, had no “personal interest” in the final result of the crime. The real perpetrator in the murder was her sister; she had incited the defendant to the murder and had a personal interest in its occurrence. The woman was merely a “tool” (Werkzeug) of her sister, and thus qualified as an accomplice (Gehilfe), rather than a direct perpetrator (unmittelbarer Täter). The Bathtub Case was the cradle of the “subjective theory of perpetration” in German criminal law, a theory that made a judicial finding of murder contingent on the personal interest of the actor. In this fashion, defendants who, like the hapless woman in the Bathtub Case, kill others with
their own hands could evade conviction as murderers if the court was satisfied they had acted on behalf of someone else’s interest (the so-called Hintermann, or “man behind the scenes”). As Jörg Friedrich acidly observed, the subjective theory was tailor-made for postwar Nazi defendants; although they had the blood of thousands of innocent human beings on their hands, many argued successfully that they were mere tools of the arch-perpetrators, Adolf Hitler and his minions.9

In the years following the Bathtub Case, German courts did not always adopt the Reichsgericht’s subjective theory of perpetration. When we turn to euthanasia cases tried in 1946 and 1947, we will notice the relatively high incidence of rank-and-file defendants found guilty as perpetrators. After 1947, however, German courts increasingly applied the subjective standard to convict euthanasia personnel—even those directly involved in mass murder—of complicity, rather than perpetration. In 1962, the German Supreme Court strikingly confirmed this trend in a decision that Friedrich calls “the exemplary verdict about political murder, generally regarded as the further development of the Bathtub Case for the sector of state criminality,” the Staschynskij trial.10 The defendant in this case, a Soviet KGB agent named Staschynskij, was prosecuted for shooting two Ukrainian nationalists living in exile in Munich. He had acted on the orders of his KGB superior Scheljepin, with whom he planned the killings in exquisite detail beforehand. Staschynskij was briefed on his travel route, the time the killings were to be initiated, the place where they would occur, and the manner in which he would approach the victims. He received a gun with poison bullets, and with this nefarious weapon carried out the murder plot to the
letter. Afterward, Staschynskij returned to the USSR, where he was decorated with official honors for performing "an important commission of the government." He was subsequently arrested during a return trip to the West and indicted for murder.

At trial, one of the key issues was whether the defendant was a perpetrator or only an accomplice in the murder of the 2 Ukrainians. To resolve this question, the German Supreme Court (BGH) invoked the subjective theory articulated in the Bathtub Case, holding that "what is decisive is the inner attitude toward the crime." In applying this earlier theory of the Reichsgericht, the BGH further held that a defendant could be an accomplice even though his actions fulfilled all the elements of the offense. With this position, the BGH specifically rejected the "substantive-objective doctrine" of perpetration, according to which anyone whose actions fulfil all the elements of the offense is a perpetrator. For the BGH, this doctrine was inapposite to the case at bar since it failed to take into account the singularity of state-sponsored political murder. On this theme the BGH wrote:

Political murders often take place throughout the world, as in Germany. The novelty now, however, is that certain modern states that have fallen under the influence of radical political views, like Germany under National Socialism, plan political murders or mass murders and order the perpetration of such violent acts. With respect to these types of officially ordered crimes, mere recipients of commands do not possess the criminologically discovered impulses or similar personal drives. On the contrary, they find themselves in the morally confused, inescapable condition of being given an order to commit the most reprehensible crimes by their own state—a state which has been made through mass propaganda to appear to many people an unquestionable authority. They obey such orders under the influence of political propaganda or the authority of command or similar influences of their own state, to which they look for the preservation of law and order. These dangerous criminal drives emanate from the sovereign authority of the state under crass abuse of this power, rather than from the recipient of the command.11 (emphasis added)

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Because Staschynskij performed the killings on behalf of a totalitarian state without personally identifying with the deeds, he was an accomplice, not a perpetrator.

The BGH did not furnish a carte blanche to all killers acting under state orders. The killer who acted within a pall of moral confusion brought on by a criminal state authority might evade the characterization of "perpetrator"; the killer who acted on his own initiative and zeal could not.

Whoever, however, willfully submits to hate-inspired political murder, silences his conscience and makes the criminal commands of another the basis of his own conviction and action, or whoever in his service or domain of influence ensures that such commands are committed ruthlessly, or whoever shows in another fashion consensual zeal or exploits such state-ordered murderous terror for his own purposes cannot claim he was merely the accomplice of the giver of the order. His thought and action coincide with that of the actual instigator of the crime. He is a real perpetrator.12

Conspicuous in the BGH's thinking in Staschynskij is its penchant to reify the "criminal drive" (Verbrechensantrieb), conceived as emanating from either the malfactor state authority, or from both the state and the actor. Although, as the Holocaust philosopher Berel Lang notes in an epigraph to this chapter, intentions are "not things at all," but exist only as ingredients of actions performed in the world, we can bracket discussion of the conceptual problem with reifying abstract notions like intent and "criminal drive"—especially their identification with forces that emanate from one or more sources. For now, it is important to understand that the BGH's verdict in Staschynskij summed up tout court two decades of German jurisprudence on the distinction between perpetration and complicity. Beginning in the late 1940's, German courts would identify as perpetrators only those defendants who killed from a personal interest—that is, killers in whose own persons their impulse to crime originated. With this context in mind, we can now turn to
the German euthanasia trials themselves, beginning with those defendants who lacked the grace or good luck of a later trial. For in the early German trials, euthanasia defendants stood before their accusers as perpetrators, and the flail of justice struck swiftly and without mercy.

A. The Perils of Being First: the Wernicke and Wieczorek Case

Less than a year after the German surrender, in March 1946, Dr. Hilde Wernicke and Nurse Helene Wieczorek stood before the state court (Landgericht) in Berlin charged with murder in violation of sec. 211 of the German criminal code. They were former members of the medical staff at the mental hospital Obrawalde near the Pomeranian town of Meseritz. The Berlin court’s findings of fact indicated that in 1943 Walter Grabowski, the new director of the Obrawalde mental hospital, informed Wernicke and Wieczorek of Hitler’s order to kill all incurably ill mental patients. He then initiated them into Obrawalde’s role in the killing program. At first, Wernicke withheld her agreement to participate, but eventually she overcame her scruples with the justification that incurable patients incapable of an adequate life should be eliminated. Wieczorek had fewer scruples, readily agreeing to participate. Grabowski swore both of them to secrecy under penalty of death. Thereafter, transports of patients arrived at Obrawalde along with lists of those designated for killing. Wernicke’s job was to examine these lists and confirm the diagnosis of incurable mental illness. She relayed the names of patients deemed truly incurable to nurse Amanda Ratajczak. Over the next year, she studied on average four to six patient histories per day, giving special attention to patients who suffered from both incurable mental illness and physical impairment.

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Patients capable of work were spared. From the spring of 1943 to 1944, Wernicke communicated the names of ca. 600 patients to nurses Ratajczak, E., and Wieczorek (who succeeded Ratajczak when she became ill in the summer of 1944) for killing. Like her co-nurses Ratajczak and E., Wieczorek injected lethal dosages of morphine and scopolamine into each patient. She performed this grisly work until September 1944. On January 29, 1945, Obrawalde’s role in the euthanasia program came to an end when the staff fled the institution with the advance of the Red Army.\textsuperscript{13}

The various judicial panels who heard the case within the state court of Berlin found the defendants guilty of murder as perpetrators. The German law of murder (codified in sec. 211 of the German Penal Code) is complex and highly nuanced. For this reason, those raised in an Anglo-American legal culture may at first find German legal conceptions of murder perplexing. Prior to 1941, murder under German law was straightforward. The Code’s definition of murder in 1912 emphasized premeditation as the essential element of the offense: “Whoever intentionally kills a person, if he carried out the killing with premeditation, is guilty of murder for that killing.”\textsuperscript{14} In 1941, the German Ministry of Justice overhauled sec. 211, redefining murder as a killing prompted by any one of several motives:

\begin{quote}
A murderer is any one who kills another person out of joy in killing [Mordlust], satisfaction of the sexual drive, covetousness or other base motives, maliciously or cruelly or by means endangering the community or for the purpose of making possible or concealing the commission of another crime.\textsuperscript{15}
\end{quote}

Writing about this revision of sec. 211 in September 1941, Roland Freisler, State Secretary in the Prussian Ministry of Justice and, from 1942 until his death in 1945, president of the Berlin People’s Court (Volksgericht), hailed it as a “renewal” that better
reflected the "natural feelings of the people." For Freisler, the older version of sec. 211 failed adequately to address the interests of "substantive justice," and thus "stood outside morality," because its emphasis on premeditation did not permit a "moral assessment" of the perpetrator. Freisler quoted with approval the annotations supporting the revision:

"The complete destruction of a member of the community directly affects the community itself. Further, in morally evaluating assaults on the life of another, the state of mind that produces the crime is decisive. It therefore does not depend solely on the direction of the will, on the goal to be achieved, but also on the motive and the kind and manner of commission. Murder is distinguished from manslaughter by a particularly base [gemein] state of mind, which has application to especially reprehensible motives or in related, especially base means [of acting]."\(^\text{16}\)

Henceforth, for Freisler and the authors of the new sec. 211, legal analysis to determine who was a murderer "must regard [the defendant's] entire personality." While the text of the revised sec. 211 was not infused with Nazi terminology or concepts, it was justified with resort to National Socialist principles—specifically, the will to give legal effect to the "natural feelings of the Volk." The new version of sec. 211 survived postwar efforts to de-Nazify German law, and continues unchanged until the present day.\(^\text{17}\)

At the trial of Wernicke and Wieczorek, the defendants were tried on the basis of the new version of sec. 211. Dismissing Wernicke's argument that her actions had been inspired by the humane motive of delivering incurable patients from their suffering, the court found that both defendants had acted from base motives. Moreover, they had also acted "maliciously," that is, they had exploited the guilelessness and defenselessness of their victims after winning over their trust—an act that "runs counter to every human feeling on the grossest level." The defendants' subordinate status in the grand scheme of euthanasia did not help them, as it would defendants in later years. On the issue of
perpetration vs. complicity, the court invoked the subjective standard of the Bathtub Case, but found that each of the defendants had identified with the killing "as her own act." Neither had declined or opposed Grabowski's offer; rather, they had inwardly assented both to the project itself and to its reprehensible philosophy of destroying "valueless" life. The state court's Schwurgericht (a panel of lay assessors), as well as the Kammergericht on appeal, held open the door to the legal permissibility of euthanasia, but insisted that the defendants' actions were not motivated by compassion. Binding and Hoche's advocacy of euthanasia, the Kammergericht held, targeted "incurable idiots" who lacked "any perceptible will to live," and contemplated an extensive legal procedure equipped with "every conceivable safeguard." By contrast, Wernicke and Wieczorek's participation in euthanasia respected neither the patient's "will to live" nor adequate procedural safeguards. The Kammergericht's distinction between "real" euthanasia and its perversion by National Socialism is reminiscent of attitudes expressed by the American National Tribunal at the Doctors' Trial. It will surface time and again in subsequent German euthanasia trials.

Nor did the state court authorities find the defendants' superior orders defense persuasive. On appeal from the Schwurgericht, the Kammergericht denied that the Hitler order of 1939 was a law, since it was never published in the Reichsgesetzblatt (Reich Legal Journal), as was required for all newly promulgated laws. Furthermore, the Kammergericht held, even if the Hitler order were a valid order, the German Civil Servant law obligated every official to refuse an order that violated the criminal law. The defendants not only did not refuse the order, but "inwardly approved" of it. For this
reason, they were guilty as perpetrators under sec. 211, new version. Since German law prior to 1949 required the death penalty in all murder cases (absent extenuating circumstances), Wernicke and Wieczorek were sentenced to death on March 25, 1946. When their punishment was carried out, they became the first—and last—euthanasia defendants tried in West German courts to suffer this fate.

B. Vanity, Ambition, and Love: the Eichberg Case

Nine months after the Berlin state court handed down its verdicts in the Wemicke/Wieczorek case, its counterpart in Frankfurt presided over the trial of medical personnel from the Eichberg mental hospital. In 1940 the Führer's Chancellery had designated Eichberg a transit center and collection point in the government's campaign against the mentally disabled. In this dual role, Eichberg received transports of mentally handicapped patients that were later dispatched to one of the six killing centers for "treatment." It also became a venue for murdering both disabled adults and children.

The most notable defendant at the Eichberg trial in December 1946 was Dr. Friedrich Mennecke, a notorious figure in the annals of Nazi euthanasia. His swaggering wartime letters to his wife, interspersing banal comments on his meals with casual references to the annihilation of mental patients, open a grotesque window on Hannah Arendt's "new type of criminal," the "cheerful, guilt-free murderer" who, as both Arendt and the Czech novelist Milan Kundera tell us, appears for the first time in the modern age, committing mass atrocity without a trace of self-accusation. In his introduction to Mennecke's selected letters, Peter Chroust notes that nowhere in these 2,500 pages does the reader find the remotest expression of guilt for Mennecke's
contribution to the euthanasia program. Chroust accounts for Mennecke’s impenitence
with the theory that he “had so firmly internalized the ‘historic mission’ of a cost-
reducing modernization of German psychiatry that he did not even begin to experience
ethical doubts.” I would suggest that Mennecke’s letters resist such a theory. Amid the
egotistical bombast of these letters, we see momentary flashes of Mennecke’s actual
thoughts about “worthless” life. Consider the following excerpt, in which Mennecke
describes his encounter with the Russian population during his service as an army doctor
on the eastern front near Charkov:

You can tell by looking at the Russian people that they are born and raised right in the
dirt, so they don’t know any better. These people are really only silhouettes in human
form that Jewish Bolshevism had an easy time molding in its image. No other people
would be better suited to be misused for an idea as absurd and crazy as Bolshevism. This
is not a master race, but the most primitive, stubborn, and shabby heap of humanity that
we have in Europe.  

I would submit that the violence bristling in these words about filthy subhumanity prove
that Mennecke harbored a racialist animus toward eastern European peoples, and that his
ideological belief in their “inferiority,” rather than commitment to a “cost-reducing
modernization of German psychiatry,” as Chroust argues, offers the best explanation of
his involvement in National Socialist genocide. Further, I would contend that
Mennecke’s ideology of “life unworthy of life” extended beyond Russians and Jews to
mentally ill patients, all of whom were thrown together into the Nazis’ many-faceted
category of worthless life.

Mennecke became the director of the Eichberg mental hospital in 1938, which he
briefly left when war broke out to assume duties as an army doctor (Truppenarzt) on the
Western front. In January 1940, Hitler’s Chancellery released him from his military
duties to participate in the nascent euthanasia program. Accordingly, he returned to Eichberg and resumed his directorship of the institution. In February 1940, he attended a meeting of psychiatrists at the Columbus House in Berlin, where the head of Department II of the Führer's Chancellery, Viktor Brack, informed him and his colleagues of Hitler's decision to set the euthanasia program in motion. Brack outlined the basic structure of the program, touching on the registration of patients in German mental hospitals by means of standardized forms, their submission to medical experts (Gutachter) for evaluation, and the transfer and killing of patients earmarked for death by the Gutachter based on their review of the forms. Killing would occur in specially designated extermination centers. Brack went on to reassure the attending doctors that the program was legal, a point he drove home by circulating among them a copy of Hitler's euthanasia order. Categories of patients exempt from the program were also discussed; these included patients injured in combat and elderly patients suffering from age-related dementia. To justify the operation, Brack marshalled the familiar economistic argument: mental patients unable to contribute to the people's community, but who nonetheless absorbed scarce resources, had to be eliminated, particularly during a time of war when so many of the nation's most valuable citizens sacrificed their lives on behalf of the fatherland.²²

Like his colleagues in attendance, Mennecke readily affirmed his willingness to participate in the program. After the February 1940 meeting with Brack, he returned to Eichberg and completed the registration forms on his patients, on occasion ordering his staff doctors to do the same without acquainting them with the reasons for it. In the
ensuing months, Mennecke also became an itinerant registrar for the euthanasia program, visiting other institutions to complete forms on their resident patients. At the satellite mental hospitals of Gabersee, Lohr, Bettburghau, and Bethel, which Mennecke visited during the winter of 1941, he was estimated to have filled out 200 forms; at his own institution of Eichberg, the number reached 1,000. In addition—and more ominously—he traveled in November and December 1941 to the concentration camps at Sachsenhausen, Ravensbrück, Buchenwald, Dachau, Gross-Rosen, Auschwitz and Flossenbürg as a participant in the Nazis' 14f13 program. At these camps, Mennecke was believed to have filled out forms on approximately 1,000 inmates. The state court of Frankfurt declared that “there can be no question that some of the inmates from the camp system whom Mennecke designated for killing were gassed in the euthanasia centers.” Among the concentration camp prisoners caught up in Mennecke’s registration drive were large numbers of Jewish men and women. In making his assessment, Mennecke had reviewed photos of the prisoners from the camp files. On the backs of the photos he had written epithets gleaned from the records, e.g., “race defiler” (Rassenschänder), “malicious agitator and German enemy” (Hetzer und Deutschenfeind), “rumored Communist,” “Jewish prostitute,” etc. Although definitive evidence was unavailable, the state court believed that at least some of these Jewish prisoners were later murdered in the euthanasia centers on the basis of Mennecke’s forms.

Mennecke’s service to Nazi euthanasia did not end with these activities. He also served as a Gutachter (medical expert), reviewing regular shipments of completed forms sent to him in packets from Berlin. In the lower left corner of each form, he wrote one
of three characterizations: “Yes,” “No,” or “Questionable.” His determinations were not based on a medical exam, but solely on the contents of the form. Wielding this divine power over the life and death of people he had never seen, Mennecke reviewed ca. 7,000 forms as a T-4 Gutachter. Of this number, he designated around 2,500 for destruction. Furthermore, during his tenure as the director of Eichberg, 2,262 patients were transferred from the facility to the killing center at Hadamar, where almost all of them were gassed between January and August 1941. Mennecke gave the lists of transferees to his underlings, ordering them to prepare the affected patients for transport. At trial, the court heard eyewitness testimony that the transferees were not all severely ill mental patients; some were only mildly disabled patients capable of work. Not all of them, in other words, were the “burnt out ruins” (ausgebrannte Ruinen) that Mennecke claimed in his defense. Finally, the court was satisfied that Mennecke had participated in the murder of adult patients at Eichberg between the summer of 1941 and December 1942. His assertion that he knew nothing of the killings was refuted by his detailed letters to his wife.  

Mennecke’s defense at his trial in December 1946 was that he had become involved in euthanasia only against his will, and had done everything in his power to secure a reassignment to the front in 1942. Again, Mennecke’s letters proved his undoing. For the state court, they revealed his passionate engagement with the euthanasia program, a program that gave Mennecke the opportunity to interact with the “superstars” of mass killing. In one letter, he boasted to his wife of the praise that Dr. Werner Heyde (an Obergutachter in section II of the Führer’s Chancellery and head of the T-4 Medical
Department) had showered on him for his work on behalf of the program. It gratified his ego to be associated with the "famous Berlin organization" (i.e., the Chancellery of the Führer), noting that he and his staff were fully cooperating with it. After his transfer to the field from Eichberg, he sought to maintain his active role as a Gutachter: in a 1944 letter to the Reich Committee (responsible for administering the children's euthanasia program), he advertised his willingness to continue his lethal work, indicating that he would accept the directorship of a children's ward in Plagwitz (lower Silesia) were it offered to him.26

Given this incriminating documentation, the state court had no doubt that Mennecke contributed to the killings at Eichberg willingly and enthusiastically. Regarding the children's ward at Eichberg, the court noted that it was established under Mennecke's regime as director, and that he had conducted correspondence with the Reich Committee in Berlin, whose "treatment" authorizations he forwarded to the ward's director, Dr. Walter Schmidt. Mennecke did not blanch at the implications of his orders: according to Schmidt's testimony, and as Mennecke himself confessed, he told Schmidt to proceed with "treatment" so long as the authorization had been given by the Reich Committee—an order that extended equally to adult patients and to children. Applying the subjective standard of the Bathtub Case, the court found that Mennecke had inwardly identified with the killings, which he had willed as his own (als eigene gewollt), and was accordingly guilty as a "co-perpetrator" (Mittäter) of murder—this despite the absence of proof that he had himself directly performed the killings. In its discussion of Mennecke's motives under sec. 211, the court observed that he was not an ideological

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killer; rather, Mennecke was driven by a “boundless ambition” and an “illimitable need for validation.” It “flattered his vanity” to interact as an equal with eminent professors and political figures, and he spared no effort to ingratiate himself with them. The 200 Reichsmarks he received every month in compensation for his work in the euthanasia program was an added inducement. In brief, Mennecke was, in the estimate of the state court, willing to sacrifice everything—“law, morals, professional ethics, honor and decency”—to attain his goal of professional advancement. Mennecke’s unprincipled careerism was the goad to his participation in mass killing. Such motives the court deemed “base and reprehensible,” thus satisfying the “base motive” element of murder under sec. 211, new version.27

Due to his work as an itinerant Gutachter, Mennecke was not able to assume direction over the children’s ward (Kinderfachabteilung) installed at Eichberg in early 1941 for the purpose of killing disabled children. Instead, he assigned the directorship to his deputy, Dr. Walter Schmidt, who returned from the field to take up his duties in the summer of 1941. For his role in the Eichberg killings, Schmidt stood with Mennecke in the dock as a co-defendant. The state court was convinced that Mennecke had briefed Schmidt on the euthanasia program, and that it would have been impossible to conceal transfers of patients from Eichberg without his knowledge. It was clear, too, that Schmidt had attended with Mennecke a meeting in Hitler’s personal chancellery, at which 40-50 directors of German mental hospitals and representatives of the Reich Interior Ministry and Hitler’s personal Chancellery were present. During this meeting, the discussion leaders described the euthanasia program as an effort to administer a "mercy
death” to mentally ill patients. They portrayed it as a legal program authorized by no less an authority than Hitler. On his return to Eichberg, Schmidt assumed control of the children’s ward as the institution’s chief doctor. He soon received a visit from Richard von Hegener, deputy director of the Reich Committee, and Professor Paul Nitsche, one of three Obergutachter (chief medical experts) and from December 1941 medical director of T-4. The Berliners informed Schmidt that mentally handicapped children in his ward were to be destroyed (the by now familiar German word was behandelt, or “treated”). There was some evidence presented at trial that Schmidt unsuccessfully tried to extricate himself from his new commission when he learned of it—a fact that would weigh significantly in the court’s assessment of his role in the killing program.28

From the summer of 1941 until the end of Eichberg as a euthanasia facility, children afflicted with severe physical and mental handicaps were transferred to its children’s ward. On arrival, they were subjected to medical observation; their physical and mental condition, as well as their “educability,” were noted on a form subsequently sent to the Reich Committee. Based on their review of these forms, Committee employees either ordered additional observation or issued an authorization to the Eichberg authorities to have the child “treated,” i.e., killed. In at least thirty documented cases, Schmidt himself administered lethal dosages of morphine and luminal to the children so designated. In another 30 to 40 cases, he had one of his staff nurses, Heléne Schürg, dispose of handicapped children with lethal injections (or, in a few instances, with deadly doses of luminal tablets). It was significant for the state court that no evidence implicated Schmidt in self-initiated killing, as the indictment against him had
alleged. All of his criminal actions, in other words, were carried out within the scope of the orders from Berlin. 29

The state court did not dwell exclusively on the destructive aspects of Schmidt's career at Eichberg, but also cited in its verdict examples of his probity as a doctor. It noted that he had sought to cure his patients with the newest medical methods, including electro-, cardio-, and insulin shock therapy. Witnesses attested to his professionalism and dedication to his patients, many of whom experienced such an improvement in their condition due to Schmidt's interventions that they could be released from the hospital. Anticipating later (and more successful) defenses, Schmidt claimed such successes were his way of opposing euthanasia: by rehabilitating patients who might otherwise have been euthanized, he hoped to demonstrate the extreme nature of the government's killing program. 30

For the court, Schmidt's actions on behalf of the euthanasia program were qualitatively different from Mennecke's. Unlike Mennecke, Schmidt's motives for participation were not self-referential. He was not impelled by "base" factors like vanity, ambition, and acquisitiveness, all of which figured prominently in Mennecke's conduct. Instead, the court pointed to the possibility that Schmidt—perhaps due to his upbringing—suffered from a "falsely understood subaltern loyalty to obey," which prevented him from refusing his collaboration with the euthanasia program. Ultimately, in the court's estimate he was a different moral animal from Mennecke, one to whom "a certain professional ethos" had to be granted. The state court was clearly impressed with the evidence presented about Schmidt's "extraordinary efforts" to effect a cure in his
patients. For this reason, it held that Schmidt—despite his proven involvement in the murder of his patients—had not acted from base motives as these were defined under sec. 211. The court did find, however, that Schmidt had acted “maliciously” (heimtückisch) by “secretly, treacherously, and falsely” transferring patients to killing centers like Hadamar, after forbidding their relatives to visit them and withholding information from the families of their whereabouts. Schmidt, in concert with his nursing staff, fostered trust in the patients and their families that they would be given medical treatment, a trust that was soon abused by lethal injections and gas chambers. The malicious nature of Schmidt’s participation in the killing resulted in a finding of guilt as a co-perpetrator of murder under sec. 211.31

Alongside Mennecke and Schmidt in the dock were members of the Eichberg nursing staff. The most conspicuous among them was Eichberg’s chief nurse, Heléne Schürg. She served as chief nurse at Eichberg from 1937 until her dismissal by the U.S. authorities in July of 1945. At trial, it was proven that she had killed between 30 and 40 disabled children with lethal doses of morphine and luminal, given either intravenously or in tablets. Schürg did not dispute her role in the killings, but raised a superior orders defense, arguing that she had acted under orders from higher governmental powers. She also argued—and I have yet to find an analogous defense in other euthanasia cases—that her amorous infatuation with Schmidt had transformed her into an almost robotic tool of the chief doctor. The state court rejected the superior orders defense, but found her love-lorn argument credible on the issue of whether she was a perpetrator or an accomplice. The court found “she had so divested herself of her own will that she placed all her
fortitude at Schmidt’s disposal, seeking to translate his will into reality and doing
precisely that.” Such prostration of her own will to act effectively nullified the “will to
perpetration” (Täterwillen) necessary to qualify as a perpetrator. She was thus guilty as
an accomplice to the murders perpetrated by Schmidt as an “indirect” perpetrator
(mittelbarer Täter). (That is, she was guilty of Beihilfe zum Mord, literally “aiding and
abetting murder.”) She was sentenced to an eight-year jail term.32

Schürg was not the only nurse convicted of complicity in murder by the Frankfurt
court. Her colleague, Andreas Senft, had been a nurse at Eichberg since 1906. As a
“station nurse” in the men’s ward, he confessed to deliberately killing patients with
injections of morphine and luminal. His defense that his 40 years at Eichberg had
conditioned him to obey doctors’ orders and to support them in all circumstances was
rejected as an exculpatory ground by the court, which found him, like Schürg, guilty of
aiding & abetting murder.33

Until the promulgation of the German Basic Law (Grundgesetz) in 1949, all
defendants convicted as perpetrators of murder in German courts were given a mandatory
death sentence, unless “extraordinary” factors were present to commute the sentence to
life imprisonment. In the Eichberg case, the court found no reason to spare Mennecke
from capital punishment. (The sentence was never carried out; he committed suicide in
his cell at the Butzbach prison near Frankfurt on January 28, 1947.) Schmidt, however,
was another story. His efforts to extricate himself from the program had miscarried, as a
result of which he sought other means to mitigate its effects, such as using therapy to
extract patients from the reach of the program. The court ascribed Schmidt’s
collaboration in euthanasia to his upbringing "in a one-sided and false education about obedience and loyalty, which deprived him of the determination to quit the action." This gap between Schmidt's subjective state of mind and his objective acts qualified him as an "exceptional" case in the reckoning of the court, warranting life imprisonment rather than the death penalty. A similar focus on subjectivity characterized the court's assessments of Schürg and Senft. Schürg's "strong relationship of dependence" on Schmidt was counted in her favor, as were her efforts to extricate herself from the program; she received a prison sentence of 8 years. As for Senft, the court found that his long-standing habit of deference had rendered him "psychologically unprepared" to deal with his role in the euthanasia program. He received a 4 year prison term.34

The significance of the Eichberg case in the history of German euthanasia trials can be interpreted on two levels. First, it typifies the willingness of German courts in the immediate postwar years to convict euthanasia killers as perpetrators under the German law of murder. In this respect, Eichberg is of a piece with the Meseritz-Obrawalde (the trial of Wernicke and Wieczorek) and Hadamar trials, representing with them a vein of cases that did not gladly suffer intentional mass killing—or the defendants responsible for it. Second, the Eichberg case adumbrates some new tendencies and directions that later courts will pursue with far more alacrity than the Frankfurt court did. These new approaches are especially evident in the court's treatment of Schmidt, Schürg, and Senft. Although it finally convicted Schmidt of murder, the court did so only after a searching examination of his subjective state of mind at the time he participated in the killings. Its analysis framed Schmidt's acts within the context of his "one-sided and false education"
about his duty to obey authority. The court did not take the next logical step and deny Schmidt’s ability as a moral agent to withhold his consent to and collaboration with an unjust exercise of the sovereign’s will, based on his lopsided socio-educational background. Yet, the raw material for such a step is implicit in the court’s reasoning. In addition, the court’s receptiveness to Schmidt’s argument that he only participated in euthanasia in order to curb its effects (e.g., by curing patients through various shock therapies) is a dim precursor to later “collision of duties” defenses, in which euthanasia killers will contend, with increasing degrees of success, that they collaborated in the program only to sabotage it from within. Again, although the state court of Frankfurt did not accept this defense here as an exculpatory or justifying ground for Schmidt’s actions, the groundwork for such a conclusion is discernible in the court’s rationale.

The Frankfurt court took a similar approach in its assessment of the two nurses, Schürg and Senft. Their psychological temperament—Schürg’s lovelorn reliance on Schmidt, Senft’s 40-year habit of automatic deference to authority—could have, and probably would have, qualified them for acquittal in a later era, on a theory that they lacked the necessary awareness of illegality (Unrechtsbewusstsein) on which criminal liability hinges. In 1946, German courts were not yet ready to give their defendants’ psychological makeup such an exonerative effect. The memory of Nazi atrocities was still vividly etched in the minds of most Germans. Further, the Cold War had not yet reached its full stride, as it would in the late 1940’s. The need to punish the killers of the National Socialist state still outweighed the need for a rehabilitated, pro-Western German nation as a democratic-capitalist buffer between the West and the Soviet sphere of
influence in eastern Europe. This geopolitical situation would change between 1946 and 1948, as we will see. When the worm did eventually turn and the West began to perceive the Soviet Union as an immediate menace to international security, deserving of higher priority than the prosecution of Nazi war criminals, the effect was to douse the fire of German prosecution with cold water. One result would be the wholesale acquittal or sentence mitigation of euthanasia defendants, including some who had killed patients with their own hands.

C. Human Weakness and the Inertia of the Will: the German Hadamar Case

Dr. Adolf Wahlmann, former chief doctor at the Hadamar mental hospital, must have had a sickening feeling of déjà vu as he sat in the defendants’ gallery in March of 1947. A photograph from the trial shows Wahlmann sitting rigidly in the gallery, his mouth frozen in a dispirited frown, his brows anxiously knitted, his chin thrust forward in an attempt at tremulous self-mastery. Wahlmann had already been convicted of war crimes at the U.S. Hadamar trial in October 1945. His prior conviction, however, related only to Wahlmann’s role in the scheme to murder consumptive eastern workers in the waning stages of the war. Sentenced to life imprisonment, the 72-year-old Wahlmann now stood accused of murdering German patients at Hadamar between 1942 and 1945. A finding of guilt could have meant the death penalty for him.

When the war broke out in September 1939, Wahlmann was living in retirement in Heidelberg. Due to the shortage of doctors in Germany, he was brought out of retirement and appointed chief doctor at the mental hospital Weilmünster in June 1940. In August 1942 State Councillor (Landesrat) Fritz Bernotat, who presided over the
system of mental institutions and nursing homes in Hessen-Nassau, appointed him chief
doctor at Hadamar. By this time, Hadamar had long since been transformed into an
extermination center for the mentally ill, replacing the Grafeneck institution when it was
closed in December 1940. (In December 1940, a gas chamber and crematorium were
installed in the institution to dispose of “unworthy” life.) Even before Wahlmann’s
arrival, Hadamar had killed 10,000 mentally disabled patients through gassing as part of
the first phase of the Nazis’ euthanasia program. A lull in the killing ensued from August
1941 until Wahlmann became chief doctor in August 1942. In late August-early
September 1942, the first transport of “phase II” arrived in Hadamar, consisting of
patients designated for killing from the cloister facility Hofen. Wahlmann had been
briefed in advance on the killing program and Hadamar’s role within it. He devised a
system of morning conferences with his chief male and female nurses, in the course of
which the nurses reported to him the names of patients they deemed fit for euthanasia.

Wahlmann and his nurses examined the patient’s records and illness history, then
discussed whether killing was indicated based on their review. The final decision resided
with Wahlmann. If he gave the green light, the two nurses wrote the names of the patient
on a sheet of paper, noting the amount of narcotics Wahlmann had specified to effect the
patient’s death (e.g., the number of tablets of luminal, trional, or similar drugs). The
paper was given to the station nurses, who used it as an authorization for killing the
patients identified by it. During the night, the affected patients were given substantial
overdoses, usually in the form of narcotics tablets. If the tablets did not result in the
patient’s death, an injection of morphine was administered the following morning, which invariably

ended the patient’s life. Afterward, Wahlmann made a brief inspection of the corpse and concocted false causes and times of death in the patient’s death certificate. The Frankfurt state court estimated that at least 900 mentally ill patients had been killed in this fashion.35

At trial, the court analyzed Wahlmann’s actions with reference to the tripartite structure of German criminal proceedings: (1) a determination of whether his acts
fulfilled the statutory elements of the offense, in this case murder 
(Tatbestandsmäsfigkeit); (2) an assessment of whether his acts were objectively illegal 
(Rechtswidrigkeit); and (3) a determination of whether he was personally at fault for his 
actions (Schuld). At the second level of analysis (Rechtswidrigkeit), the objective 
illegality of a defendant's action may be negated by a "justifying ground" 
(Rechtfertigungsgrund), such as self-defense or necessity. At the third level (Schuld), a 
defendant may still be acquitted if the court finds that the illegal act was due to certain 
subjective factors like mental illness, mistake of law (Verbotsirrtum), or collision of 
duties (Pflichtenkollision). The Frankfurt court found that Wahlmann's actions 
fulfilled sec. 211's definition of murder, insofar as he acted "maliciously" by abusing the 
relationship of trust that existed between patient and doctor. His patients and their 
relatives looked to him to do everything in his power to either cure their illness or 
mitigate its effect. Instead, he exploited their trust by distributing overdoses of 
medication designed to cause their death. To this injury was added the insult of 
fraudulent causes of death, aimed at deceiving the victims' next of kin about the actual 
fate of the patient. Although the court found Wahlmann guilty of murder as a perpetrator 
under sec. 211, it denied that he had acted from "base motives." On the issue of what 
precisely motivated Wahlmann to collaborate in the mass killings, the court cryptically 
attributed his involvement to "human weaknesses and inadequacy, and a certain inertia 
(Trägheit) of the will." 

In the black-and-white photograph of the Hadamar trial reproduced above, an 
unassuming, bespectacled man sits to the right of Wahlmann. He is tensely expectant,
looking for all the world, in his dark suit and tie, with his recessive chin and graying temples, like a mild-mannered accountant. This is Dr. Hans-Bodo Gorgass, convicted by the Frankfurt court in the murder of 2,000 patients during his five months as a T-4 doctor at Hadamar. Like many of his T-4 colleagues, Gorgass served on the front as a military doctor until given the "uk" (unabkömmlinge, or "indispensable") designation by section II of Hitler's Chancellery. In April 1941, released from his military duties, he reported to Landesrat Bernotat in Wiesbaden, who gave him orders to report to the Führer's Chancellery in Berlin for further instructions regarding an "important task" for him. In Berlin the next day he was received in the Führer's Chancellery by SS Dienstleiter (Service Leader) Viktor Brack. Brack claimed (fraudulently, I should add) that a law existed, according to which incurable mentally ill patients were to be granted a "mercy death." Under the law, specially-appointed physicians were to carry out the euthanasia. Due to unspecified reasons of secrecy, the law could not be published.

Nonetheless, Brack assured Gorgass that his work as a T-4 euthanasia doctor was perfectly legal. Brack then announced he would receive a crash course in killing at the Hartheim mental hospital near Linz. Without expressing concerns about the commission given him by Brack, Gorgass immediately departed for Hartheim.\(^{39}\)

On arrival at Hartheim, Gorgass met with the institution's director, Dr. Rudolf Lonauer. Lonauer briefed Gorgass on the circle of those involved in the euthanasia program, disclosing to him that the mentally handicapped were disposed of in gas chambers located in six separate facilities within the Reich. At his trial, Gorgass told the Frankfurt court that these revelations deeply "shocked" him. He claimed, however, that
Lonauer assured him only severely ill patients refractory to therapy would be affected. This assurance, along with Lonauer's mention of the names of renowned physicians involved in the operation, eased Gorgass' conscience. Over the next several weeks, Gorgass served an apprenticeship in killing at Hartheim, tutored in the fine art of murder by Lonauer. After his stint at Hartheim, Gorgass graduated to the killing center of Sonnenstein near Pirna, where he observed the asphyxiation of patients with carbon monoxide gas. From Sonnenstein he arrived at Hadamar in mid-June 1941 to begin his service. There he was introduced to his work by Alfons Klein's predecessor as director of the institution, Dr. Friedrich Berner. Gorgass claimed at trial that Berner told him he had a copy of the euthanasia law in his possession, but for security reasons was not able to show it to Gorgass. Berner then placed Gorgass under oath and swore him to secrecy about the euthanasia program with a handshake.40

The killing process at Hadamar unfolded as follows: patients arriving at Hadamar in transports were measured, weighed, photographed, and disrobed before being led into an "examination room," where Gorgass inspected their patient histories and photocopies of their registration forms, upon which the Gutachter had inscribed his initials. The purpose of this final examination was to ensure that the patients' symptoms were fully noted on the photocopies, and to guarantee that no war-wounded patients or foreigners had been inadvertently included. Afterward hospital personnel brought them into the gas chamber—a room 30 cubic meters in area, disguised as a shower room. Once the entire transport (consisting of between 60-100 patients) was locked in this room, Gorgass went into a passage behind the gas chamber, where he turned on a valve that poured carbon monoxide gas.
monoxide gas into the chamber. As he did so, he observed the effect of the gas through a
d peephole. After around 10 minutes Gorgass turned off the gas valve. Another one to two
hours passed before the chamber was ventilated and the corpses removed for cremation.
Gorgass' role in the killing process ended at this point, only to resume with each new
transport, which arrived on average twice per week. With two exceptions—one
involving a war veteran, the other a pregnant woman (subsequently killed with a lethal
injection by the chief nurse)—Gorgass effected the deaths of all the patients brought to
him in the examination room. His role continued from June 1941 until the end of the first
phase of euthanasia (i.e., the gassing phase) in August 1941.41

Like many of his colleagues in the euthanasia program, Gorgass claimed that all
the patients he gassed were in advanced stages of mental illness and physical decrepitude.
The Frankfurt court found this assertion problematic, since, in its words, “a not
inconsiderable number of those killed [at Hadamar] were neither physically nor mentally
ill. There were many who were still capable of light work, who could carry on a limited
conversation, who experienced emotional impressions (like joy, or emotions tied to good
or ill treatment), and who could even correspond with their relatives.” One witness, a
Dr. N., testified that many of those killed could have been treated with therapeutic
measures, which might have produced an improvement in their condition. Eyewitness
testimony heard at trial cited specific examples. Another witness, a medical doctor,
described one of the victims as a small girl “who could not work at all, but was harmless,
always happy, and greeted him every morning like a father.” His efforts to gain her
exemption from transport failed, and she was sent to Hadamar for gassing. Another
victim, a farm hand from Fulda, was not only capable of work, but cognitively aware enough to recognize a former acquaintance of his in the Hadamar disrobing room. In its verdict the court listed several other examples, including a Jewish assessor committed to Eichberg in accordance with sec. 42b for distributing communist leaflets. The man was later transferred to Hadamar to be killed.42

In determining the nature of Gorgass’ actions in furtherance of the euthanasia program, the Frankfurt state court applied the criteria of sec. 211, beginning with “base motives.” According to the court, no such motives were perceptible in Gorgass’ conduct. “It has not been proven,” held the court, “that greed, the need for validation, striving after material advantage, or other despicable motives have caused Gorgass to collaborate in the implementation of the program.” Rather, the court believed it possible that Gorgass may have been bedazzled by the illuminati within the Chancellery of the Führer who had approached him. “a small doctor,” with “a secret Reich matter” (geheime Reichssache). Being awed into cooperating with a plot to commit mass murder did not “bear the stamp of moral reprehensibility”; it was instead due to “a certain human weakness.” Despite this finding, the court found him guilty of murder under sec. 211 because his actions were “malicious,” that is, he had acted “secretly, viciously, and fraudulently.” Like his co-defendant Wahlmann, Gorgass lulled the transportees into a false sense of security by winning their trust, then coarsely abused this trust by killing them in gas chambers camouflaged as showering facilities. Gorgass was accordingly convicted with Wahlmann of murder (“malicious” killing) under sec. 211.43
Only Gorgass and Wahlmann were convicted as perpetrators of murder in the Hadamar case. Although neither was deemed to have acted out of "base motives," the court denied extenuating grounds in sentencing the two doctors. Gorgass argued for mitigation under paragraph 3 of sec. 211, an argument rejected by the court based on his "extremely unethical conduct during the euthanasia operation." According to the court, had Gorgass "carried within himself high ethical values and a strong professional ethos," it would have been obvious to him that the mass killing at Hadamar was illegitimate "from a medical as well as a human-ethical standpoint." Presumably, only some form of disengagement of himself from the program would have sufficed as "ethical" conduct. Likewise, the court based its rejection of Wahlmann's claims of extenuation on the "especially high measure of irresponsibility" and "strong renunciation of the medical professional ethos" his actions displayed. Absent mitigating factors, both men were sentenced to death.44

Besides Gorgass and Wahlmann, other members of the Hadamar administration faced judgment at the hands of the Frankfurt court. The nursing staff (including the bedeviled Nurse Irmgard Huber, convicted of war crimes in the American Hadamar Trial) and the technical and office staff were all indicted. The logic of the Bathtub Case guided the court in categorizing the nurses as accomplices, rather than perpetrators:

They were all inwardly too dependent and possessed of a powerful inertia of the will in order to grasp situations of such gravity in a sufficient manner. Above all, however, they saw their medical role models, whom they were accustomed to respect and esteem, [acting] weakly and without will, and found in them neither support nor a role model.45

Moreover, the Frankfurt court considered the nurses' ability to conform their actions to the law compromised by subjective factors, such as a "primitive nature" and (in one case)
"pregnancy" that "restricted her power to resist." Their punctilious churchgoing also weighed in their favor. On this rationale, the nurses were convicted of aiding and abetting murder (Beihilfe zum Mord) and given jail terms between three and eight years. The office staff, among them secretaries who had logged both the arrival of the patients and the property (including gold teeth) confiscated from them, were all acquitted on the ground that their criminal intent could not be sufficiently proven.46

On appeal from the state court (or court of the “first instance”), the state appellate court of Frankfurt (Oberlandesgericht) on October 20, 1948 criticized the lower court’s determination that the nurses were all accomplices rather than perpetrators. The appellate court held that the lower court had exaggerated the subjective theory of perpetration. This theory could only be applied in cases where the defendants "did not themselves commit the killing, but have collaborated in some way in the killings that were committed . . . .” In such cases, stated the court, "the question must be answered whether they were perpetrators or participants, . . . i.e., [whether they] identified themselves inwardly with [the killing] and approved of it.” Where a defendant has fulfilled all the elements of the offense himself, however, that defendant is a perpetrator. "Whoever kills another person with his own hands, whoever administers the deadly shot, or mixes poison in another’s food, is a murderer, even if he does it in the interests of another, i.e. ‘for’ him. This result corresponds to the natural way of viewing the matter.” However, since the defendants, and not the government, had lodged the appeal, the case could not as a matter of law be remanded to the lower court. The latter’s characterization of the nurses as accomplices remained unchanged.47
The Hadamar case bears comparison with the Eichberg trial: in both, the T-4 doctors were convicted as perpetrators of murder under sec. 211's definition of "malicious" killing; in both, nurses were characterized under the subjective theory as accomplices to murder (*Beihilfe zum Mord*), rather than as perpetrators. Although jurists in the two trials were willing to convict physicians of murder as perpetrators, we can discern in both a tendency to regard the motives of the doctor defendants as something other than "base:" Schmidt's conduct was actuated by a "falsely understood subaltern loyalty to obey," Wahlmann’s by "human weaknesses and inadequacy, and a certain inertia of the will," Gorgass' by "a certain human weakness" that awed him into collaborating with mass murder. Only Mennecke, in his overweening self-importance, in his grandiose egomania, was declared to have acted "basely." Both cases are notable, too, for their refusal to convict as perpetrators nurses who with their own hands had murdered thousands of human beings. By the end of the Hadamar trial in mid-1947, we are moving steadily toward an era in the prosecution of Nazi euthanasia in which the rationale governing the portrayal of nursing staff as accomplices will be extended to T-4 doctors.

D. The Benefits of a "weak and unstable personality": the Kalmenhof Case

In the history of National Socialist euthanasia prosecution, the trial of the T-4 doctors Mathilde Weber and Hermann Wesse wears a Janus face. One face stares backward toward the earlier prosecutions of the Meseritz-Obrawalde and Eichberg medical staffs. The other looks toward new vistas in the evolution of German euthanasia trials. Although the first trial of the Kalmenhof doctors would end in early 1947 with the
convictions of both Weber and Wesse as murderers, two years would pass before the Frankfurt court, on remand from the appellate state court, would change its mind and find a T-4 doctor guilty not as a perpetrator, but as an accomplice.

The Kalmenhof mental hospital was founded in the mid-1920's as one of several charitable public institutions, "born," in the ironic words of the Frankfurt state court, "in the spirit of humanity and a practicing love of one's neighbor." The bathic incongruity between the lofty sentiments of Kalmenhof’s house rules from 1925 and its murderous role in the Nazis’ campaign of extermination cannot but strike the contemporary reader: "The employees of the institution should demonstrate in their behavior within and outside their service—particularly, however, in their treatment of the residents—that they have internalized the spirit of humane, religious, and moral principles." The association to which Kalmenhof belonged undertook to nurture "feebleminded" (schwachsinnig) but educable children by means of instruction and work therapy, with the goal of making of them "useful people." When Hitler came to power in 1933, the Nazis wasted no time in subverting these constructive aspirations. They replaced Kalmenhof’s director and appointed the Nazi zealot Fritz Bernotat chairman of the association. This was a dire omen for Kalmenhof’s patients; in 1936, at a conference of directors of mental hospitals in the castle of Dehn, Bernotat was reported to have told the assembled directors, "If I were a doctor, I would kill these patients."48

These remarks from a local Party satrap underscore an important point that we should not lose sight of in our study of Nazi euthanasia: the assault on the mentally ill began long before the outbreak of war in September 1939. German professors were
lecturing their students as early as 1933 on the duty of German doctors to assist in the
destruction of "life unworthy of life," as the remarks of Heidelberg Professor Viktor von
Weizsäcker on the theme of "The Social Illness" reveal:

It would be illusory—it would even be unfair—if the German doctor did not believe he
bore a responsibility to contribute to the extermination policy, born of need. In earlier
times, he was also involved in the destruction of unworthy life or unworthy fertility, in the
exclusion of the valueless through internment, in the state-political policy of annihilation
[Vernichtungspolitik].

Nazi Party officials throughout the public health care system labored to translate these
sentiments into reality. By 1938, the former director of Eichberg, Dr. Wilhelm Hinsen,
could see the handwriting on the wall, based on the sharply declining standards of care in
German mental hospitals. Testifying as a witness at the Eichberg trial in 1946, Hinsen
told the court:

I quit the service at the beginning of 1938. Euthanasia was on the horizon, but it was not
yet acute. That it would happen was my conviction. There was a growing deterioration
of care for the mentally ill. Their care was subsumed under the catch phrase: we have to
conserve. That was in the first years of National Socialism... The meat rations [for
mentally handicapped patients] were reduced. The ratio of doctors to patients was
reduced: the goal was one doctor per 300 patients... The chronic deterioration of
medical and human care, the course neglect of patients, etc. went unpunished, because it
was said: oh, well, they're only mental patients. In this way such a loosening in the
interpretation of the [medical] duty materialized that I did not believe was possible.

The calculated neglect of mental patients, in short, was underway in German hospitals
well before 1939—a fact that undermines efforts to portray euthanasia as motivated
primarily by the needs of the German war economy.

When the killing program began, Kalmenhof was transformed into both a transit
center, to which patients from other institutions were sent en route to Hadamar, and a
miniature killing center in its own right, where individual murders were committed
through lethal doses of narcotics (tablets and injections). At the time Kalmenhof
assumed these roles in 1940, Dr. Mathilde Weber was its managing physician. In January 1941, the Reich Labor Association (Reichsarbeitsgemeinschaft, one of the front organizations for Hitler's Chancellery) sent to Kalmenhof lists of patients to be prepared for transport on a pre-determined day by the busses of GEKRAT (the transport arm of the Führer's Chancellery). These selections had been made by T-4 Gutachter based on registration forms completed and returned to Berlin by the Kalmenhof staff in 1940. Of the 600-700 patients at Kalmenhof, 232 were transferred to Hadamar, where they were gassed between January 17 and April 29, 1941. Patients were also transferred to Kalmenhof from other institutions for a short time before further transport to Hadamar.

In 1942, a children's ward (Kinderfachabteilung) for the destruction of mentally disabled children was installed in Kalmenhof. Weber served as its managing doctor until May 10, 1944, when she was replaced by Hermann Wesse.52

During her tenure as managing doctor of the ward in August 1942, transports of children arrived at Kalmenhof from Hamburg, Bonn, and the Ruhr. These children were accommodated on the third floor of the building, which was reserved for the so-called "Reich Committee children." By this time, a portion of the hospital had been commandeered by the German army, causing acute shortages in hospital space. In the children's ward, conditions were such that several children were assigned to a single bed. After a brief stay in Kalmenhof, nearly all of the transferee children died. The killings were done by a floor nurse, Maria Müller, by means of luminal tablets mixed in deadly doses in the children's food. At trial, Weber claimed she never personally administered
lethal injections or overdoses of medication to these children. She further argued she had no clear knowledge that killings were taking place, since she neither lived in the hospital nor lingered there beyond the morning hours. With respect to Müller’s actions, Weber disclaimed knowledge of her work. When her suspicion grew that Müller might have a hand in the patients’ deaths, she alleged that she warned the nurse repeatedly.53

The state court did not find her defense cogent. Her assertions notwithstanding, the court was convinced Weber not only suspected Müller of killing mentally disabled children in the ward, but had actual knowledge of these killings. Further, the court believed Weber had condoned the killings and even promoted them by listing spurious causes of death on the death certificates. Weber herself admitted that “in the course of time” she understood that the children were to be destroyed under authorization by the Reich Committee in Berlin. With each newly arrived transport of children, Weber received a list with the children’s names and a “treatment authorization”—a Nazi euphemism signifying that the children were to be killed. At trial, she testified that she had placed the list with the authorization in an open drawer in the desk in her office, but did not forward it to Müller. The court established that hospital personnel had a passkey to Weber’s office, with which they could have easily obtained access to it; thus, even if no direct evidence showed that Weber had given the list to Müller, the nurse could have inspected it with little trouble.54

Nor was the Frankfurt court impressed with Weber’s defense that she, unlike her successor, Hermann Wesse, was not a “Reich Committee doctor” (i.e., a physician
entrusted by the Reich Committee in Berlin with carrying out euthanasia). The court conceded this point, but countered that Landesrat Berntat had instructed her to deal with the children in the ward as follows: “You don’t have to do much, since there isn’t any more treatment involved; it would be best if they disappear quickly.” Weber admitted she understood at the time that “disappear” meant “be killed.” Her claims of non-involvement were further rebutted by mortality rates at Kalmenhof during her presence there as director of the ward. According to records in the Idstein registry office, prior to the installation of the children’s ward at Kalmenhof, on average one to two children died per month; afterward, the death rate shot up to 55 per month. During one six-week period, seventy children—most of them patients transported to Kalmenhof from Hamburg on August 8, 1943—perished in the ward. On individual days in September 1943, as many as six children died there. The court was clearly struck by the cessation of mortality in the ward from September 26, 1943 to November 7, 1943, a period in which Weber and Müller took leaves of absence for health reasons. Weber was temporarily replaced by Dr. H., during whose brief tenure as director of the ward not a single child died. When Weber and Müller resumed their work in the ward on November 7, deaths again proliferated: from November 8-11, the deaths of six children were recorded. For the Frankfurt court, this fact proved that most of the deaths in the ward were not due to natural causes but to poisonous doses of medication. It further showed a dramatic linkage between the children’s deaths and the presence of Weber and Müller.55

The data on mortality were critical in refuting Weber’s claim that the deaths of children in the ward were attributable to natural causes. The court rejected this defense,
along with her representation that the children transported to Kalmenhof were in such a
deplorable condition of health, aggravated by the strains of transportation and inadequate
nutrition, that they died shortly after arrival. Three witnesses at trial testified to the
children's stable condition: they described many of the children as conveying "no
impression of idiocy" and, in some cases, as playing like normal children would. One
witness stated that some of the children "were all able to run," and for this reason she had
the "impression" they were not "terminal cases."^56

Also weighing against Weber's assertions of innocence were her documented
contacts with Professor Carl Schneider, a T-4 Gutachter and chaired professor
(Ordinarius) at the University of Heidelberg, where he was involved in research on brains
plundered from euthanized patients.^57 During the summer of 1942, Weber participated
in a four-week long course with Schneider, presumably on the subject of euthanasia.
Weber portrayed the trip as purely recreational in nature—a portrayal the court
discounted. In view of the shortage of doctors in 1942, the court speculated that Weber
was sent to Heidelberg for initiation into the mechanics and goals of the euthanasia
program. Her link with a leading figure in Nazi euthanasia, as well as her documented
receipt of bonuses (Sondervergütung) from the Reich Committee in compensation for her
unspecified collaboration with its "purposes" (Ziele), put paid to her defense of innocent
entanglement in the program.^58

Weber's final line of defense foreshadowed the representations of other
euthanasia doctors tried in the years after her conviction. This was the "sabotage"
argument, which she related to the court as a Hobson's choice among three alternatives:
There were only three possibilities for me since 1942: (1) either to collaborate in the
euthanasia project; (2) to seek a reason to extricate myself from the institution, where I
also had my illness to consider; (3) to place myself in a position in which my life would
be secure and the greatest good of the children could be at the same time preserved.\textsuperscript{59}

Wesse strove to convince the court that she had chosen the third alternative as a means of
sabotaging the euthanasia program where she could. The court did not accept her story.
Instead, it found that Weber had opted for the first alternative of collaborating in the
operation despite her visceral revulsion against it. The Frankfurt court agreed that she
strove to disengage herself from the activities in the children’s ward; however, time and
again she allowed herself to be mollified by Bemotat’s reassurances, so that she never
mustered the resolve to divorce herself from the program. This, the court held, she could
have accomplished with little prejudice or difficulty to herself. In response to Weber’s
claim that she did in fact eventually sever her connection with the children’s ward, the
court replied that she did not leave Kalmenhof for ethical or legal reasons, but, as she had
written in a letter from 1944 to the authorities in Wiesbaden, because of her failing
health.\textsuperscript{60}

The two primary charges against Weber related to the transfer of adult patients
from Kalmenhof to Hadamar and the destruction of disabled children in the Kalmenhof
children’s ward. The court acquitted Weber of the first charge on the ground that no
evidence existed to prove she was aware of the purpose behind the registration forms
when they were first circulated to the medical staff at Kalmenhof in 1940. Further, when
she did finally learn of their function, it was unproven that any killings were carried out
on the basis of the forms she had knowingly completed. With respect to the second
charge (killings in the children’s ward), Weber fared considerably worse. Although it
was never proved Weber had murdered anyone with her own hands, the court nonetheless insisted on the importance of her contribution to the murders. Without a physician to falsify causes of death, the program could never have been kept secret. Nurse Maria Müller, the syringe-wielding killer in the ward, relied on Weber to conceal her murderous actions with misleading death certificates. Although Weber’s contribution to the crime occurred after the killings were performed—lending an appearance of accessory after the fact to her role in the program—the court held that this contribution was “causal” to the occurrence of the murders. Without it, the success of the program could not have been ensured.  

Determining that Weber was co-responsible for the murders committed in the children’s ward, the court had no difficulty in finding that she was a perpetrator, not an accomplice. In one of the last euthanasia cases to apply the principle of the Bathtub Case to the detriment of a defendant, the court held that Weber had embraced the killing operation as her own. In support of this finding, it pointed to an occasion in which Weber had accused two of her nurses of violating their oath of silence, threatening to denounce them to higher governmental authorities. She did this gratuitously, without external compulsion, in a manner of acting that revealed “how very much she had made the ‘operation’ her own.”  

For Mathilde Weber’s successor as head of the children’s ward in 1944, Dr. Hermann Wesse, Kalmenhof was one in a string of assignments that embroiled him in the massive killing projects of the Third Reich. By the time of his arrival in Kalmenhof, Wesse was an experienced hand in the medical destruction of human life. In 1942 he had
worked briefly in the children’s ward at Brandenburg-Görden under a leading architect of the euthanasia program and a T-4 expert, Dr. Hans Heinze, before reassignment to a clinic for juvenile psychiatry in Bonn. Here he was instructed in the techniques of euthanizing disabled children in accordance with the standards of the Führer’s Chancellery. In October 1942, Wesse was an assistant doctor in the children’s ward at the Waldniel mental hospital until its closure in mid-1943. From there he did a three-month stint at the children’s clinic of the University of Leipzig under another T-4 potentate, Dr. Werner Catel. At Leipzig Wesse acquired his doctor’s diploma in “congenital and acquired feeble-mindedness.” Thereafter he worked in the Uchtspringe mental hospital’s children’s ward. His time at Uchtspringe was cut short when in December 1943 he was drafted into the army. In April 1944, Berlin attached the “indispensability” status (“uk-gestellt”) to him and sent him to Kalmenhof as Mathilde Weber’s replacement.

Prior to his assignment at Kalmenhof, Wesse allegedly reported to Berlin for orientation from Richard von Hegener of the Führer’s Chancellery. Von Hegener informed him that during his directorship of the Kalmenhof children’s ward, he was to submit reports about the patients to the Reich Committee containing the patient’s medical history and a “physical, neurological, psychiatric, intellectual, and characterological” assessment. Three medical experts in Hitler’s Chancellery would examine the reports and prepare expert assessments (Gutachten) independently of each other. If all three agreed that the patient should be “put to sleep,” Wesse would receive an order to have the patient killed. Afterward, he was obliged to contact the Reich Committee about the
outcome. At trial, Wesse claimed von Hegener had threatened him for non-compliance with these orders, allegedly warning him, "If you refuse, you will face dire consequences," then smiling and adding, "You don't think about spending your life in a concentration camp."

After meeting with Fritz Bernotat and the acting director of Kalmenhof, his co-defendant G., Wesse began his death-dealing work in the children's ward in May 1944. At trial, Wesse portrayed himself as a mere cog in an infernal machine. "I was there as a simple soldier," he told the court. "I could only say 'yes' and 'yes indeed,' and was accustomed to obeying orders." The evidentiary record contradicted Wesse's claim that he was just an obedient footman in the grand scheme of mass killing. Shortly after his arrival in Kalmenhof, Wesse wrote a letter to von Hegener, dated May 12, 1944, in which he virtually requested that potential euthanasia victims be sent to him:

I would like to inform you that I, as planned, have taken up my duties in the Reich Committee department in Idstein [i.e. Kalmenhof]. Since, however, at present no Reich Committee children are here, I would be grateful to you if you would effect a transfer of Reich Committee children sometime soon to the institution here.

Wesse's extraordinary letter demonstrates a category of institutional criminality that pervades all aspects of Nazi genocide—a category of action that the late German criminologist Herbert Jäger called "initiatives from the bottom to the top" (Initiative nach oben). For Jäger, this category is particularly exemplified in crimes committed by experts within the sprawling National Socialist bureaucracy; it is thus less than surprising to find a high incidence of such initiatives among the policymakers, planners, and implementers of the euthanasia program. At its very origin, as we have seen, Nazi genocide depended on imaginative and resourceful elaborations by lower echelons of
vague orders issued from the top. As Jäger observed, "the organizational mechanism of mass annihilation did not function solely on the basis of a strict hierarchical order of command 'from top to bottom,' but also on an 'initiative from bottom to top.'" In chapter 3, I referred to this phenomenon as the "entrepreneurial dimension" of Nazi genocide. It is illustrated in the person of Christian Wirth, registrar at the killing center of Grafeneck and one-time director of the killing centers of Brandenburg, Hadamar, and Hartheim before assignment to the death camps in occupied Poland (commandant and inspector at Belzec, inspector of Sobibor and Treblinka). During the trial of the major war criminals at Nuremberg, a witness referred to a conversation he once had with Wirth about the destruction of the mentally disabled:

Wirth described to me quite animatedly how he had arrived at the manner of execution, with no kind of assistance, but on the contrary he had to develop the manner [of carrying out the annihilation of the patients] by himself. An old vacant institution in Brandenburg was the only thing given to him. He made his first experiments in Brandenburg and developed after considerable thought and individual tests the subsequent system. This system was applied now in significant scope in the operation against the mentally ill.  

The witness related that the "system" Wirth developed— asphyxiation in gas chambers— was, with some "improvements," later used in the Final Solution.  

Wesse's request that he be sent disabled children for killing represents another example of an initiative from the bottom to the top. Although he had been introduced to the children's operation at Kalmenhof by von Hegener, Wesse's petition for victims proceeded entirely from him. No pressure was applied, no compulsion exerted, no order issued to make such a request—it emanated solely from Wesse. His act was a gratuitous exceeding of what was required of him, much like Weber's castigation of her staff nurses for breaching the oath of secrecy. The initiative Wesse demonstrated in his letter to von
Hegener is a further proof of the Nazi regime’s appalling success in evoking the entrepreneurship of its rank-and-file, who became the hands-on killers of the Third Reich.67

While serving as director of the Kalmenhof children’s ward, Wesse prepared reports on the children based on their patient history, a medical exam, and an intelligence test. He forwarded between 100 and 150 such reports to the Reich Committee. When he had received a killing authorization from Berlin, he gave it to Nurse Müller for execution, who killed the patients by mixing luminal into their evening meals. The court found that Wesse furnished 25 such authorizations to Müller, affecting a wide range of children in the ward: “feebleminded” school-age and adolescent children, as well as “characterologically deviant” children (i.e., juvenile delinquents). In two cases Wesse himself administered lethal overdoses of morphine that caused the patients’ deaths. The patients involved, Margarete Schmidt and Ruth Pappenheimer, were no more “hopeless” cases than some of Weber’s patients. Margarete Schmidt was a 23-year-old epileptic who worked as a servant girl in the hospital. The court described her as having a “good capacity for work”; she attended to much of the housework in the Kalmenhof facility, which, with some supervision, she could accomplish without difficulty. In January 1945 Wesse, who had earlier sent a report to Berlin on Schmidt detailing her physical and mental condition, received a killing authorization for her. As an epileptic, Schmidt was accustomed to taking luminal tablets; for this reason, Wesse elected to kill her himself with an injection of luminal. The injection did not effect her death, causing Müller to
administer an additional injection, this time of morphine, from which Schmidt expired a short time later. The death records in the Idstein Registry office listed her cause of death as “epilepsy, increasing dementia, status epilepticus, brain swelling.” Why Wesse and Müller murdered Schmidt was a matter for speculation by the court. It conjectured that Schmidt’s work as a housemaid likely exposed her to the crimes perpetrated there by Wesse and Müller. Wesse may have consciously slanted the report to her prejudice, in an effort to authorize her killing and thereby “dispose of a burdensome witness” (eine lastige Mitwisserin). \(^{68}\)

If the circumstances surrounding Schmidt’s death were suspicious, those attending Ruth Pappenheimer’s demise were sinister. Pappenheimer was an 18-year-old half-Jewish girl, described by the court as “mentally normal,” but characterized by Wesse as “asocial” (i.e., “characterologically deviant”). She was committed to Kalmenhof in the fall of 1944 after an adolescence of minor juvenile delinquency, including various sexual peccadilloes (including sexual relations with a variety of soldiers) and the theft of some bottles of wine and a wool scarf from her employer. For reasons not clarified in the court’s opinion, Landesrat Bernotat in Wiesbaden took an especially malignant interest in doing away with her. According to Wesse, Bernotat had demanded that he prepare a report about Pappenheimer for the Berlin authorities. After the report was completed and sent to the Reich Committee offices, Bernotat supposedly badgered Wesse with questions about whether the killing authorization had been given, complaining that Berlin worked too slowly. Eventually the authorization arrived, and Wesse administered a lethal
injection of morphine to Pappenheimer, a mentally and physically healthy young girl.

The Frankfurt court was convinced that she was murdered only because she was Jewish.69

The court’s deliberation on whether Wesse was a perpetrator or an accomplice was brief and succinct. In 25 proven cases, he had collaborated in the murder of Kalmennhof patients; in at least two of them, he had himself produced the patients’ deaths. Applying the standard of the Bathtub Case, the court found that Wesse “desired the killings as his own.” For this reason, he was a co-perpetrator in the children’s ward murders.70

What, according to the court, were Weber and Wesse’s motives for action? Neither was impelled by ideological motives, it held. Rather, they murdered for career-related reasons: Weber wanted to “preserve her cushy independent job.” Wesse his “indispensability” status that exempted him from front-line military service. The court regarded both of these motives as “base” under sec. 211. As far as sentencing was concerned, the court weighed extenuating against aggravating factors for both Wesse and Weber, and found no compelling reason to grant them a mitigated punishment. On January 30, 1947, they were sentenced to death.71

This pronouncement, however, did not end Mathilde Weber’s judicial odyssey. Nearly 15 months after her conviction by the Frankfurt state court, the appellate court of Frankfurt reversed the lower court’s finding that Weber was guilty as a perpetrator. According to the appellate court, the lower court did not sufficiently clarify “why an action occurring after the completion of the crime [i.e., falsifying death certificates] can be considered co-perpetration,” instead of aiding and abetting. The appellate court did
not exclude the possibility that Weber was indeed a perpetrator; if, for example, her
"guarantee of help" encouraged Müller's "will to perpetration" (Täterville), then such
action would constitute perpetration, even though it was done after the crime was
performed. This showing, the appellate court stated, the lower court never made. For
this reason, the appellate court remanded the case for reconsideration by the Frankfurt
state court.72

When the case arrived in the lower court for retrial, Weber received a much more
charitable reception than she had on her first go-around. By the time the court delivered
its new verdict in February 1949, much had changed in the history of German euthanasia
trials. Weber's prosecutions, in fact, are divided between two separate eras: the period of
retributivism (the first trial) and the era of growing leniency toward National Socialist
euthanasia operatives (the case on remand). Between her first trial in early 1947 and the
retrial in February 1949, the geopolitical landscape had changed considerably in Europe.
The Truman Doctrine had been enunciated in February 1947, declaring the United States'
intention to "contain" Soviet communism wherever it appeared in the world. The
Truman Doctrine made clear the Americans' commitment to maintaining a strong
military presence in regions perceived to be threatened by Soviet invasion. For western
Germany, this meant unabated U.S. troop strength on German soil as a counterweight to
the Russian Army. Irresistibly, as the decade of the 1940's wound down, the realization
that Germany would be divided into two separate countries stole over the German people.
The Council of Foreign Ministers, established at the Potsdam Conference in July 1945 to
develop a uniform policy for Germany, repeatedly failed to produce a consensus on the
German question. Between April 1946 and December 1947, the Council met five times with nothing to show for its efforts except mutual denunciation and idle speechmaking. On June 23, 1948, the futile work of the Council was interrupted when the Soviets instituted a blockade of West Berlin in response to western Germany's currency reform. The blockade isolated 2.5 million Germans living in West Berlin from the western allies and interdicted the importation of food and electricity into the western half of the city. When the Russians lifted the blockade after 324 days, the Council of Foreign Ministers reconvened in Paris on May 23, 1949. The issue of the meeting was as fruitless as its predecessors. By this point, the fear that German division would become permanent had congealed into a certainty: it was clear to all that Germany would be split between a West and an East Germany with a partitioned Berlin situated in the middle. The waning years of the 1940's marked the beginning of the Cold War, the incunabula of the bipolar world that would dominate and envenom international politics for the next half-century. The Cold War was in full force when Mathilde Weber's second trial began in March 1949.73

The Frankfurt court on retrial interpreted the subjective theory of perpetration to Weber's advantage. According to the court, the facts did not support a finding of perpetration: Weber never volunteered her services to the Reich Committee, but was already involved as a doctor in Kalmenhof when the children's operation started; nor was she a Nazi party member, from which the court inferred a presumption that she did not subscribe to euthanasia for ideological reasons. The court was persuaded by her defense that "she found her work in Kalmenhof unpleasant and quickly formed the desire to extricate herself from it." Incredibly, where in the first trial the court had rejected
Weber’s argument that her distaste for the killing program had led to her removal from Kalmenhof in May 1944 (on the proven ground that she had departed for health reasons, not out of conscientious objection), the court now accepted Weber’s claim that her “inward rejection” of euthanasia caused her dismissal. For all of these reasons, it found that Weber had not desired euthanasia “as her own,” and was thus guilty only of aiding and abetting murder (Beihilfe zum Mord), that is, of being an accomplice. On the issue of punishment, the court affirmed extenuating grounds in Weber’s case, based on her relative youth and immaturity at the time of her service at Kalmenhof, which affected her ability “to deal with the demands made upon her.” Moreover, her educational background had not prepared her for agonizing ethical choices. “She had only the common school and career education behind her when she began her work in Kalmenhof in 1939,” the court held (as if a doctorate in Practical Ethics were required to perceive the wrongfulness of murdering children). The court characterized her as “fundamentally a weak and unstable person,” whose “guilt consists in the fact that she closed her eyes to what was happening around her and let the nurse subordinate to her do as she liked.” Hence one could not lump her in with all the other euthanasia doctors; she was a distinct “exception.” This indulgent line of reasoning led the court to sentence Weber to a jail term of three-and-a-half years.74

As trifling as her sentence was in comparison with the enormity of her crimes, Weber never served more than a month of her punishment. After her second trial she was released from custody and her sentence suspended due to poor health. Not until October 1954 was she sufficiently healthy to do her time. In November 1954 she was
again released, apparently for time served prior to her second trial. By 1960, she had resumed her career as a practicing doctor. Hermann Wesse, also indicted and tried for his role in euthanizing patients at the Waldniel mental hospital, benefited from the abolition of the death penalty in Germany in 1949. Nonetheless, he was one of the few euthanasia doctors to spend considerable time in jail for his collaboration in the euthanasia program: after twenty years, he was released from prison in September 1966 for health reasons.\textsuperscript{75}

Mathilde Weber benefited from the freshening breeze of leniency that blew over German euthanasia trials after 1947. Had her appeal come before the Frankfurt appellate authorities in 1946 or 1947, we might question whether she would have enjoyed such a favorable outcome. One historical factor that may account for this seachange in judicial attitudes was the growing antagonism between East and West that would crystallize into the Cold War. The thickening tension between the U.S. and the Soviet Union in the late 1940's was a Godsend for Weber in her second trial. A politically and morally rehabilitated Germany was needed to anchor the Western alliance against the Soviet bloc. The imperatives of international politics intersected with a German society eager to lay its scandalous past to rest. Within this society, the German judiciary—itself tainted by its prior contacts with Nazism—became a fervent accessory to the nation's act of willed amnesia. The tools of German criminal law like the distinction between perpetration and complicity and the statutory definition of murder were used to further this act of collective forgetting. Although the most visible symbol of the yearning to forget appeared in late 1949 with the Bundestag's amnesty of certain types of Nazi crimes, trials
like Weber's had already proclaimed Germany's determination to close the book on National Socialist criminality. The direct beneficiaries were Nazi war criminals who had yet to stand trial. The immediate victim was justice.

In the early phase of the German trials, the courts convicted defendants as perpetrators of murder under German law. The wrongdoers' motives, in the estimate of the courts, were various: they included ideological affinity with Nazi doctrine (Wernicke, Wieczorek), vanity and self-seeking ambition (Mennecke), a distorted sense of obedience (Schmidt), human weakness and an "inertia" of the will (Wahlmann and Gorgass), careerism (Wesse), and a weak, unstable personality (Weber). Among these euthanasia killers, only Wieczorek, Wernicke, Mennecke, Weber, and Wesse were deemed to have acted with "base motives" (i.e., in a morally reprehensibly manner). Only Wernicke and Wieczorek paid for their participation in Nazi euthanasia with their lives. With the exception of Wieczorek, all the nurses were convicted as accomplices to murder, based on motives ranging from love (Schürg) to thoughtlessness (Senft). These determinations were predicated on a subjective analysis of the defendant's moral and intellectual capacity to comprehend the wrongful nature of the killing operation. Of these early trials, only in the Kalmenhof case did a western German court categorize a T-4 doctor as an accomplice rather than a perpetrator. As we will see in Chapters 7 and 8, reducing euthanasia doctors' roles in the Nazi killing program from perpetration to complicity—and, in several cases, even granting them acquittal for "proven innocence"—would become inflationary in German courts after 1947.
At this juncture, however, the reader may ask on what basis the Germans presumed to exercise jurisdiction over euthanasia crimes. While such crimes were typically charged as homicide under sections 211 (murder) and 212 (manslaughter) of the German Penal Code, they were committed with the approval—and even on the orders—of the highest state authority. Euthanasia defendants could and did argue that, given the governmental backing behind the program, they had been unaware that their actions were illegal, and thus should be acquitted due to a “mistake of law” (Verbotsirrtum). The strategy devised by the German judiciary in the immediate aftermath of the war was to revive natural law theory as a basis of jurisdiction over euthanasia crimes. As we will see in the next chapter, reliance on natural law enabled the German judiciary, for a brief time, to neutralize the claims of defendants that they did not recognize their conduct was illegal. Further, it empowered that same judiciary, however fleetingly, to affirm that the essence of human thought and action transcended the determinisms of political ideology and social conditioning that still threaten to overwhelm our concrete being in the postmodern age.

NOTES

1 The quote is a comment Göring made to the Nuremberg court psychologist Martin Gilbert, reproduced in H. Jäger, Verbrechen unter Totalitärer Herrschaft. pp. 323-324.
5 On this theme, see J. Friedrich, Die kalte Amnesticie, pp. 54-55. Speer’s notion of “divided responsibility” may also extend to the field-level executors of a criminal government’s orders like the men of Christopher Browning’s Reserve Police Battalion 101. However, the all-too-human capacity to drown moral awareness in the tedium of bureaucratic routine is much more problematic in the cases of those directly involved in mass killing. Their proximity to the immediate horror of taking human life—when Browning’s ordinary
men ended a day of mass shooting, their clothing was spattered with blood and specks of brain—complicates the process of evading personal responsibility through resort to collective guilt. The same may be said of euthanasia doctors directly involved in causing the deaths of mental patients, half-Jewish children, concentration camp inmates, and eastern workers through gassing or lethal injection. From the standpoint of the moral consciousness, it is one thing to participate in a crime by issuing or transmitting written orders; it is quite another to inflict death and destruction on others with one's own hands.

6 See Rückerl, The Investigation of Nazi Crimes, 1945-1978, p. 34. Dick de Mildt notes that Law #10’s prohibition of German prosecution of crimes committed by Germans on non-Germans was not always obeyed, inasmuch as in the period from May 1945-January 1950 sixty-one of the 260 Nazi murder trials in (western) German courts involved the killing of non-Germans. With this caveat in mind, as de Mildt acknowledges, it may still be surmised that the political, social, and legal atmosphere in postwar Germany did not foster earnest and unflinching efforts by German courts to confront the full range of Nazi criminality. See de Mildt, p. 22.

7 For a discussion of some of the differences between Law #10 and sec. 211, see the State Court of Koblenz’s discussion in JuNSV, Lfd. Nr. 225, pp. 52-53; Henry Friedlander. “The Judiciary and Nazi Crimes in Postwar Germany,” The Simon Wiesenthal Center Annual, vol. 1, pp. 31-32; Friedrich, pp. 152-153.

8 Jacobs v. State, 85 S. 837 (Ala. App. 1918). In traditional Anglo-American criminal jurisprudence, as Albert Lévitt summarized it in 1922, “an intent is not an essential ingredient of a statutory crime: ... as it can be inferred from various acts, it is not an essential ingredient of common law crimes. A crime does not consist of an act and an intent, but simply an act.” Albert Lévitt. “Extent and Function of the Doctrine of Mens Rea.” 17 Illinois L. Review (1922): 586. The action-oriented emphasis of Anglo-American jurisprudence may be a vestige of Anglo-Saxon law, which demanded compensation from an actor for damage his actions have caused regardless of his intent. See A. Lévitt. p. 578.


11 Quoted in Friedrich, p. 362. For the text of the BGH’s opinion in Staschynskij, see BGHSt. 18, 87 ff.; Neue Juristische Wochenschrift 63, 355 ff.

12 Quoted in Friedrich, pp. 362-363.


16 Quoted by Roland Freisler, “Gedanken über das Gesetz zur Änderung des Reichsstrafgesetzbuches.” Deutsche Justiz, Rechtsplege und Rechtspolitik, 26 September 1941, p. 934.

17 Postwar German jurists defended the revised version of sec. 211 as a law untainted by National Socialist ideology, claiming it was modeled on Article 99 of the outline for the Swiss Penal Code of 1918. See Dombrowski, p. 83; Schöneke, Deutsche Juristische Zeitung 1947, p. 77; OLG Köln in DRZ 1946, p. 94.

18 JuNSV, Lfd. Nr. 003, pp. 36-38.

19 JuNSV, Lfd. Nr. 003, pp. 36-38.

20 Milan Kundera, The Art of the Novel, p. 54.

See supra, chapter 3, p. 193 ff. 23

JuNSV, Lfd. Nr. 011, p. 142. 24

JuNSV, Lfd. Nr. 011, pp. 143-144. The state court of Frankfurt admitted it could not prove with certainty that Mennecke had knowingly participated in the Final Solution—only that he had filled out forms on some of the concentration camp prisoners. 25

JuNSV, Lfd. Nr. 011, p. 145. 26

JuNSV, Lfd. Nr. 011, p. 147. 27

JuNSV, Lfd. Nr. 011, p. 160. 28

JuNSV, Lfd. Nr. 011, p. 147-148. 29

JuNSV, Lfd. Nr. 011, p. 149. 30

JuNSV, Lfd. Nr. 011, p. 150. While Schmidt’s therapeutic interventions may have been effective, a far more arresting way to show “the extreme nature” of Nazi euthanasia would have been to decline participation in it. This Schmidt did not do. 31

JuNSV, Lfd. Nr. 011, pgs. 150, 161. 32

JuNSV, Lfd. Nr. 011, p. 151. 33

JuNSV, Lfd. Nr. 011, pgs. 164-165. 34

JuNSV, Lfd. Nr. 011, pp. 326-327. 35

JuNSV, Lfd. Nr. 011, pgs. 147, 160. 36

JuNSV, Lfd. Nr. 011, pgs. 147-148. 37

JuNSV, Lfd. Nr. 011, p. 149. 38

JuNSV, Lfd. Nr. 011, pgs. 147, 160. 39

JuNSV, Lfd. Nr. 011, pgs. 147-148. 40

JuNSV, Lfd. Nr. 011, p. 149. 41

JuNSV, Lfd. Nr. 011, p. 150. While Schmidt’s therapeutic interventions may have been effective, a far more arresting way to show “the extreme nature” of Nazi euthanasia would have been to decline participation in it. This Schmidt did not do. 42

JuNSV, Lfd. Nr. 011, pgs. 150, 161. 43

JuNSV, Lfd. Nr. 011, p. 151. 44

JuNSV, Lfd. Nr. 011, pgs. 164-165. 45

JuNSV, Lfd. Nr. 017, pp. 325-326. 46

JuNSV, Lfd. Nr. 017, pp. 317. 47

JuNSV, Lfd. Nr. 017, pp. 357-358. 48

JuNSV, Lfd. Nr. 017, pp. 358-360. 49

Quoted in Friedrich, p. 191. 50

JuNSV, Lfd. Nr. 017, p. 345. 51

JuNSV, Lfd. Nr. 017, p. 372. In German criminal law, unlike its Anglo-American counterpart, the government/prosecution can appeal a verdict unfavorable to it. Under Anglo-American law, appeal can only be made by the defendant; issues of guilt or innocence resolved in the defendants’ favor are considered *res judicata* (matters adjudicated) that are not subject to appeal. 52


Excerpted in Klee, *Dokumente*, p. 63.


JuNSV, Lfd. Nr. 014, pp. 232-233. Evidence was presented that, before her departure on medical leave, Weber tried to stop the shipment of the "Reich Committee children" to Kalmenhof during her six-week absence. The court believed Weber's efforts were actuated by her knowledge that only Müller, whose own medical leave coincided with Weber's, could both perform and conceal the killings.


See supra, chapter 2, pp. 111-113.


JuNSV, Lfd. Nr. 014, p. 251.

De Mildt, pp. 132-133.

JuNSV, Lfd. Nr. 014, pp. 237-238.

JuNSV, Lfd. Nr. 014, p. 238.


The Frankfurt state court, curiously enough, did not regard Wesse as acting on his own initiative, as it made clear in assessing his punishment. "Wesse did not perform his acts on his own initiative, but was determined in his action by higher authority. Further, he was a relatively young person at the time, whose upbringing occurred at the beginning of the Nazi period, and may have been influenced by the uncritical and narcotizing words 'Führer commands, we follow.'" True enough. Wesse did not himself design the euthanasia program, nor, like Christian Wirth, did he invent malefic agencies for ending human lives. In its assessment, however, the court overlooks Wesse's May 1944 letter to the Reich Committee, which furnishes convincing proof that Wesse to a certain extent did act independently of the Berlin authorities.

JuNSV, Lfd. Nr. 014, pp. 238-239.

JuNSV, Lfd. Nr. 014, pp. 239-240.

JuNSV, Lfd. Nr. 014, pp. 239-40.


De Mildt, pgs. 132, 135.
CHAPTER 6
THE CONTEST BETWEEN OLD AND NEW GODS:
GERMAN EUTHANASIA TRIALS AND THE REVIVAL OF NATURAL LAW THEORY

Not truth, but authority makes law.

Thomas Hobbes

The state is legally free of any restraint; even authoritative acts of brutality are, from a formal-legal standpoint, binding on courts, administrative authorities, and subjects if they are clothed in the form of the law.

Georg Meyer

There are . . . principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate skeptic can still entertain doubts about them.

Gustav Radbruch

There is no will of the State; there are only individual wills of those governing. When they act they are not the mandataries or the subordinate parts of a supposed collective person, or an assumed personality, the State, whose will they express and execute. They express and carry out their own wills; there is no other. Any other conception of the State is fantastic.

Léon Duguit

When the Old God leaves the world, what happens to all the unexpended faith?

Don Delillo
Chapters 5, 7, and 8 of the present study explore how West German courts adjudicated the cases of health care providers (chiefly physicians) implicated in the National Socialists' assault on the lives of the mentally disabled. The analysis focuses on both the nature of the crime itself as elaborated by the "main perpetrators" Hitler, Bouhler, Brack, et al. and on the roles of the rank-and-file doctors, nurses, and public health officials who implemented it throughout the German Reich during the war. As we will see, the West German judiciary's conception of the legal and moral responsibility of the "small wheels" in the killing machine changed significantly over time. It began as a willingness to convict the rank-and-file as perpetrators, then shifted to a view of them as accomplices who did not embrace euthanasia "as their own" (a progression developed in Chapter 5). Finally, the courts issued acquittals on the basis of three primary legal doctrines—extrastatutory necessity, collision of duties, and exertion of conscience/mistake of law. The study suggests that the trajectory of the change from retributivism to leniency and acquittal was not the result of a mechanical application of legal doctrine to euthanasia killings, but to other forces—political, social, and cultural—that increasingly impinged on it in the late 1940's. What our analysis in these chapters does consider is how German courts conceived of their legal authority to try, convict and punish euthanasia defendants—that is, by what right the judiciary presumed to pass judgment on the defendants at all. This chapter describes the crystallization of natural law theory in West German verdicts as a response to the problem of jurisdiction.

The issue of jurisdiction is much thornier than it might at first appear. Although Hitler had vetoed enactment of a formal euthanasia law out of regard for the uses it would be put to in foreign propaganda, he had issued a secret order under his signature
authorizing Bouhler and Brandt to set the killing program into motion. Many euthanasia personnel were aware of the order; to some, copies were exhibited. Moreover, in an April 1941 meeting of German state prosecutors and judges in Berlin, Viktor Brack effectively immunized euthanasia operatives from arrest, indictment, or prosecution. Given the permissive atmosphere in which Nazi euthanasia evolved, postwar defendants could plausibly argue they had acted in conformity with the orders of the sovereign authority in Germany at the time, and thus could not be charged with acting illegally. Further, they could with some credibility maintain they had lacked any awareness that their conduct was wrongful, and should thus be acquitted for a mistake of law (Verbotsirrtum).

If, as so many euthanasia defendants argued, their actions were countenanced by Hitler as the highest state authority in Germany during the war, then their postwar indictment for participation in euthanasia would violate a fundamental norm of German law, the ban on ex post facto (or retroactive) prosecution. This was a cornerstone of modern German criminal law, a principle codified in the German Penal Code of 1871, the Weimar Constitution of 1919, and the Basic Law (German Constitution) of 1949. The need to prosecute Germans involved in the mass murder of hundreds of thousands of mentally ill patients was compelling; yet, to violate the sacred tenets of the Rechtstaat and criminalize actions that were not illegal at the time of their commission risked an arbitrariness that savored of National Socialist caprice. The Allies had encountered a similar dilemma at Nuremberg, one solved by joining uncodified crimes against humanity to the more securely established Laws of Armed Conflict. Where, as in the Subsequent Proceedings, the link between crimes against humanity and war crimes was dissolved,
prosecution tended to invite charges of “Victors’ Justice” from the German public. As we have seen, however, the Common Law lawyers and judges were less troubled by *ex post facto* considerations than were their Continental counterparts: for the pragmatic Americans and British, to allow Nazi war criminals to escape indictment for their million-fold murders would be a far greater injustice than to prosecute them retroactively. The International Military Tribunal reflected the Anglo-American position in its assessment of one defendant: “[S]o far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished.”

Due to the centrality of the principles of legality in Continental law, the German judicial authorities had more scruples about breaching the prohibition of *ex post facto* laws. The strategy they developed to solve the problem differed in kind from the Anglo-Americans. Rather than brush aside *ex post facto* objections by invoking the overriding need to punish wanton criminality, the Germans revived a tradition of legal thought that had fallen into desuetude in German courts for 150 years—the theory of natural law. It is not an exaggeration to say that the application of natural law theory was the most significant factor in German jurisdiction over euthanasia-related crimes in the immediate postwar years. With reference to it, the courts could prosecute Nazi medical crimes, and do so consistent with the ban on retroactive prosecution (the principle of *nulla crimen sine lege*).
I. The History of Natural Law in German Jurisprudence

A. The Precarious Balance: Reason vs. Revelation in Natural Law

Like the notion of "life unworthy of life," the idea of natural law is traceable to the Classical Age of ancient Greece. Perhaps because of the fragmentation of the Greek mainland into individual poleis or city-states, Greece was the first civilization to remark on the diversity of "truths"—customs, languages, lifestyles, and laws—spread across the world's cultures. This observation led the Greeks to ponder the distinction between the nomoi (human-made laws) and physis (nature), raising the prickly question of the relationship between conventional morality and the law. If ethics was purely conventional and culture-bound, then no universal standard existed to measure individual laws or acts of state. Nothing, in fact, would exist outside the naked power to coerce or cajole obedience to law, nor could individual laws be challenged on behalf of a higher authority. Plato and Aristotle may justly be regarded as the first Western thinkers to defend a naturalistic theory of ethics, based on the ability of the mind to grasp a "higher law" that both transcended and adjudged man-made laws. In his Rhetoric Aristotle set forth a bivalent definition of law that would set the terms of debate for the next two millenia:

I mean that law is either particular or universal; by "particular" law I mean that which an individual community lays down for itself (a law partly unwritten, partly written); and by "universal" law I mean the law of nature. For there is a natural and universal notion of right and wrong, one that all men instinctively apprehend, even when they have no mutual intercourse nor any compact.  

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“Law” was thus for Aristotle a two-headed entity. It consisted of individual laws promulgated by rulers, which one could ascertain through observation, and of “a natural and universal notion of right and wrong,” ascertainable to all through reason. The just society would seek to approximate with its particular laws the loftier law of reason, and in every case this law of reason was superior to the edicts of rulers.

The dichotomy between particular laws and a higher law underlies all of Western legal theory until the modern age. It is captured in the Continental system of jurisprudence in the French distinction between _droit_ and _loi_ and the German _Gesetz_ and _Recht_. In German law, _Gesetz_ refers to statutory, scientific, and customary laws. In each case, a _Gesetz_ is subject to validation or refutation, since we can consult it and test it for its truth value. George Fletcher describes _Gesetz_ as forming the heart of the “positivist paradigm.” By contrast, the word _Recht_ refers not only to all written and customary _Gesetze_ within a given legal system, but, in Fletcher’s words, to “the unwritten principles and policies that come to the fore only as a result of assessment, judgment, and judicial assertion.” Fletcher translates _Recht_ as “the Right” (a term that captures the normative aspect of the German word), quoting Gustav Radbruch’s definition of the Right as “consist[ing] in the pursuit of justice.” Radbruch’s definition indicates that the Right is a sort of interface between the particular laws of a society and the eternal ideals of justice. Ultimately, however, the domain of “right” and justice toward which _Recht_ points does not lend itself to empirical observation or knowability in the conventional sense—unlike individual _Gesetze_, which can be more or less fully known (by reading the text of a statute, for example). To borrow a phrase from Fletcher, _Gesetze_ “conceal no
mysteries," while Recht "is open-ended, transcendent, undetermined. It can never be fully known." The indeterminacy of Recht will be, as we will shortly see, a primary reason for its rejection in 19th and 20th century German law.9

Plato, Aristotle, and their intellectual scions did not regard the higher law of nature as either unknowable or mysterious. In his De Republica, the Roman natural law theorist Cicero affirmed the rational character of it:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and at all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.10

In this excerpt from Cicero, all of the essential features of natural law theory are present: its intelligibility in the natural world, its enduring and universal quality, and its provenance in the will of God. This association between human reason, the moral imperative, and the will of God is an ancient one in the history of natural law theory, lending credence to Roscoe Pound's observation in 1924 that Western jurisprudence had a "theological basis . . . well into the nineteenth century."11 While most natural law adherents did not believe every thought in the mind of God should be reduced to a statute, they did hold that the laws of a state must not conflict with divine law, understood as the "law of reason." One of the titanic figures in natural law theory, St. Thomas Aquinas, summed up the primacy of divine law: "But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of
reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; or otherwise the sovereign’s will would savour of lawlessness rather than of law.” A particular law at odds with the “rule of reason” decreed by God and revealed in nature forfeited its claim to legality, as Aquinas affirmed with reference to St. Augustine: “As Augustine says, that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice.” By “justice” Aquinas explicitly means “the law of nature.” Any deviation from this law of nature transforms a law into “a perversion of law.” If we did not know the source, we could easily mistake Aquinas’ words for those of Gustav Radbruch seven hundred years later.

By the 17th century, this synthesis of nature, rationality, and divinity was beginning to break apart. Among the first European legal scholars to push natural law theory towards secularization was Hugo Grotius (1583-1645), commonly regarded as the founder of modern natural law and human rights. In his De Jure Belli ac Pacis (On the Law of War and Peace, 1623), Grotius acknowledged the supremacy of natural law as binding on all peoples everywhere, but denied that it was dependent on the will of God. Rather, the natural law consisted in the collective legal experience of the human race. While not denying a link between natural law and God—Grotius believed that God’s will was one of the bases of natural law—he clearly thought it was accessible to the human mind without divine revelation. Our perception of Grotius’ natural law in other words was independent of revelation: even if God did not exist, the natural law would be valid. God might “will” reason, as Grotius taught, but God was not necessary to our ability to understand the natural law and to act in accordance with its precepts.
In England, legal positivism found an early champion in a contemporary of Grotius, Thomas Hobbes (1588-1679), whose life work was a systematic defense of the position that "law" was to be equated with enacted (positive) law. In his *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (published posthumously, 1681), Hobbes set forth the future mantra of legal positivism: "It is not Wisdom, but Authority that makes a Law . . . [N]one can make a Law but he that hath the Legislative Power." For Hobbes, the "Legislative Power" who possessed the exclusive right to make law was the King; as sovereign authority of the realm, his power was absolute and not to be challenged with appeal to an imaginary "higher" authority. Only complete submission to the laws of the sovereign could avoid the civil discord and bedlam, the "war of all against all," that characterized social life in the absence of a strong central power.\(^{13}\)

In Germany, the prising of natural law from revelation was furthered by Samuel Pufendorf (1632-1694), the first German scholar to occupy a university chair in natural law. According to Pufendorf, our knowledge of obligation arises from three sources: reason, the laws of sovereign authority, and divine revelation. The first of these, reason, was sufficient to enable us to understand the cardinal idea of natural law, *socialitas*—the duty to co-exist with others in society and promote the common good. Pufendorf's natural law was very much "this world"-oriented, focusing on the requirements, discoverable by reason, that we face in adjusting ourselves to social life. Although conceding the importance of divine revelation to the Christian's life in the hereafter.
Pufendorf drew a sharp distinction between our knowledge of divine truths and our rational apprehension of ethical demands. God was no more needed in Pufendorf's jurisprudence than in that of Grotius and Hobbes.\textsuperscript{14}

The secular implications in the work of Grotius, Hobbes, and Pufendorf contributed to the rise of the dominant school of European jurisprudence in the 18\textsuperscript{th} century, the so-called "school of natural law." The German word for this school, \textit{Vernunftszrecht} ("rational law"), emphasizes its central methodological premise. In an age of Enlightenment, when truth claims were increasingly forced to plead their case before the bar of reason, natural law jurists sought to justify individual laws with reference to their rational character. Late 18\textsuperscript{th} and early 19\textsuperscript{th} century Continental law, including the Prussian General Law of 1794, the Austrian General Civil Legal Code of 1811, and the Napoleonic Penal Code of 1810, reflected the influence of the natural law school. The Prussian General Law of 1794, in particular, was heavily indebted to the premier systematic thinker in the natural law school, Christian Wolff (1679-1754), who constructed a formidable theory of legal validity based not on the ethical content of laws, but on their place within a closed legal system. The internal consistency (\textit{Widerspruchsfreiheit}) of the principles of law embraced by the system guaranteed their validity. Borrowing from the methods of the natural sciences, Wolff held that a "science" of law could be created that had the rigor and precision of mathematical proofs. He began with a first principle given by natural law, i.e., that law should be geared to "perfecting the human being and his condition" (\textit{Vervollkommung des Menschen und seines Standes}). This principle entailed the corollary that the law should avoid anything that would impair the "perfecting" of human beings. From these general axioms Wolff
extrapolated an entire system of concrete laws, described by one German commentator as
"a triumph of the deductive method." In the thought of Pufendorf and Wolff, the
validity of laws hinged upon their logicality and mutual coherence within a closed legal
system. God as a source of legal authority had become supernumerary.\(^{15}\)

**B. The Era of Positivism and the End of Natural Law**

Although the 18\(^{th}\) century school of natural law de-emphasized the role of divine
revelation in our discernment of what was law, it still upheld the capacity of human
reason to know the Good and to frame laws in accordance with it. Pufendorf and Wolff
both held that reason could detect the first principle of natural law, the duty of the
individual to adapt him- or herself to life in society. By the 19\(^{th}\) century, even this
modest claim for reason was under attack. In German legal history, the 19\(^{th}\) century is
described as the era of the "surmounting of natural law" (\textit{Überwindung des Naturrechts}),
an age in which a new positivist paradigm of legal validity gradually emerged. Two
factors are credited with this seachange: (1) the thought of the German philosopher
Immanuel Kant and (2) the rise of a "historical school of law."

The late Fritz Bauer once accused Immanuel Kant (1724-1804) of helping prepare
the path that led to Auschwitz and Treblinka.\(^{16}\) Bauer’s indictment may be questioned,
but there is little doubt that Kant dealt a decisive blow to the tradition of natural law in
Continental jurisprudence. His \textit{Critique of Practical Reason} (\textit{Kritik der praktischen
Vernunft}) and \textit{Elementary Principles of Legal Theory} (\textit{Anfangsgründe der Rechtslehre})
repudiated the doctrine of natural law, particularly the idea essential to natural law that
reason could immediately perceive the Right (\textit{das Recht}). For Kant, unaided reason was
incapable of determining the legality of specific laws; if it could, then our moral
autonomy would be prejudiced. Kant held that law must not become an auxiliary to
moral conduct. Rather, law could only secure the external conditions in which the moral
freedom of every person could be reconciled with the moral autonomy of others.

The Right is thus the essence of conditions under which the will of the individual can be
merged with the will of others according to a general law of freedom . . . . Every action is
right, the maxim of which permits the freedom of will of each person with every other
according to a general law . . . . We thus arrive at the general legal principle: act in such
a way that the free exercise of your will can coexist with the freedom of every person
according to a general law . . . .

Kant’s theory of law would become the intellectual foundation of 19th century formalism
and legal positivism. Rainer Schöder sums up his significance for natural law:

No further discussions were needed about how correct decisions could be derived from
general substantive-ethical principles for concrete situations. Only from the concrete
situation itself, with the aid of the categorical imperative, could the right “decision” be
made. The content of the obligation consisted in the answer to the question whether the
decision in this situation could become a general law at any time.

Kant’s critique of natural law strongly influenced the historical school of law,
associated with the German jurist Friedrich Carl von Savigny (1779-1861). Kantian
overtones are especially resonant in Savigny’s statement that “law serves morality, not by
performing its command, but by guaranteeing the free development of its power dwelling
within each individual will.” Savigny’s 19th century was a time in which Europeans
discovered the historicity of humankind: all institutions, all cultures, and indeed all
thought were subject to temporality, and all were conditioned by a unique historical
process. The discovery of deep temporality was implicit in the late 18th century rebellion
of Romanticism against an Enlightenment cosmopolitanism that had rejected the
particular in favor of the universal. In 19th-century Germany, this revolt against the
generalizing drift of Enlightenment thought expressed itself in historicism (Historismus),
an intellectual movement with distinctively Romantic attributes that dominated German
thought until the late 19th century. Historicism was a conscious repudiation of both the Enlightenment and natural law theory: against natural law’s insistence on eternal truths accessible to reason, historicists insisted on the uniqueness of cultural phenomena, arguing that all values were specific and culture-bound, not, as natural law theorists supposed, universal and timeless. This was the air that Savigny and his followers breathed in 19th century Germany. The implications for Savigny’s conception of law were profound: no natural law subject to codification existed; rather, law was integrally bound up with the historical development of a people (Volk). It was the product of a particular Volksgeist, which Savigny understood as the “literary history” (Literärgeschichte) of a people. Like historicists generally, Savigny did not regard these cultural artifacts as instantiating a universal principle of right. Instead, they were to be valued as ends in themselves.20

Although the proponents of the historical school flatly rejected natural law, they did not discount the activity of God in the social and political order. “Classical historicism at no time asserted that the universe was devoid of rational or ethical purpose,” historian Georg Iggers remarks, “but expressed its faith that the apparent expressions of irrationality, individual spontaneity, and will were manifestations of an underlying ethical order. This faith assumed the existence of a God who at each moment in history, actively, created the mysterious balance which linked each sovereign monad to the total whole.”21 Toward the end of the 19th century, however, the historicist belief in a providential order behind the multiplicity of individual cultural forms was laid under siege. This was in part due to the reception of Darwin’s theory of evolution, which presented a systematic theory of biological development, grounded in observation and
analysis, that functioned independently of a creator god. The late 19th-century vogue of a
tough-minded naturalism undermined historicist theism. At the same time, it actualized
the relativity of values that had always lurked as a potentiality within historicism. The
"value-free" methods of the natural sciences increasingly colonized other intellectual
disciplines, including law.

As Iggers sagely observes, the ultimate value conferred by historicism on
individual cultures and time periods reflected an "extreme optimism." There was no
space within the historicist paradigm for "real evil in nature," since standards of value
extrinsic to particular cultural forms could not be invoked to judge them. Perhaps for
this reason, historicists tended to regard freedom and morality as fully compatible with
the state. This equation became untenable in the late 19th century, when legal positivism
displaced the historical school as the dominant legal paradigm in Germany. The defining
feature of legal positivism was its insistence that the "science" of law was neither bound
to a metaphysical principle (natural law) nor to a socio-historical context (historicism)
that conferred validity on it. For the positivists, law was entirely independent of external
considerations. "Instead of seeking to deduce a system from the nature of man," Roscoe
Pound said of the positivists, "or to deduce an ideal body of principles from some
assumed or metaphysically demonstrated first principle, they sought to take legal precepts
exactly as they were—as one of them put it, to take the 'pure fact of law'—to analyze
actually existing legal institutions, and to obtain in that way the materials for a universal
science of law." Like the natural law theorist Christian Wolff, positivists asserted that
law was a body of internally consistent and logically interdependent principles.

Positivists departed from Wolff in their denial that law had anything to do with morality.
or ethics. The validity of a law did not depend on anything save its position within a logically coherent system of law promulgated by the sovereign. The science of law was unconcerned with normativity; what “ought to be” must be left to philosophy, theology, or politics. One of the most influential of the German positivists, Bernhard Winschied, drove home this point in his statement that “[legislation] rests in many cases on ethical, political, business considerations or on combinations of these considerations, which as such are not the subject of the jurist.”

The aim of legal positivists, then and now, is to construct a meta-theory about instances of discourse that are legally valid, without resort to principles of legitimacy (like morality or reason) outside the system so devised. In Anglo-American legal cultures, we are not much troubled by the ethical agnosticism this view of law assumes, chiefly because we tend to believe democratic government undercuts the authoritarian uses to which the law might be put. The tradition of classical liberalism, particularly the social contractarian theories of John Locke, balanced positivism in Anglo-American political praxis with the indefeasible rights of the individual. Anglo-American culture, in short, never wholly overcame its suspicion of unchecked state power; the welfare of the individual was primary, and to the individual’s well-being government must be subordinated. The situation was quite different for German legal positivism and statecraft. The German concept of the Rechtstaat, the ideal of a state governed by law that emerged as the handiwork of late-19th-early 20th century liberal positivists, was not the equivalent of the classical liberal state. While positivists like Hans Kelsen insisted that the state respect the privacy of its citizens, the Rechtstaat ideal was agnostic about the justice or injustice of laws; what primarily mattered was “procedure and the manner
of enactment [that] replaced justice as the criterion of law. In Germany, contrary to Anglo-American politico-legal culture, positivism unleashed the state from considerations of morality, ethics, or justice. The result was an apotheosis of state power, one that, in the retrospective light of what was to follow in the 1930's and '40's, even the most hardboiled modern positivist must find disconcerting.

Even before the era of positivism, a strong statist tendency underpinned German political thought. "All substantive moral systems," Fichte taught, "which seek after a purpose of duty outside duty itself, are entangled in the fundamental error of all dogmatism." Kant likewise underscored the primacy of duty and obedience to the sovereign authorities which decree law: "Because the people . . . must be regarded as united under a general legislative will, they must not judge differently than the current head of state desires." In another passage, Kant voiced the judge's duty to restrict his attention to actually existing law:

The jurist finds the law . . . (acting as he should as an official of the government) not in his reason, but in the statutory code. Laws above all determine that something is right, and to inquire whether the laws themselves may also be right must be rejected by jurists as inconsistent. It would be absurd to refuse obedience to an external and highest will because it supposedly clashes with reason. The reputation of the government hinges on withholding from its subjects [Unterthanen] the freedom to judge according to their own conceptions, but to decide about right and wrong according to the prescription of the legislative power."

In these statements, deference to the legislated will of the sovereign power is unmistakable. A remarkable continuity subsists between these notions of obedience and submission to state power and the assertion of a German expert on constitutional law, Georg Meyer (1841-1900), quoted as an epigraph to this chapter: "The state is legally
free of any restraint; even authoritative acts of brutality are, from a formal-legal standpoint, binding on courts, administrative authorities, and subjects if they are clothed in the form of the law."

It is not my argument here that legal positivism need eventuate in blind submission to the will of an absolutist state. Rather, my argument is that legal positivism in Germany, when combined with a deeply rooted ethic of obedience to state power, culminated in a morally agnostic attitude toward the orders and laws of the sovereign. But perhaps this last statement should be qualified. When I say "morally agnostic," I am referring to traditional Western moral principles, especially those arising from the natural law tradition. To suggest, however, that German liberals at the fin-de-siècle were devoid of moral concerns would be an overstatement. Like the traditions of German idealism and German historicism they inherited, they believed in a raison-de-etat that characterized the actions of the state carried out in furtherance of its own interests as serving a higher moral purpose. In his Philosophy of Law (1820), Hegel adumbrated this view of the state as a self-enclosed system serving the ends of an inscrutable cosmic purpose:

Each nation as an existing individuality is guided by its particular principles, and only as a particular individuality can each national spirit win objectivity and self-consciousness; but the fortunes and deeds of States in their relation to one another reveal the dialectic of the finite nature of these spirits. Out of this dialectic rises the universal Spirit, pronouncing its judgments. for the history of the World is the world’s court of justice.28

For late 19th-century German liberals, as for Hegel, the individual was subordinate to the play of historical forces, of which the state was the highest embodiment. The cunning of reason (List der Vernunft) had produced the state; in its absence, all culture and morality would be impossible. Legal positivism, as the jurisprudential arm of German political
liberalism, assumed that the legal system of a true Rechtstaat was morally justified in historical terms. For this reason, positivists no doubt felt justified in applying a morally agnostic, purely formalistic hermeneutic to the "science" of legal interpretation.

This was the political and legal culture in which German judges, politicians, and civil servants were reared prior to the Nazis' seizure of power in 1933. In the years following the end of the war, the German tradition of legal positivism was arraigned for paving the way not only to the Nazi state, but to the gas chambers of the death camps. Leading the charge in this assault was a former positivist, Gustav Radbruch, whom we may credit for the postwar revival of natural law theory.

II. Legal Illegality and State Power: The Critique of Gustav Radbruch

"We condemn the minister who delivers a sermon contrary to his conviction, but we honor the judge who does not allow himself to be deterred from his devotion to the law by his conflicting feeling of justice." The author of these words, penned in 1932, was the renowned German jurist Gustav Radbruch. For much of his distinguished legal career, Radbruch was a steadfast positivist who enjoined German jurists to enforce all laws unconditionally, including unjust ones, offering them the cold comfort that they at least thereby promoted legal stability (Rechtssicherheit). It beggars the imagination that the writer of so consummate a statement of legal positivism could do a complete about-face thirteen years afterward. In an article appearing on September 12, 1945 in the Rhein-Neckar newspaper, Radbruch unveiled his conversion from legal positivism:

There are basic legal principles that are stronger than every existing law... These basic principles are called the law of nature or reason. If laws consciously violate the ends of justice... then these laws lack validity, then the people owe them no obedience, then jurists must summon the courage to deny them the character of law.
In the 13 years between his 1932 and 1945 statements, much had transpired to effect this change: the triumph by legal means of a vicious dictatorship, the defeat of Germany in a catastrophic world war started by that dictatorship, and the murder of millions during the war, carried out by the same dictatorship. The twelve-year imperium of the Third Reich was an unmitigated disaster for Germany and all of Europe. Radbruch blamed German legal positivism for helping open the door to the jackbooted vandals of the Nazi state.²⁹

Gustav Radbruch (1878-1949) was a Social Democratic expert in constitutional law and an influential legal philosopher. In the Weimar Republic he had served as Reich Justice Minister (1921-23) before working as a Professor of Law at Heidelberg University. When the Nazis came to power in 1933, he was dismissed from his university position. Perhaps because of his antagonistic relationship with National Socialism, Radbruch emerged from the war in 1945 as one of the few uncompromised German jurists, enjoying impeccable democratic credentials that reached back into the 1920’s.³⁰ The prestige of his untainted past may have made a German legal community burdened in 1945 with its own complicity in Nazi crimes attentive to his pronouncements. Radbruch’s message in the postwar years was all the more relevant because it addressed the crisis into which the Nazi experience had plunged German law—the crisis of uncertainty about the nature of what precisely bound judges in their interpretation of laws.³¹ Radbruch’s public conversion resolved this unsureness—at least in the minds of many German lawyers and judges—in favor of “supralegal law.” After his first anti-positivistic salvo in September 1945, Radbruch published his well-known defense of natural law theory in the Südwestdeutsche Juristische Zeitung (SJZ) in August 1946, “Legal Illegality and Supralegal Law.” Radbruch began his essay with the
statement that the National Socialists secured the obedience of the military and the judiciary to its criminal purposes with two principles: "A command is a command" and "law is law." The first of these tautologies, he observed, was always qualified by the Military Code of Criminal Justice, sec. 47 of which forbade obedience to orders serving a "criminal purpose." The principle of "law is law," by contrast, admitted of no such limitations. "It was the expression of positivistic legal thinking, which ruled German jurists for many decades almost without challenge," Radbruch wrote. "Legal illegality was therefore as self-contradictory as supralegal law. Praxis was repeatedly confronted by both problems." ^32

The two "problems" Radbruch referred to were the "self-contradictory" maxim of positivism that "law is law" (the idea that the validity of a given law has nothing to do with substantive justice) and the natural law idea that an unjust law forfeits its legality. Both positions were problematic; yet, judges had to commit themselves per force to one of the two theories. Radbruch found it meaningful that courts had already sided with natural law in their verdicts concerning the status of National Socialist law. One of the earliest cases was a 1946 verdict of the Wiesbaden district court (Amtsgericht) in a civil matter. The case involved the heirs of Jews whose property had been confiscated according to Nazi laws during the war, before they were deported to Poland and killed there. The defendants had purchased the confiscated property at private auction. After the war, the heirs sued the defendants to return the property to them as the rightful owners. The defendants raised what in Anglo-American law is known as a "bona fide purchaser" defense, arguing they had innocently acquired the property at auction and thus were the rightful owners. In its verdict in favor of the plaintiff-heirs, the district court
held that the Nazi laws declaring Jewish property subject to confiscation by the state
"were in violation of the natural law, and were already null and void at the time of their
decree."33

Radbruch also described a verdict by a Russian occupation court in an eastern
German criminal case involving "denunciation" to the Nazi authorities. In this "grudge
informant" case, the defendant had notified the police that his neighbor had called Hitler a
"mass murderer" responsible for starting the war. The denunciatee was subsequently
arrested, convicted of "preparations for treason," and executed. The Schwurgericht
convicted the denouncer of aiding and abetting murder despite his argument that he had
acted in accordance with the law at the time, which required Germans to report cases of
"high treason" to the local authorities. The court rejected this defense, evidently
persuaded by the prosecutor's argument that Nazi laws targeting unjust ends were
nullified ab initio. Later in the same essay, Radbruch cited with approval the words of
the State Prosecutor of Saxony, affirming that no judge could justify his enforcement of a
law that was "not only unjust, but criminal," inasmuch as such laws contradicted the
"inescapable, authoritative law, which denies validity to the criminal orders of an
inhuman tyranny." These and other examples, Radbruch concluded, proved that "the
struggle against positivism" raged throughout the German court system. And the courts
were well-advised to maintain the struggle, since, in Radbruch's oft-quoted phrase,
positivism had rendered German jurists "defenseless" against the "arbitrary and criminal
content" of Nazi laws.34
What was the content of Radbruch's natural law, the "supralegal law" that both measured and determined the validity of positive law? The vagueness of his natural law invited different interpretations. According to Manfred Walther, Radbruch's natural law harked back to the Vernunftsrrecht (law of reason) of the Enlightenment, rather than to Catholic (Neo-Thomistic) natural law. Walther bases his assessment on Radbruch's statement from 1934: "Human rights, Rechtstaat, separation of powers, popular sovereignty, freedom and equality, the ideas of 1789, have again emerged from the flood of skepticism, in which they appeared to have drowned." Walther's identification of Radbruch's natural law with the secular French Revolution, however, does not take account of the impact of the war on Radbruch's thought, nor does it reckon with some of his postwar writings that evidence a more religiously-oriented theory of natural law. In "The Renewal of Law" (1946), he referred to the "thousand year old common wisdom of antiquity, the Christian Middle Ages, and the period of the Enlightenment," all of which asserted the existence of "a law of nature, a law of God, a law of reason." Fritz Bauer, a former student of Radbruch and the motive force behind the postwar Remer and Auschwitz trials, traced Radbruch's natural law to both humanistic and religious principles of human dignity in Western cultural history. The noted jurist and legal historian Eberhard Schmidt pointed out in a 1952 lecture that Radbruch never endowed his natural law with substantive content, nor spelled out how exactly the natural law was to be discerned. In the wake of Radbruch's 1947 essay attempts were made to flesh out the "Radbruch formula," but even these efforts could not overcome the conceptual fuzziness that clouds all projects to establish a universal and unchanging principle of right.
However interpreted, Radbruch's clarion call to revive natural law theory found an audience among German jurists in the years following its publication. Prior to the Nazi era, the Reichsgericht (forerunner to the postwar Supreme Court) subscribed to a positivistic theory of law, as typified in the famous dictum: "The lawmaker is independent and bound to no other limitations than those which he has himself drawn from the Constitution or other laws." The effects of the war and Radbruch's highly publicized critique of positivism wrought a thorough re-orientation in the thinking of the Reichsgericht's postwar successor, the Bundesgerichshof (Federal Supreme Court). The Supreme Court in fact was the first legal forum to invoke Radbruch's formula. In a 1946 civil case the court stated, in language taken almost verbatim from Radbruch's "Legal Illegality" article: "If the principle of equality in the promulgation of positive law is violated, the law forfeits any quality of law and is generally not law." Nor was such language unusual in the German Supreme Court's opinions published after the war.

Appeals to a "preexisting and accepted order of values and principles of duty governing human society," "an inviolable and supralegal domain of human freedom and right derived from the 'moral autonomy' of the person," and "an order of family life" that is "given by God," are scattered throughout the postwar jurisprudence of the high court.

Radbruch's influence was not confined to the highest judicial authorities in western Germany. Anti-positivistic statements also appeared in the decisions of district, state, and appellate courts. "The judge serves the law and has to apply it unless its application is forbidden by the general moral law," held the appellate court (Obergerichtshof) of Cologne in 1949. The appellate court of Bamberg in 1950 enjoined judges to nullify "laws contrary to natural law." In a strange case, the district court of
Wuppertal in 1946 rejected the legally minimal penalty meted out to a defendant, reasoning that "the laws may no longer be interpreted as something rigid and completely unchangeable by subordinating all feelings of justice," since "the judge's absolute consciousness of duty regarding justice and morality and the citizen to be judged by him [is] higher than the positive law." Also in 1946, the district court of Wiesbaden held that laws "contradicting the natural law [are] at the time of their decree null and void."

According to the district court, such laws were those that violated principles "so intimately connected with the nature of the human being in its essence that their infringement would destroy the mental-moral nature of the human being."^41

It is not the purpose of this study to evaluate the validity of the Radbruch thesis and its accusation that legal positivism delivered the German judiciary into the hands of Nazism. A few observations, however, can be made in passing. First, from a historical point of view, Radbruch's claim that the positivism of the 1920's and '30's rendered jurists "defenseless" against Hitler is questionable. While the Reichsgericht remained attached to legal positivism, lower court judges and lawyers often departed from it, or repudiated it altogether. In fact, like many Germans during the Weimar period, significant numbers of jurists were unreconstructed monarchists who stubbornly clung to the memory of the Kaiserreich. Their political commitments are vividly demonstrated in the statistics from German political murder trials in the early 1920's. From January 1919 to June 1922, verdicts in 376 political murder cases were issued by German courts. Of this number, 354 were committed by right-wing and 22 by left-wing assassins. Prosecution of right-wing murders resulted in one life sentence and 90 years of jail time, yielding an average prison term of just over three months per killing. Prosecution of
murders committed by the left netted ten death sentences, three life sentences, and total jail time of 248 years, nine months, or an average prison term of more than 11 years. As historian Koppel Pinson has observed, such favoritism displayed by the German judiciary toward the nationalist right served to de-legitimize the Weimar government. It is by no means self-evident, however, that these reactionary judges were legal positivists; if anything, their willingness to condone political murders on the right and severely punish those on the left represented a break with legal positivism, not its fulfillment.42

National Socialist jurists, moreover, explicitly renounced legal positivism and the ideal of the Rechtstaat. In the minds of its creators, the Nazi state was bound neither by a natural law "hanging in the stars," as the jurist H. Lemme put it in 1937,43 nor by strict adherence to the letter of the law. The highest authority in the Nazi state was the will of the Volk as expressed in the statements of the Führer. Nothing above Hitler's declared will could be suffered to challenge, modify, or subvert it, for the National Socialist state, as the embodied will of Volk and Führer, transcended all dissension, all political strife, all factionalism. In National Socialism, the divisiveness of parliamentary politics was overcome. Guided by this anti-positivistic, anti-democratic philosophy of law, the Nazis wasted little time repealing a cornerstone of the liberal Rechtstaat: the prohibition of legislative and judicial analogy, i.e., charging a defendant with violating a law that most closely resembled his conduct, although a specific law proscribing the conduct did not exist. (The prohibition of analogy is a species of the nulla crimen sine lege maxim banning ex post facto laws.) The German Criminal Code of 1871 had forbidden the use of analogy in criminal proceedings. The 1919 Weimar Constitution reproduced this prohibition, stating in Article 116 that "punishment can be inflicted for only such acts as
the law had declared punishable before the act was committed." On June 28, 1935, the Nazi government repealed the ban on analogy. Henceforth, those acts deemed by the state to offend "the sound perception of the people" could be charged as crimes:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinable penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.44

In judicial proceedings, the Nazi state shamelessly politicized the administration of justice by requiring judges to decide cases not with reference to positive law, but to the National Socialist worldview as expressed by Hitler. The transformation of the German court system into an ideological servant of the Nazi state was faithful to point 19 of the original Party platform, which had demanded "substituting a German common law [deutsches Gemeinrecht] for the Roman law, which promotes a materialistic world order." A leading primer for judges in the Nazi state, *Guiding Principles concerning the Position and Task of the Judge*, exhorted jurists in their deliberations to "preserve the concrete Völkisch community order, eradicate pernicious elements, punish anti-social behavior and mediate disputes among community members." The text went on to assert that the basis for court decisions was "the National Socialist worldview as expressed particularly in the Party program and in the statements of the Führer." This "worldview," according to the authors, was binding on the judge.45

These examples illustrate the dubiouness of the part of Radbruch's thesis that blames positivism for contributing to the rise of Hitler. Not only had many jurists in the 1920's and 1930's defected from positivism, especially its insistence on formalistic legal interpretation, but the National Socialist jurists themselves renounced positivism in favor...
of a style of lawmaking and interpretation based on the "sound perception of the Volk"—a euphemism for the will of Adolf Hitler. I would suggest, however, that Radbruch's indictment of positivism dealt less with its formalism than with the old concomitant of German legal positivism—the duty of uncritical obedience to state power. As we have seen, the propensity to elevate acts of state above ethical challenge runs like a red thread through 19th century German idealism, historicism, and liberalism. It was this tradition of state absolutism that Radbruch's thesis primarily challenged. His pupil Fritz Bauer understood that the gravamen of Radbruch's indictment was the truckling attitude of pre-war German jurists toward state authority, as he wrote in 1955:

The servile respect for everything that appears as formal law dictated to a significant number of German jurists at the turn of the century the principle that the state is legally bound by no limitations; even brutal authoritative acts, if they are clothed in the form of law, are formally law and are binding on courts, administrative authorities, and subjects.16

Five years later, Bauer repeated a similar lamentation, placing legal positivism squarely within a German tradition of "state piety":

Peace and order are the first duty of the citizen [in Prussian-German officialdom]. Opposition, criticism, originality, civil courage, were all outlawed as discord and... "German hereditary evil." False obedience, misunderstood loyalty, political impotence and inertia regarding human rights, byzantinism, the spirit of the subordinate, the driving force of the crowd, and the specific German talent for state piety corresponded, and still correspond, to legal positivism—qualities that have determined German history for centuries and allowed the idea of freedom to be stunted in favor of a pure order of thought.47

Even for critics of Radbruch like Manfred Walther, this aspect of Radbruch's critique of German legal positivism is compelling. It represents a "moment of truth" in the obloquy directed at positivism, both by Radbruch and the postwar euthanasia trials.48
III. The Uses of Natural Law in German Euthanasia Trials

Before his death in 1949, Gustav Radbruch had occasion to comment on the verdicts of the state and appellate courts of Frankfurt in the Eichberg case (Mennecke, Schmidt, et al.).\(^4^9\) At trial, the defendants had defended their participation in euthanasia with appeal to the Hitler order of September 1, 1939, arguing that as a valid and formally binding law it had afforded a legal basis for their actions. They further claimed that even if the order were not valid law they had nonetheless believed at the time in its efficacy, and therefore were not criminally liable due to a mistake of law. In opposition to this view, the prosecutor had urged that the order was not a law because it lacked the formal elements of legal validity: it had neither been published nor countersigned by the proper ministerial authority. The state court rejected the defendants’ arguments, holding that whether the order was a “law” or not it was illegal. The court in other words refused to accept the prosecutor’s view that the Hitler order be denied legal validity on the basis of its formal inadequacies. Instead, the court declared that the state was not the ultimate source of law; it was bound by the “moral law.” Insofar as the Hitler order violated fundamental norms of justice, it forfeited any claim to legal validity, even if it was considered a “law” at the time of its decree. The manifest immorality of the Hitler order was so clear that it could not have been lost on the defendants. The Frankfurt appellate court upheld the state court’s determination, noting that the defendants must have been aware the euthanasia program violated “evident natural law principles.” In his commentary on the case, Radbruch applauded the courts’ endorsement of natural law.
The verdicts demonstrated that “even tyranny has its limits, and may not just proclaim any arbitrary act a law.” He concluded with the prediction that the Eichberg verdict would be of “considerable importance for future euthanasia cases.”

Radbruch’s words were indeed prophetic for many of the cases subsequent to the Eichberg trial. In the trials we examine in chapters 5, 7, and 8, euthanasia defendants were usually charged with murder under sec. 211 of the German Penal Code. The true basis for the courts’ jurisdiction, however, was the defendants’ egregious violation of the “law of nature,” which was superior to all positive laws inconsistent with it. The verdict in the Hadamar trial is representative. Although acknowledging the importance of positivism to “legal unity and security,” the state court of Frankfurt held that positivistic interpretations were curtailed wherever individual laws clashed with the eternal and unchanging law of nature. When a law violated the natural law, it lost all of its compulsory power and ceased to be valid law. The court identified one of the principles of natural law as the “sanctity of human life,” with which the state could interfere only as the result of a valid legal judgment (such as a death sentence) or in times of war. Since the Hitler order—whether or not it was a law—vitiates this cardinal principle of natural law, it was nugatory at the moment the Führer reduced it to writing. Hence, the defendants’ actions pursuant to this so-called law were in reality “objectively illegal.” Furthermore, held the court, their actions were subjectively illegal: no matter how much they may have believed in the existence of a valid euthanasia law, “the wrongful nature of the so-called euthanasia program was apparent even to the simplest and most

* Some German legal scholars like Walter Lewald rejected the application of natural law theory as unnecessary. For Lewald, the German law of murder was adequate to prosecute Nazi crimes. See Lewald, “Das Dritte Reich—Rechtststaat oder Unrechtsstaat?” N/W (1964), Heft 36, p. 1660.
psychologically immature people"—apparent by virtue of the natural law. The reasoning of the Frankfurt court in the Hadamar case, denying the state ultimate authority as a source of valid law, nullifying the Hitler order for its unjust content, and upholding the defendants' awareness of illegality with reference to the law of nature, is typical of many of the verdicts we have considered in the previous two chapters.$^{51}$

Natural law theory proved to be highly serviceable in the prosecution of euthanasia defendants after the war. It not only justified the jurisdiction of German courts over euthanasia crimes that were not deemed criminal under the Third Reich, but also furnished them with a means of punishing such crimes without violating the "principles of justice" enshrined in Continental law. As suggested in chapter 4, upholding the principles of legality—the ban on *ex post facto* prosecution or punishment, statutory ambiguity, and analogy—was more important to the Germans than to the Americans in their confrontation with Nazi euthanasia. This difference had much to do with the respective histories of Anglo-American and Continental jurisprudence. The Common Law tradition had always granted to the judge a wider margin for interpreting legal rules and precedents than its European counterpart. On the continent, on the other hand, stricter adherence to the principles of legality arose from two sources: first, the codification approach to law imbibed from the Roman law tradition; and second, 19th century political struggles to limit the absolutist claims of monarchist governments. Recourse to natural law permitted German courts to preserve the principles of justice while observing Grotius' maxim that "serious crimes cannot go unpunished."$^{52}$ Additionally, the Americans never ceased to think of Nazi euthanasia (as well as the Final Solution) as being related to Hitler's overarching goal of expanding Germany's
borders through wars of conquest. As long as euthanasia killings were carried out in furtherance of this larger military purpose, they could be interpreted legally and conceptually as war crimes, and thus covered by prior treaties and international conventions. German jurists, by contrast, did not approach euthanasia killings as war crimes, but as violations of the German Penal Code. By appealing to the superordinate authority of natural law in which the general proscription of murder was grounded, these jurists could discount the defendants’ claims that their activities were sanctioned by the highest sovereign powers in Germany during the war.

Natural law also gave the German judiciary a normative basis on which it could reprehend Nazi euthanasia, its top-level architects, and its field-level implementers. In trial after trial, euthanasia defendants portrayed the killing of the disabled as a program inspired by humanitarian concerns, with the aim of “releasing” incurably ill patients from their misery. In refuting this characterization and branding Nazi euthanasia as simple murder, German courts in the immediate postwar era (1945-47) insisted these killings were not motivated by compassion but by “reprehensible” and “crassly utilitarian” rationales that violated the most sacred principles of civilized peoples. By placing their talents and energies at the disposal of this criminal project, rank-and-file doctors and nurses had become parties to it. The unmistakable message was that the “small wheels” (Rädchen) in the machinery of destruction were not the dupes of Hitler and his minions, but culpable agents responsible for what they did.

Finally, natural law theory empowered postwar German courts to overcome a potentially exculpatory defense by euthanasia personnel—namely, that the outward trappings of legality surrounding the euthanasia program had led them to believe in its
lawfulness. Under traditional German law, this "mistake of law," if proven, would result in an acquittal at the third level of judicial analysis, that of subjective fault (Schuld). By invoking a law of nature accessible to all rational people, German judges neutralized these mistake of law defenses: the unjustified killing of disabled patients was a patent violation of the sanctity of life, a core value of the natural law, of which the defendants had to have been aware in virtue of their very existence as rational beings.

Interpreting natural law so as to deny mistake of law defenses continued until the early 1950's, when the "exertion of conscience" cases phased out natural law theory. Henceforth, German courts would not assume that the law of nature was accessible to all rational beings; instead, they would examine whether individual defendants had "exerted" their consciences sufficiently to understand the natural law. The self-evident quality of natural law was thereby de-emphasized in favor of a subjective, case-by-case exploration of a defendant's capacity to comprehend the wrongfulness of euthanasia killing. We pick up the history of the West German euthanasia trials in the next two chapters.

NOTES

1 The original Latin reads: Non veritas sed autoritas facit legem. Quoted in Bassiouni, Crimes, p. 97.
6 See supra, chapter 4, pp. 217 ff.
7 22 IMT 444. In this context, the reader will recall Robert Jackson's Opening Address at the IMT: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot tolerate their being repeated." Supra, chapter 4, p. 219.
8 Quoted in Bassiouni, Crimes, p. 98. See also Plato, Laws, 797 D; Roscoe Pound, Law and Morals (Chapel Hill: University of North Carolina Press, 1924), pp. 4-6.
9 George Fletcher, "Two Modes of Legal Thought," 90 YALE L. J. 970, 980-982 (1981). The concept of Recht is more complicated than my sketch in the text. In the interests of convenience, I have focused only
on one of the meanings of Recht, i.e., its reference to substantive justice. I would direct the interested reader to Fletcher’s article for a more detailed exposition of Recht and its manifold referents. See also Gustav Radbruch, Rechtspolitologie, 6th ed. (E. Wolf, 1963), pp. 284-290; Bassiouni, Crimes, p. 102.


12 St. Thomas Aquinas, Treatise on Law (Summa Theologica, Questions 90-97) (Chicago: Regnery Gateway, 1970), pgs. 4, 78, quoted in Bassiouni, Crimes, p. 99. Bassiouni comments: “Aquinas, Cicero and the Stoics follow Plato and Aristotle’s view that law is an emanation of the ratio and should be the right reason.”


14 Schröder, Rechtsgeschichte, p. 72; Rüping, Grundriss, p. 57.

15 Christian Wolff, Institutiones Iuris Naturae et Gentium, Venedig 1769; Schröder, Rechtsgeschichte. pgs. 73, 78-79; Rüping, p. 57.


18 Schröder, Rechtsgeschichte, pp. 97-98.


22 Iggers, The German Conception, p. 72.

23 Pound, Law and Morals, p. 139.


Quoted in Bauer, Die Humanität, p. 70.

Georg Friedrich Hegel, Grundlinien der Philosophie des Rechts, Vol. VII, Sämtliche Werke, Hermann Glockner, ed. (Stuttgart, 1928), p. 446. The excerpt from Hegel bears comparison with Ranke's belief that states, as expressions of the will of God, are meaningful units, ends in themselves, and that in following their vital interests, they can only do good. "Igers, The German Conception, p. 80.


See Manfred Walther, "Hat der juristische Positivismus die deutschen Juristen wehrlos gemacht?" Kritische Justiz (1988), p. 275; Schröder, S. 163. The German judiciary was steeped in the criminality of the Nazi regime. German jurists served as judges in the Nazis’ infamous Volksgerichtshof and Sondergerichte, where they often sent defendants to their deaths for trifling offenses and on flimsy evidence. The "behemoth" of the Nazi state (to borrow a phrase from Franz Neumark) required legal experts to fill its labyrinthine bureaucracy. The German legal profession was happy to oblige.

On the postwar crisis in German jurisprudence, see Eberhard Schmidt, Gesetz und Richter: Wert und Unwert des Positivismus (Karlsruhe: Verlag C.F. Müller, 1952), pp. 12-14. Schmidt points out how uncertainty about legal interpretation caused German courts at all levels to waver between natural law and positivism.


Neo-Thomism is a strand of natural law influenced by St. Thomas Aquinas, holding that normativity is grounded in the "order of being as expressed in the natural world and in human beings." The German jurist Hans-Ulrich Evers described the core of Neo-Thomism as follows: "A person can perceive the law of nature from the order of being by means of his reason, illuminated by God, either through direct insight into normative principles or through conclusions derived from first principles." Evers, "Zum unkritischen Naturrechtsbewusstsein in der Rechtsprechung der Gegenwart," SJZ, 21 April 1961, p. 242.


Entscheidungen des Bundesgerichtshofs in Strafsachen [hereafter BGHSt], 6, 46; BGHSt 4, 385, 390; BGHZ 11, p. 34. For other Supreme Court cases expressing similar views, see BGHSt 2, 238; BGHSt 2, 177. Radbruch's formula was also taken up by the Federal Constitutional Court (Bundesverfassungsgericht, or BVerfG). On the influence of Radbruch on the Supreme Court and Constitutional Court, see Björn Schumacher, Rezeption und Kritik der Radbruchschen Formel, Diss. Göttingen 1985, pp. 31-103. For differences between the Supreme Court's interpretation of natural law and that of the Constitutional Court, see Evers, p. 241.

Neue Juristische Wochenschrift [hereafter NJW], 1949, p. 473 ff.; Deutsche Richterzeitung [hereafter DRZ], 1950, p. 302; Deutsche Rechtsprechung I (181); DRZ, 1947, p. 343.


F. Bauer, "Im Kampf um des Menschen Rechte," p. 40. The sentence following the semi-colon in this quotation is an unequivocal reference to Georg Meyer. (See epigraph to this chapter.)

F. Bauer, "Die 'ungefährte Nazijustiz,'" Die Humanität, pp. 133-134.

Walther concedes that Radbruch's critique of thoughtless submission to state power was legitimate: "If the inclination to infer justification from power is regarded as a quality of the authoritarian character, and if this quality then is called positivism, Radbruch's thesis becomes at the very least more understandable." Walther, p. 273.

On the Eichberg trial, see supra, chapter 5, pp. 298-309.


JuNSV, Lfd. Nr. 017, pp. 350-52. For other euthanasia verdicts employing the same natural law discourse (including verdicts resulting in acquittal), see JuNSV, Lfd. Nrs. 014 (the Kalmenhof case), 102 (the Rhine Province case, especially the part of the verdict pertaining to Hermann Wesse), 211 (the Baden case), 271 (the Eglfing-Haar case), 380 (the Westphalian case), 381 (the Uchtspringe case), 383 (the Sachsenberg case).


See supra, chapter 4.

The new issue for German courts was formulated by the Göttingen state court in 1953: "whether the defendants were able to become aware of [the wrongfulness of Nazi euthanasia] through a proper exertion of their conscience." JuNSV, Lfd. Nr. 381.
CHAPTER 7

In the end, the destroyer triumphs—Lucifer upon the ruins of the world.

- Norbert Elias, on Hitler’s destruction of the Weimar Republic

In 1948 Brigadier General Telford Taylor, head of the U.S. Chief of Counsel for War Crimes, noticed a change in the climate of opinion regarding the prosecution of Nazi crimes. It was already perceptible in the American successor trials under Control Council Law #10, of which the Medical Case was a part. “It was apparent to anyone connected with the entire series of trials under Law #10 that the sentences became progressively lighter as time went on,” Taylor wrote. “Defendants such as Darré, Dietrich, und Stuckart in the ‘Ministries case’ (Case #11), who, although convicted under two or more counts of the indictment of serious crimes, received very light sentences in April 1949, would surely have been much more severely punished in 1946 or 1947.” Taylor attributed this trend toward greater leniency to “waning interest on the part of the general public” in war crimes trials and heightened focus on “international events,” by which he clearly meant the Cold War.²
Disenchantment with prosecuting and punishing Nazi war criminals did not appear de novo in 1948, but had been growing in intensity since the end of the war in May 1945. The socio-political Zeitgeist of the late 1940's suggests a connection between growing public disaffection with Nazi trials and the higher incidence of acquittals and extenuated sentences beginning in 1948. Against this backdrop a series of euthanasia cases beginning in 1948 inaugurated a new era of leniency in T-4-related prosecutions that would continue into the mid-1960's and beyond. One of the hallmarks of these cases was the German legal doctrine of “collision of duties,” by means of which euthanasia doctors not only evaded the charge of murder, but left German courtrooms as moral heroes dedicated to undermining euthanasia by participating in it.

I. Destroying Lives in order to Save Lives: the Collision of Duties Cases

That an act of homicide may be justified or excused on a theory of necessity (Notstand) was an idea that arrived late in the history of German criminal law. The German Criminal Code of 1871 contained no mention of it as a justifying or exculpatory ground, nor did case law acknowledge it. Up until the third decade of the 20th century, therefore, German law did not recognize as legal an action committed in violation of the law for the purpose of avoiding a greater harm—including a physician’s efforts to save the life of a mother by aborting her fetus. Under German law prior to 1927, such a physician could face homicide charges. In 1927, however, the German Supreme Court made law by endorsing a new theory of justification in a criminal abortion case. The defendant, a German physician, had ordered an abortion for a woman believed to be a suicide risk if forced to carry her illegitimate child to term. His actions were objectively illegal; the law forbade the killing of a fetus unconditionally, admitting of no special
circumstances (like the health of the mother) that might justify or excuse the killing. The German Supreme Court, however, expounded a new theory of “extra-statutory necessity” (Übergesetzlicher Notstand), holding that a doctor who commits an abortion is not guilty of criminal homicide if the doctor acted only after carefully weighing the legal interests (Rechtsgüter, literally “legal goods”) involved, and deciding that the mother’s interest in life outweighed that of her fetus. In short, the Court held that acting to prevent a greater harm or to preserve a higher legal interest did not make the actor criminally liable, even if the conduct fulfilled all the elements of the statutory offense.³

A variant of the extra-statutory necessity doctrine was the “collision of duties” defense. According to this variation on the necessity doctrine, an actor is to be acquitted of a crime if he was forced to commit it in order to avert a “greater injustice.” The collision of duties would emerge in the late 1940’s as the first successful defense in German courts against charges of murder for euthanasia crimes, beginning with the case of Drs. Karl Toldt and Adolf Thiel of the Scheuern mental institution.

A. The “Merciless Quandary” and the Limits of the Law: The Scheuern Case (October 1948)

The mental hospital Scheuern in the province of Hessen-Nassau was, like the Kalmenhof institution, established on the lofty principle of Christian charity toward the mentally handicapped. Also like Kalmenhof, Scheuern was drawn into the euthanasia program early in the war. The institution had cared for epileptic and “feebleminded” patients since its creation by the “Inner Mission” of the German Evangelical Church in 1850. It remained true to its mission until 1937, when the provincial authorities replaced Scheuern’s executive board with Nazified members of the local government.
president of the new board was *Landesrat* Fritz Bernotat, a ubiquitous presence in the ambitious killing project launched in Hessen-Nassau. We will recall Bernotat as a crass, murderous detractor of the mentally disabled, who publicly announced his view in 1936 that they ought to be killed *en masse.*[^4] His accession to president of Scheuern's executive board was an unmitigated disaster for its patients. Bernotat pressured the director of Scheuern, Dr. Karl Todt (a doctor of pedagogy, not medicine), into joining the Nazi party, despite his tepid attitude toward Nazi ideology.[^5]

Todt's medical assistant, Dr. Adolf Thiel, took up his duties at Scheuern in 1938. Although he had joined the Nazi party well before 1933, the state court of Koblenz would characterize him as a lukewarm supporter of Nazism. In the summer of 1940, both Todt and Thiel were at Scheuern: the two men had been exempted from military service. Todt because of his age, Thiel because of his medical unfitness. That summer, Todt received from Berlin the first batch of registration forms to be completed on his patients. Innocent of their purpose, Todt completed the forms on 500-600 patients and returned them to the Berlin authorities. In March 1941 the first transports of patients identified for killing were sent from Scheuern to unknown destinations. In the aftermath of these transports, Todt and Thiel received notices announcing the deaths of the transferred patients. At this point they realized their patients had been killed pursuant to the Nazis' euthanasia program.

March 1941 was also the month when the provincial authorities decided to convert Scheuern into a transit center (Zwischenanstalt) at the service of T-4. Scheuern would henceforth receive shipments of patients from other institutions designated for ultimate transfer to Hadamar. The purpose of the transit centers, as we have previously

[^4]: "en masse"
[^5]: "Nazi ideology"
seen, was twofold: to create an additional layer of mystification about the fates of transferred patients by sending them to intermediate stations before final transport to a killing institution; and to afford more opportunity for exempting patients who did not meet the guidelines for killing, e.g., war veterans, cases of age-related senility, or patients capable of work. Transit centers were established throughout Germany, but the province of Hessen-Nassau had a disproportionately high share. In addition to Scheuem, the provincial transit centers included Weilmünster, Herborn, Kalmenhof, and Eichberg—all of which were favorably close to the killing center of Hadamar, which they supplied with victims.

Between March 1941 and September 1944, Scheuem served as a transit center for approximately 1,640 patients. At trial, the state court of Koblenz had no difficulty finding both Todt and Thiel guilty of complicity (Beihilfe) in the murders of around 1,000 of them. By aiding the transport of patients from Scheuem to Hadamar and continuing to fill out the KdF’s registration forms after they had discovered their purpose, the pair had fulfilled the objective elements of the offense (the first level of analysis in a German trial, or Tatbestandsmäßigkeit) of aiding and abetting murder (Beihilfe zum Mord). Further, their actions were “objectively” illegal in the sense that no traditional “justifying grounds” (Rechtfertigungsgründe) like self-defense or emergency existed to legitimate their conduct. Thus, their behavior in connection with the euthanasia program passed muster under the second level of judicial analysis, “illegality” (Rechtswidrigkeit). The novelty of the Scheuem case, however, occurred when the court finally turned to the third and last stage of analysis, guilt (Schuld): here, it refused to find the defendants personally
culpable for their involvement in euthanasia killings. The court premised its acquittal of
the defendants on a defense that had been unsuccessfully raised by other defendants in
earlier cases: the so-called “collision of duties.”

According to the Koblenz court, Todt and Thiel were embroiled in a “merciless
quandary” not of their own making: either to abstain from illegality by resigning their
posts, as a result of which their patients would be abandoned to ideological zealots from
Berlin who would ensure their complete destruction; or to collaborate in the euthanasia
program, assisting with the destruction of patients already doomed to die in order to save
whomever they could. The court accepted Todt and Thiel’s claim that they had opted
for the second course of action—remaining at their posts in the Scheuern facility, at great
risk to themselves, for the purpose of sabotaging the euthanasia program. The sabotage
consisted of discharging patients who might otherwise have been transported,
exaggerating patients’ capacity for work and its importance to the institution, and
concealing severely ill patients from the roving T-4 Commission that occasionally visited
Scheuern. In this manner, the court determined, the defendants saved 250 patients from
transport at the cost of collaborating in the transfer of 1,000 patients, all of whom were
subsequently murdered. A 20 percent rate of success was a significant accomplishment,
the court held, given the “horribly constraining circumstances” the defendants faced.
Moreover, if the defendants had resigned in protest, they would have been replaced by
“some sort of SS man, an obedient minion, or one of the young doctors reared in the
Hitler youth, who would have proceeded with the necessary ruthlessness . . . .” As a
result, the court believed, more patients would have died.
Remaining at one’s post to save as many lives as one could, even at the price of assisting in the destruction of those whose fates were already sealed, did not justify the defendants’ actions, the court held. Rather, their patent conflict of duties excused their actions. In other words, their collaboration in euthanasia was objectively illegal (rechtswidrig) at the second level of analysis, but they bore no criminal guilt (Schuld) for it at the third level. For this reason the defendants had to be acquitted. In arriving at this determination, the Koblenz court exhibited a degree of hesitancy and circumspection—one might even say humility—lacking in verdicts that were soon to follow. We see this attitude in the court’s quotation of the German criminal law jurist von Weber on the subject of the collision of duties: “The solution of such a conflict can only be found in an absolute sense in the conscience; the individual must negotiate his conscience with his God. The legal order offers no standard for its solution.” Von Weber concluded that one who has grappled with such a conflict “after earnest examination of his conscience” should not be held criminally liable for his actions. Von Weber’s theological discourse, savoring of Luther’s idea of the individual alone before God, must have struck a chord in the state court, which adopted von Weber’s view of the matter in acquitting Todt and Thiel. Although they were excused from criminal wrongdoing, the court refused to speculate on the quality of their inward conscience: “Whether the defendants are able inwardly to feel themselves free of any guilt is a matter for their personal conscience.”

The argument that one has participated in criminal behavior in order to curb its worst excesses was not raised for the first time in the Scheuern case. Ernst Kaltenbrunner had raised a similar defense at the IMT in Nuremberg, as had Viktor Brack during his testimony at the U.S. Doctors’ Trial. Neither had met with success.
The Scheuern case was the first acquittal of euthanasia defendants on the basis of a "conflict of duties." Other courts would accept this defense in the aftermath of Todt and Thiels' acquittal, albeit with more cocksureness and aplomb than the Koblenz court had evinced. The latter had recognized that the Scheuern trial was, in the vernacular of American law, a "case of first impression" (i.e., a case without precedents to guide its resolution). This may help explain the tentative quality of the opinion. The court's verdict in Scheuern was a bellwether of a new age in euthanasia prosecution, perfectly suited to a reconstituted West Germany seeking to cast off even the minimal reservations the Koblenz court had entertained.

B. The Rhine Province Case (November 1948)

The story of the "violentization" of German attitudes toward the mentally ill—and of German judicial interpretations of this process—is told in the extensive trial opinions of the state and appellate courts. Hence, it is important for the reader to understand the complicated factual history related in the landmark cases in the western German prosecution of euthanasia defendants. Since the twenty-day trial of Dr. Walter Creutz and other Rhineland defendants in November 1948 is the leading case in the collision of duties trials, considerable space is devoted below to the court's findings of fact. In these details are written the ghastly history of German civilization's descent into mass murder.

The Scheuern case, as we have seen, was the first western German trial to acquit euthanasia defendants. Not until the Rhine province trial, however, would a German court characterize the actions of its defendants as not only legally justified, but as morally praiseworthy. The leading defendants in the trial were all charged with murder under sec. 211 of the German Penal Code and crimes against humanity under Control Council
Law #10 for their roles in the Nazis' euthanasia program. They included Dr. Walter Creutz, the former State Councillor and Department Chief for the Rhine province's system of mental institutions headquartered in Düsseldorf; Drs. We. and R., former departmental doctors in the mental hospital of Galkhausen; Drs. Kurt Pohlisch and Friedrich Panse, professors of psychiatry and neurology at the University of Bonn; and Dr. Hermann Wesse, former assistant doctor in the children's ward at the Waldnien mental hospital from October 1942 until July 1943. They had reason to be encouraged by the outcome of the Scheuern trial: its rationale would be applied to acquit all of these doctors (except for the luckless Hermann Wesse), thus perpetuating the trend toward acquittals of euthanasia defendants.

When the war started in 1939, Dr. Walter Creutz served as a medical officer (Sanitätsoffizier) in the German army until given indispensability status and reassigned as departmental chief (Dezernent) in the Rhine provincial administration. On his return to the Rhineland, he discovered that the rumors he had heard of measures against the mentally ill instituted from the highest levels of the Nazi government were true. The court found that Creutz consulted with friends of his within both the Protestant and Catholic institutional systems, particularly the director of the Inner Mission, Pastor O., and the Prelate Schulte-Pelkum. Pastor O. informed him that the institutions of the Inner Mission had declined filling out the questionnaires distributed to all public and private mental hospitals by the Reich Ministry of the Interior. Regrettably, other public and private institutions in Württemberg in 1940 had not followed the Inner Mission's example, but, believing the forms were part of a statistical survey to determine the labor capability of their patients, had filled them out, taking special care to underestimate their
patients' ability to work so as to avoid their conscription into the German war economy. In this manner, they unwittingly wrote the death warrants for the patients reported in the forms.\textsuperscript{13}

The Düsseldorf state court was persuaded that Creutz was stung by these revelations, and thereafter sought to organize a plan of resistance to the euthanasia program among the mental hospitals and nursing homes of the Rhineland. Toward the end of 1940 or beginning of 1941, he composed a memorandum to convince the governor, \textit{Landeshauptmann} Heinrich Haake, to oppose implementation of the killing program in the Rhineland. The memo was allegedly tuned to the pro-Nazi biases of Haake, and hence emphasized the unrest among the population and the erosion of public trust in health care institutions that such a program would invariably cause. Creutz's ruse was for a time successful; impressed with the logic of the memo, Haake declared his intention to reject implementation of euthanasia for the Rhineland. Haake even stiffened his resolve when Berlin announced a "commission" would be sent to Haake's offices in February 1941 to "discuss this question." Haake invited Creutz to present his dissenting view to the commission. When the delegation from the \textit{Führer's Chancellery} arrived on February 12, it comprised some of the leading figures in the euthanasia program: Werner Heyde, T-4 chief medical expert (\textit{Obergutachter}) and head of the T-4 front organization Reich Working Group for Mental Hospitals and Nursing Homes (\textit{Reichsarbeitsgemeinschaft Heil- und Pflegeanstalten}); Reinhold Vorberg, director of T-4's Transport Office and of its front organization, the Charitable Foundation for the Transport of Patients, Inc. (GEKRAT); and Friedrich Tillmann, chief of T-4's Administrative Office (\textit{Büroabteilung}). To this august group of killers Creutz made his
pitch. When he had finished, Heyde responded with a single gesture; he removed a copy of the Hitler euthanasia order of September 1, 1939 and presented it to Landeshauptmann Haake.\textsuperscript{14}

The Hitler decree had the desired effect. Haake immediately backpedaled, declaring that, in view of the expressed will of the \textit{Führer}, he withdrew all his objections to importing the euthanasia program into the Rhineland. The Berlin Commission then demanded transit centers (\textit{Zwischenanstalten}) be erected in the Galkhausen and Andernach facilities. These two institutions were chosen because patients could be readily transported from them to Hadamar by the busses of GEKRAT. Haake later called the directors of Galkhausen and Andernach and instructed them on the Commission's decision to transform their institutions into transit centers. Creutz in the meantime found himself in a vexing dilemma: whether to resign his position in protest, or to remain at his post to minimize the damage to Rhineland mental patients. He opted for the second of the two alternatives. Creutz's decision, the court held, was actuated by a sense of duty to his profession and to the patients entrusted to him. Reprising the findings of the Koblenz court in the Scheuern trial, the Düsseldorf court believed that Creutz's resignation would have sounded the death knell for many more Rhineland patients, since a zealous advocate of euthanasia would no doubt have succeeded him.

Intent on curbing the effects of the euthanasia planned for the Rhine province, Creutz attended a meeting sponsored by the \textit{Führer's} Chancellery in Berlin, where, in the presence of 50-60 health care professionals, Viktor Brack discussed Hitler's order to set euthanasia in motion, alluding to the secret draft of a law that would one day place the program on a firm legal standing. At this meeting, Werner Heyde outlined the categories
of patients exempt from the program. These included patients capable of work, patients whose mental illness was war- or age-related, foreigners, and patients incapable of transportation.\textsuperscript{15}

After this meeting in Berlin, according to the court's findings of fact, Creutz organized his own conference of directors from public mental hospitals and nursing homes within his administrative district of Düsseldorf-Grafenberg, scheduled for March 29, 1941. At this conference, he tried to marshal resistance to the euthanasia program. Acknowledging that open rebellion against the measures would be futile, he urged his auditors to remain at their posts and save as many patients from transport that they could. This could be accomplished by broadly interpreting the criteria for exemption as outlined by the Berlin authorities. This could best be done in the home institutions (\textit{Ursprungsanstalten}) of the patients and in the transit centers. Creutz recounted the categories of patients exempt from transport, then added that the range of those exempted could be enlarged by equating patients injured in accidents with those suffering from war-related disabilities. Furthermore, Creutz suggested that diagnoses of schizophrenia among elderly patients be changed to age-related pathology. The participants in this conference agreed with Creutz that it was more advisable to remain at their posts and save whomever they could than to resign and leave their patients in the lurch.\textsuperscript{16}

On the same day that this conference of directors convened in Düsseldorf, a commission from Berlin consisting of five doctors under the leadership of Professor Paul Nitsche appeared at the Andernach mental hospital. Nitsche, like Heyde, was a T-4 chief medical expert and (beginning in December 1941) the head of T-4's Medical Office; later on, he would develop the scheme to kill mentally handicapped patients surreptitiously
with overdoses of luminal. After examining some of the Andernach patients, Nitsche and his colleagues prepared a list of patients selected for liquidation, to be given to Andernach’s director upon his return from the Düsseldorf meeting. The patients on this list numbered 225 men and 245 women. They would not be transported from Andernach to Hadamar until June 7, 1941, but when the operation was set in motion, it unfolded with lethal thoroughness: with only a handful of exceptions, all the transferred patients were gassed after arrival in Hadamar. A similar procedure took shape at the new transit center Galkhausen, where 3 of the 5 doctors from the Nitsche commission prepared lists of patients of 255 men and 154 women for transportation. A number of these selectees were later withheld, so that a total of 232 men and 141 women were transferred from Galkhausen in late May 1941 to Hadamar for killing.17

Typically, Creutz received the transport lists from Berlin, which he forwarded to the home institutions along with an order to have the patients noted on the lists prepared for transfer to the transit centers of Andernach or Galkhausen. After the patients were transported, the home institution returned the lists to Düsseldorf, indicating in the “Remarks” column the names of patients exempted from transport. From Düsseldorf the lists were re-routed to Berlin. The transferred patients were received in special subdepartments within the transit centers; at Galkhausen, the men were accommodated in a subdepartment headed by Dr. We., the women in one headed by Dr. R. Creutz had assigned Dr. We. to the post of departmental doctor in Galkhausen in March 1941 from the Grafenberg institution. The director of Grafenberg, a Dr. Sioli, informed him prior to his departure of the euthanasia program now underway in the Rhineland. Sioli also told him he had been assigned to Galkhausen “as an especially reliable doctor” who could be
entrusted with the order to sabotage the operation to the best of his abilities. Shortly after he assumed his duties, Creutz briefed him on the tasks and goals that lay ahead of him as part of the plan to work at crosspurposes with the Berlin authorities. Dr. R., on the other hand, was at Galkhausen at the time it was transformed into a transit center, serving there as head doctor in the women's department since 1938. Beyond rumors, Dr. R. knew little about the euthanasia program until relatives of patients killed at Hadamar contacted him with news of their deaths. His suspicions then grew that the patients had been the victims of foul play. Later, the director of Galkhausen, Dr. Winkel, apprised him of the program, emphasizing the broad latitude he and other doctors could exercise in withholding patients from transportation.18

The Düsseldorf court found that both We. and R. did everything in their power to undermine the government’s campaign against the disabled. They embellished their assessments of their patients’ capacity for work even in especially severe cases, sometimes discharging their patients from the hospital in order to remove them from transport. The court was satisfied that We. had practiced this deception in 34 cases and R. in 40 cases. Both had regularly approached the relatives of the patients to submit requests for release, coaching them on the proper method for submitting such petitions. In one case cited by the court, R. was involved in an abortive attempt to “abduct” a patient vulnerable to transport. After this “abduction” was foiled by a staff nurse, R. demonstrated his willingness to give it a second try, in the event the danger of transportation was imminent.
We. and R.’s efforts received the unwavering support of Creutz back in Düsseldorf. Creutz approved all petitions for release submitted to him from Galkhausen. Their collective efforts to subvert the operation provoked numerous warnings from the T-4 offices in Berlin, which admonished Creutz in reproachful telephone conversations to implement the measures more rapidly and with greater efficiency. In March 1941, GEKRAT (T-4’s transportation arm) proposed to Landeshauptmann Haake the immediate removal of patients from four Nassau institutions as a way to erase the backlog caused by the retarded pace of transfer among the Rhineland institutions. Catching wind of this communiqué, Creutz persuaded Haake to reject GEKRAT’s proposal. At a directors’ conference in Düsseldorf in July 1941, Creutz again underscored the importance of restricting the operation as much as possible. Two months later, in September 1941, he was notified in a letter signed by Werner Heyde that the euthanasia program had been terminated “for technical reasons.”

The court had little documentary evidence on which to make a finding about the success of Creutz and his fellow conspirators in their attempts to oppose the program. Instead, it was largely confined to witness testimony (including that of Creutz, We., and R., all witnesses with a motive to lie). The best it could determine was that, of the 5,046 patients identified for transport by the Berlin authorities, around 946 were ultimately transferred to Hadamar for liquidation.

Several months before the official stop of the program, Creutz received a visit from Hans Hefelmann and Richard von Hegener of Berlin’s Reich Committee. They confided in Creutz that the Committee had launched a new program to euthanize severely mentally ill children in specially-created “children’s wards” (Kinderfachabteilungen).
Rhineland facilities were to play a part in this expansion of the killing project. Accordingly, Creutz was ordered to establish in Galkhausen and in another institution yet to be determined two such wards. Creutz expressed his misgivings about this "children's operation" (Kinderaktion), but the committee representatives were unmoved by his plea. Thereafter, Creutz remonstrated with the Berlin offices, until in July 1941 he received a letter from Viktor Brack, accusing him of intentionally obstructing the installation of the wards in the Rhineland. Brack warned Creutz that if he did not change his view on the matter, he would face dismissal from his job, as well as a complete overhaul of the Rhineland's institutional system. Creutz passed on Brack's letter to Haake, who resented the charges of misfeasance made against one of his officials. Haake contacted Reichsleiter Philip Bouhler, the chief of the Führer’s Chancellery, about the dispute. Haake and Bouhler arrived at an agreement that a children's ward would be established at the Waldniel mental hospital. Haake overcame Creutz's hesitancy about participating in the operation of the ward by assuring him it would be wholly subordinate to the Reich Committee, and that he would need only to worry about installing and assigning a nursing staff to it.

As with the adult operation, Creutz resolved to cooperate with the children's program only to the degree necessary, all the while pursuing a plan of subversion and sabotage. Choosing a house in Waldniel as the site for the proposed children's ward, Creutz temporized by having it thoroughly renovated, a project that lasted several months, and by insisting on outfitting it with a hard-to-obtain x-ray machine (although no such equipment was needed in the ward). Not until October 1941 was the ward ready to receive its new director. Creutz's report to the Berlin Reich Committee that he was
unable to find anyone willing to serve as the ward’s director became the occasion for Berlin to appoint their own man, a doctor from Saxony named Georg Renno. Renno was no stranger to killing mental patients: he had served for a time as a gassing technician in the Hartheim killing center before taking up duties as director of the Waldniel children’s ward in October 1941. Before Renno could begin his work in Waldniel, he suffered a hemorrhage that rendered him unable to fulfil his responsibilities. Renno proposed Dr. Hermann Wesse as his replacement. During Wesse’s prior visits to see his wife, a staff doctor in the adult section at Waldniel, Wesse had declared his support for euthanasia to Dr. Renno. These declarations no doubt commended him to Renno as his possible successor. The Reich Committee’s Hefelmann and von Hegener vetted him at a meeting in the waiting room of the Düsseldorf train station. Afterward, they adjourned to the offices of the provincial government, where they informed Creutz that Wesse would succeed Renno in the Waldniel children’s clinic. Creutz invited Wesse to wait outside, then complained to Hefelmann and von Hegener that Wesse was not properly trained to undertake this work. Surprisingly, Hefelmann and von Hegener did not override his criticism, but suggested that Wesse be sent to the children’s ward in Görden for advanced training with Dr. Hans Heinze, the director of the ward and a T-4 ‘Gutachter’.

Wesse remained at Görden until February 1942, at which time, primarily at the instance of Creutz, he was sent to the Rhine State Clinic for Juvenile Psychiatry in Bonn for further psychiatric training, where he lingered another seven months. In the meantime, Creutz contacted the Waldniel hospital and demanded that its chief medical advisor, Dr. Sc., be assigned to monitor Wesse’s activities in the children’s ward. Creutz personally instructed Dr. Sc. to stop any excessive or careless action by Wesse. With this
"spy" in place, Creutz ordered Wesse’s transfer to Waldniel on September 26, 1942. By October, he was active as the director of Waldniel’s children’s ward, on the patients of which he filled out reports noting the severity of mental disability (e.g., “idiocy,” “feeblemindedness,” “mild, medium, or severe degree”) and his evaluation of the child’s educational capability. These reports, proofed for errors by Dr. Sc., he forwarded to the Reich Committee in Berlin. Weeks later he received a decision from the Committee: children capable of education were to be discharged, while those whose educational level was still indeterminate were to be retained for further observation. Children considered incapable of education were to be “put to sleep,” a linguistic euphemism for killing. The authorization was also euphemistically worded: “The child X is to be brought to therapy.” After a final exam, Wesse had two of his nurses, W. and M., administer between three and five tablets of luminal to the child in the evening. Afterward the victim typically fell into a deep sleep before dying one or two days later. Wesse himself informed the relatives that their child had died of an “acute illness.” He then falsified the cause of death in the victim’s death certificate. In this way, Wesse and his accomplices caused the deaths of “at least” 30 children with lethal overdoses of luminal.21

In addition to his involvement in the transports of Rhineland patients during Phase One of the euthanasia program and in Wesse’s infanticide at the Waldniel children’s ward, Creutz was charged with complicity in the transfers of patients to the Hadamar killing center from 1942-1945. The immediate cause of this second wave of transports was the increasingly urgent demand for hospital space due to Allied bombing of German cities. The Rhineland was particularly afflicted with a shortage of available beds. To cure the problem, the Reich Ministry of the Interior suggested that 370 patients be
transferred from the monastery of Hoven (which was to be used as a hospital for the
bombed-out residents of an old age home in Cologne) to Hadamar. Creutz objected to
the suggestion, but his fears were allayed with reassurances that Hadamar would resume
its functioning as a normal mental hospital. Nonetheless, Creutz continued to be
apprehensive that something would go wrong at this notorious killing center. Wishing to
consult directly with the medical staff at Hadamar, he traveled to the institution to inspect
it for himself. While there, he encountered former patients from the Rhineland who had
been transferred to Hadamar, now working on the institution’s grounds. He saw no
evidence that patients were being put to death within Hadamar’s walls. Encouraged by
his visit, Creutz returned to Düsseldorf in the belief that transports to Hadamar could
move forward without danger to the patients. This trust seemed to have been abused
when death notices about the Hoven patients transported to Hadamar poured into
Creutz’s office. Creutz asked Haake to inquire about the reasons for the deaths. The
latter’s inquiry disclosed that predominately infirm patients had been transported, and
that the high incidence of such patients accounted for the enhanced mortality rate.

The transportation of patients from Rhineland facilities accelerated from 1943
until the end of the war. With the proliferation of death notices it became clear to Creutz
that the transferred patients were being killed in the collection centers. In April 1943,
Creutz submitted a petition to Josef Goebbels, State Secretary Stuckardt of the Reich
Interior Ministry, and Karl Brandt requesting an investigation to ascertain why so many
patients were dying after transfer. His concerns were dismissed with the reply that the
high mortality rates were due to food rationing required by the war emergency and to the
transport of severely ill patients. In the meantime, Creutz continued to send patients
within the Rhine province to mental hospitals throughout Germany, including the killing centers at the Pomeranian mental hospital, Meseritz-Obrawalde, and Gross-Schweidnitz in Saxony. Some were dispatched to the General Government in Poland (that part of occupied Poland not formally annexed to the German Reich). Interested in establishing his own collection center for mentally disabled transferees from the Rhineland staffed with Rhineland medical personnel, Creutz sent one of his physicians to the General Government to investigate the feasibility of such a plan. His plenipotentiary negotiated with local authorities to make the institution of Kulparkow near Lemberg available for this purpose. Between August 1943 and May 1944, Dr. R. and several nurses from the Rhineland were transferred to the Kulparkow institution. 22

This period of deportations between 1942 and the end of the war coincided with the “wild” euthanasia characteristic of the second phase of the killing program. For the Rhineland as for much of the German Reich, the selection of patients in the “wild” phase was made not on the basis of forms but by the home institution itself. Although the Berlin authorities stood behind the program from beginning to end, their presence was now less conspicuous, their role restricted to identifying hospital space made available by the transports and to providing transportation (under the auspices of GEKRAT). The overwhelming number of these patients were transported to their deaths.

The Düsseldorf state court subjected Creutz’s actions in connection with the euthanasia program to the familiar three-tiered analysis of German criminal adjudication. At the first level, or “fulfillment of the elements of the offense” (Tatbestandsmässigkeit), the court found that Creutz fulfilled all of the elements of aiding and abetting murder (Beihilfe zum Mord) as well as crimes against humanity under Law #10. Creutz was not,
however, a perpetrator but an accomplice, since he “by no means desired the result as his own.” The court next turned to consider whether Creutz’s acts were objectively illegal under the second level of analysis (Rechtswidrigkeit). We will recall that the court in the Scheuern case deemed Todt and Thiel’s actions “illegal” under this second tier; only at the third tier, or guilt (Schuld), did it acquit Todt and Thiel based on a “collision of duties” (that is, the irreconcilable duty to remain aloof from criminal wrongdoing and the medical duty to save as many patients as they could). In the Rhineland case, by contrast, the court held that the doctrine of “extra-statutory necessity” (Übergesetzlicher Notstand) justified Creutz’s involvement in the transportation of patients to their deaths. The lay assessors on the court (the Schwurgericht) found that Creutz was an unswerving opponent of the operation, who had spared no pains in restricting the numbers of patients removed for killing. In order to subvert the aims of the program, Creutz had to project an image to his superiors in Berlin of cooperation with their designs. Wherever he could, held the Schwurgericht, Creutz worked at crosspurposes with Berlin: his orchestration of a program of sabotage, his consistent resistance to erection of a children’s ward at Waldniel, his opposition to the short-term director of the ward, the euthanasia enthusiast Dr. Renno, and his planting of Dr. Sc. in the ward to oversee and restrain the actions of Dr. Wesse all attested to Creutz’s commitment to impeding euthanasia in the Rhineland. The state court was further impressed with the numbers of patients Creutz’s sabotage plan had saved: of the 5,000 patients Berlin had earmarked for destruction, only 946 were finally dispatched to the killing centers. Individual cases supported these figures. For example, the court cited the transport lists of September 4 and 13, 1941, which had sent
97 patients to the transit centers of Galkhausen and Andernach for ultimate transfer to Hadamar for killing. Of these patients, 67 were withheld or discharged—a significant accomplishment ascribed to Creutz's rescue plan.\(^2\)

None of these achievements would have been possible without Creutz's limited participation in the killing program, the court stated. Invoking an argument familiar from the Scheuern case, the Düsseldorf court pointed out that his resignation from his post would have opened a vacuum quickly filled by Berlin with a zealous euthanasia proponent. In this regard, the court found meaningful the example of the mental health system in Vienna during the war. Informed by Brack of the planned euthanasia program in early 1940, the advisor (Referent) for the health care system in Vienna, a Prof. Dr. Gu., resigned his position in protest. The result was that Berlin appointed an ideological Nazi to the post, who implemented euthanasia killing in Vienna's mental hospitals remorselessly and in full compliance with Berlin's wishes. Consequently, 50 percent of Vienna's mental patients were destroyed—a figure that made the mortality rate of 7.5 percent in the Rhine province seem paltry by comparison. Had Creutz followed Gu.'s example and resigned his post, the Rhineland would likely have experienced a death rate similar to that in Vienna.\(^2\)

Creutz's difficult but conscientious choice to remain in his job inevitably ensnared him in criminality. His situation, the court analogized, was like that of a man who encounters three mountain climbers hanging from a rope over a sheer precipice. The only means of saving any of the climbers is to cut the rope they are clinging to, with the aim of at least saving one of them; a failure to act would consign all of them to certain death. By cutting the rope and rescuing one of the climbers, the man's action was
justified by the extraordinary circumstances of the predicament in which he found himself. The court considered the metaphor of the three mountain climbers applicable to the Rhine province case: “The case of a doctor who . . . can save a considerable number of his patients only by sacrificing others must be treated in the same way as the mountain climbers . . . .” In each case, the actor must decide either to renounce any involvement, thereby ensuring destruction of the patients, or to participate in a criminal enterprise in order to save as many as possible. Creutz, a confirmed enemy of euthanasia, elected to rescue patients in the only manner available to him, and did a creditable job of it. His actions relating to the 946 adult patients transported to their deaths in 1941 and the 30 children killed in the Waldniel children’s ward from 1942-1943 were justified under the legal doctrine of extrastatutory necessity. Thus, he was acquitted of both aiding and abetting murder and crimes against humanity in these two instances of mass killing.25

Regarding the transportations of patients between 1942-1945 for the purpose of freeing up hospital space, the court likewise found Creutz innocent of wrongdoing. Although some patients were murdered in facilities like Meseritz-Obrawalde, there was no evidence that Creutz was aware they were being transported to their deaths. With this final acquittal, Walter Creutz walked out of the Düsseldorf courtroom on November 24, 1948 a free man.26

The Galkhausen staff physicians, Drs. We. and R.. raised the same extrastatutory necessity argument to defend their participation in the euthanasia program. Although they, like Creutz, fulfilled the objective elements of the offense of aiding and abetting murder, they too were acquitted as saboteurs of euthanasia. Dr. We. exploited every opportunity to foreground his patients’ status as war heroes or foreign nationals to secure
their exemption; in other cases, he exaggerated a patient's fitness for work or deliberately misrepresented a patient's psychopathy as being war-related. Several witnesses vouched for Dr. R.'s vocal opposition to the euthanasia program. One witness, a Protestant minister, related that R. had confided in him that he had remained at his post only to save patients. Other witnesses described how R. had subverted the program by exempting certain patients from deportation to Hadamar. The two doctors, like Creutz, faced a dire "conflict of duties" that forced them to choose between abandoning their patients to almost certain doom or collaborating minimally in the euthanasia program so as to rescue whomever they could. The court held that this "collision of duties" operated as a "justifying ground" (Rechtfertigungsgrund) to acquit both We. and R. of all charges.  

The last group of defendants in the Rhine province case to be acquitted on the basis of a collision of duties comprised two University of Bonn professors, Kurt Pohlisch and Friedrich Panse. Pohlisch enjoyed a triple appointment as Professor of Psychiatry and Neurology at the University of Bonn (1934), head doctor of the University's mental clinic, and director of Bonn's provincial mental hospital. Panse, who had befriended Pohlisch during their studies together at the University of Berlin, used his connections with Pohlisch in 1936 to obtain an appointment as chief doctor at the Provincial Institute for Psychiatric and Neurological Genetic Research in Bonn. In 1937, Panse became a lecturer at the University of Bonn, where he taught courses on racial hygiene. Both men joined the National Socialist party that same year.

Although witnesses at the trials of Pohlisch and Panse lionized them for their dispassionate commitment to pure science, the professors' research on eugenics during the 1930's savored of anything but disinterested science. Under the auspices of the
Central Office for the Hereditary Biological Inventory, they worked on developing a national genetic data bank that would someday record the racial-hygienic background of the German population. Pohlish and Panse's contribution was a prodigious archive containing eugenic information on 300,000 residents in the Rhine Province. Their work on this project brought them into contact with a rogues' gallery of future euthanasia killers, including Herbert Linden, future T-4 chief medical expert and Reich Commissioner for Mental Hospitals (a position that would catapult him into a preeminent role in the euthanasia program after his appointment in October 1941).

In April 1940, Pohlisch and Panse attended a recruitment meeting of mental health professionals in Berlin presided over by Viktor Brack. During this meeting, it was generally agreed that all schizophrenics hospitalized without improvement in their conditions for a period of five years, as well as all "feeble-minded" patients not regarded as essential workers, were to be killed after analysis of their registration forms by government experts. In the aftermath of the meeting, both men served for a time as medical experts (Gutachter) reviewing these registration reforms until the summer of 1940. The court determined that in ten of the 300-400 cases Pohlisch examined, he had affirmed a basis for proceeding with euthanasia; the figure for Panse was 15 of 600 cases. These actions, the court found, furthered the goals of the Berlin authorities to annihilate disabled patients deemed "unworthy of life," thus fulfilling the elements of the offense of aiding and abetting murder and crimes against humanity. (The professors were accomplices rather than perpetrators because they did not embrace the killings "as their own," but participated in euthanasia solely on behalf of the T-4 leadership.)
Pohlisch and Panse claimed that their engagements with the T-4 program were all actuated by a desire to subvert it from within. One witness at trial testified that the two professors had objected to the killing program when Brack unveiled it at the April meeting. They themselves characterized the meeting as a success in terms of restricting the categories of patients subject to euthanasia. The Düsseldorf court found evidence to support this testimony, such as proof that the two men had proposed revising the registration forms to include additional categories of exemption from transport. Panse had persuaded the Berlin authorities to exempt some patients from transfer in order to use them as specimens in high school instruction; Pohlisch convinced them that a determination could not be made based only on the registration forms, but also required a personal examination. Furthermore, the court found that the agreement to exempt patients capable of work from transport was due to the professors' lobbying efforts. Summing up their role at the April conference, the court concluded: "In sum it must be said that in the conference considerable restrictions were achieved and both defendants contributed to it through their suggestions."^29

With respect to their roles in completing the registration forms, the court accepted Pohlisch and Panse's assertion that they so rarely identified a patient for transport that Berlin eventually cancelled shipment of the forms to them. The court was also receptive to their argument that they only selected patients for transport whom they believed were terminal cases likely to die before removal could occur, or who were so ill that they would be exempted under Berlin's guidelines on patients incapable of transport. Not one of the patients they had "selected," the professors declared, were killed as a result of their selection. The court tended to agree with them, noting that the mortality rates in the
Andernach and Galkhausen facilities (serviced by the Bonn professors) were lower than other institutions in the Rhine province from May - July 1941 (the period of Pohlisch and Panse's work as Gutachter). Based on this evidence, the state court held that it was "not only possible, but highly probable" that the defendants' arguments were correct, and that their work on the registration forms never resulted in the deaths of any patients.\(^{30}\)

The Düsseldorf court had no difficulty in justifying the Bonn professors' actions on the ground of a "collision of duties." Its statement of their "dilemma" is a textbook example of this variety of German euthanasia cases:

> The evidence unambiguously discloses their unconditional awareness of responsibility as dutiful doctors and their opposition to the euthanasia program. Their proven countermeasures had considerable success for the welfare of their patients. In deciding whether to participate or not, defendants confronted a dilemma: on one side, they were forbidden by their medical duties to participate in these criminal actions; on the other, they had the duty to help and to protect their patients. They faced an actual conflict of duties, which they solved in earnest and conscientious self-examination. They bore the duty to help through participation in the operation; they were therefore necessarily entangled in criminal action. They participated in the operation because they saw it as the only way to pursue the higher duty to save at least a part of the patients who would otherwise be lost.\(^{31}\)

On the basis of "proven innocence," Pohlisch and Panse were, like Walter Creutz, acquitted of all charges.

The court’s unctuous tribute to the Bonn professors quoted above is oddly discordant with what we know of their research in racial-hygiene during the 1930’s. To suggest that such research, conducted under the aegis of the Nazi state, was not overtly political disregards the historical record. Further, in his 1961 judicial testimony before his death by suicide, T-4 Obergutachter Werner Heyde dismissed Pohlisch's self-exculpatory portrayal of himself as a saboteur of euthanasia, countering that Pohlisch was "uninterruptedly active as a Gutachter" for Berlin, and that at the April 1941 conference he enthusiastically supported the euthanasia plans outlined by Viktor Brack. These facts,
coupled with Pohlisch’s energetic exertions to prepare a draft of a euthanasia law (later vetoed by Hitler out of fear of foreign propaganda), cast the defendants’ moral “dilemma” in a different and unflattering light.32

In the court’s defense, much of this information was unknown to it in 1948, when it proclaimed that the defendants had “pursue[d] the higher duty to save at least a part of the patients who would otherwise be lost.” Both men, as Dick de Mildt notes, resumed their psychiatric careers after their acquittal. In this way, the three defendants acquitted in the Rhine province case participated in that reintegration into professional life of former Nazi officials that characterized the postwar years of reconstruction in Germany. Before they could move on with their lives, however, they faced yet another round of judicial proceedings.

In German criminal law, by contrast with its Anglo-American counterpart, both the defendant and the government are entitled to appeal a decision that either believes is legally deficient. (In U.S. and English law, the principle of double jeopardy interposes an absolute barrier to any such appeal by the government of an acquittal.) In the Rhine province case, the state prosecutor appealed the Düsseldorf state court’s decision directly to the Supreme Court for the British Zone (Obergerichtshof der Britischen Zone), arguing on appeal that the court had misapplied the doctrine of “extrastatutory necessity.” The Supreme Court agreed, and reversed the lower court’s verdict regarding Creutz, Pohlisch, and Panse because it reposed on a misinterpretation of extrastatutory necessity. According to the higher court, this doctrine was inapplicable in cases where two groups of people were involved—i.e., one group to be saved and another to be sacrificed. Only when two legal duties were in conflict and the actor performed the higher of the two
duties at the expense of the lower could the defense be successfully invoked to justify violating the law. Clearly, the Supreme Court for the British Zone felt that the Düsseldorf court had endorsed the defendants’ sacrifice of so-called “hopeless” patients in the interests of saving other patients.* This was a grave legal error, the Supreme Court held, since one could not compare the two groups and proclaim one worthier of being saved than the other. “Human lives,” the Supreme Court declared, “cannot be weighed against each other.” Implicit in the Supreme Court’s opinion is a subtle rebuke directed at the lower court for assigning the lives of “incurable” patients to a less valuable class of “legal goods” (Rechtsgiiter) than the lives of healthier patients. It is not too much of a stretch to discern in the lower court’s reasoning a tendency to acquiesce to the Nazis’ own taxonomy of more valuable and less valuable human lives.33

In January 1950, the case was retried in the Düsseldorf state court on remand from the Supreme Court for the British Zone. The authors of the second opinion were unfazed by the higher court’s criticism. They continued to laud Creutz for hazarding his own life and career on behalf of his patients, describing him as a man who had pushed himself “to the very brink of the concentration camp” in his efforts to save lives. In minimal deference to the Supreme Court’s ruling, the state court declined applying extrastatutory necessity a second time; instead, it found that Creutz was “exempt from punishment” at the third level of criminal-legal analysis (i.e., guilt, or Schuld). For the Düsseldorf court, even this lenient outcome insufficiently recognized Creutz’s valor. By

* The Supreme Court for the British Zone (OGBHZ) was frequently at odds with regional courts in western Germany in the postwar years. The antagonism may have been due to the OGBHZ’s role in ensuring that Allied Control Council Law #10 was properly observed in trials conducted by regional courts. As De Mildt has observed, the perception by some regional German jurists that Law #10 violated the ban on ex post
the time of Creutz's second acquittal, the Supreme Court for the British Zone was no longer available to chasten the state court: it had been replaced by the German Supreme Court (*Bundesgerichtshof*) in 1950, which exhibited a less antagonistic attitude toward the findings of the lower courts in these cases.\(^{34}\)

The Rhine province was not the first case to acquit euthanasia accomplices of criminal wrongdoing; that distinction belongs to the Scheuem trial. However, the case of Creutz, Pohlisch, et al. was the first euthanasia trial to portray these accomplices as moral superheroes, dedicated to saving human lives on peril of being thrown into a concentration camp. By the time of Creutz's retrial in October 1950, the reservations expressed by the Koblenz court in the Scheuem trial ("whether the defendants are able inwardly to feel themselves free of any guilt is a matter for their personal conscience") had dissipated. Increasingly, courts were using triumphalist moral language to describe the participation of euthanasia defendants in the mass destruction of the mentally disabled. For the German critic of postwar German justice, Jörg Friedrich, the Rhine province case was a judicial and moral outrage. "Only this judiciary, itself especially well-schooled in murder, could extol to his patients a nine-hundred-fold murder accomplice as an idol of morality," Friedrich corrosively remarked.\(^{35}\) The Düsseldorf court's example did not fall on flinty soil. It flourished in the verdicts of subsequent courts following in its wake, transforming men into virtuous paragons who, in a different era, would have earned the label of murderers.

\(^{34}\) In the

\(^{35}\) See De Mildt, *In the*
C. The Württemberg Case (June-July 1949)

One of the more bizarre of the "collision of duties" euthanasia cases involved four doctors in the Württemberg mental health administration. Their twelveday trial is remarkable for the range of verdicts it issued for these euthanasia killers: two acquittals on a theory of collision of duties, one acquittal for lack of evidence, and a conviction of the primary defendant, albeit with a mitigated sentence that reflected the court's unwillingness to condemn his murderous complicity on moral grounds.

The leading defendant in this case, Dr. Otto Mauthe, was the former Chief Medical Officer (Obermedizinalrat) for the mental health system in Württemberg's Ministry of the Interior. His superior in Business Section X, the deceased Ministerial Councillor Dr. Stähle, initiated Mauthe into the euthanasia program being prepared by the Berlin authorities. Mauthe was commissioned to implement the program in the state of Württemberg. Acting on this commission, he ensured that registration forms were distributed and properly completed in the 48 institutions within his jurisdiction. In late November 1939, he informed these mental institutions via a decree from the state Ministry of the Interior that war conditions required that certain patients be transferred, as ordered by the Reich Defense Ministry. The institutions receiving the transports were to provide notice to the patients' relatives. After this decree was disseminated, lists with the names of patients to be transported were sent to the home institution (Abgabeanstalt), which were expected to ready the patients for transfer. These patients were later transported to the killing center of Grafeneck (and, after its closure, to Hadamar), where
with few exceptions they were murdered. In order to prevent discharges of patients before they could be transported to their deaths, the Ministry of the Interior issued a decree in September 1940 prohibiting discharges without the Ministry’s approval.

The killing center Grafeneck came into existence in October 1939 when Herbert Linden ordered Dr. Stähle to convert a former castle belonging to the Samaritan Foundation Association into a site for the furtive destruction of mentally handicapped patients. The Interior Ministry accordingly confiscated the building on October 12. The rooms within the Grafeneck facility were used as office space for the T-4 staff. The actual “extermination room” was located 300 meters away from the main building in a shack formerly used for farming purposes. This inauspicious shack was nothing less than a gas chamber. Adjacent to it, three crematoria were installed to dispose of the murdered patients’ bodies. A capacious wooden barracks and doctor’s office stood nearby. The Grafeneck premises were shrouded in a dragnet of secrecy: behind physical barriers that sealed the institutional grounds off from the public, guards were on constant patrol. Their rounds took them past signs warning outsiders that all who ventured into this No Man’s Land risked danger of epidemic disease. When the mentally disabled arrived at Grafeneck, usually in busloads of around 75 people, they were brought into the receiving barracks, where they were disrobed by nursing personnel and led to the examining doctor. This notable undertook a minute-long physical exam; occasionally, the exams resulted in an exemption of the patient from killing. The vast majority, however, were conducted into the gas chamber, which, in an eerie prefiguration of the gas chambers at Auschwitz, was disguised to resemble a shower room, complete with phony water faucets. Once all the patients were in the chamber, the door was shut and
locked, and the chamber filled with carbon monoxide gas. Within minutes the patients were dead. Their bodies were removed and immediately incinerated in the crematoria. The presiding doctor recorded false causes, dates, and places of death on the victims’ death certificates. The Registry Office of Grafeneck officially registered them as suffering death from “natural causes.” In a transparent effort to obstruct public knowledge of the killings, the Grafeneck staff monitored the hometowns of the victims with colored pins stuck into a map of Germany. In this way, they could ensure that suspicion would not be aroused by issuing too many death notices from any one location.

The Grafeneck killing center took a frightful toll of lives during its short-lived existence from October 1939 until mid-December 1940. Some 10,654 disabled patients were killed there during this 14-month period. After its doors were closed in December 1940, the Hadamar institution took up where Grafeneck had left off. Evidence admitted at Mauthe’s trial indicated that 267 patients from Württemberg institutions were killed at Hadamar. In addition to these killings of patients from Württemberg facilities, at least 93 children were transported as part of the regime’s Kinderaktion to children’s wards outside Württemberg, chiefly Eichberg, where they were murdered.

Otto Mauthe typified that new species of criminal who emerges for the first time in history during the era of Nazi genocide, the “desk murderer” (Schreibtischläufer). Although never personally harming anyone with his own hands, he consigned thousands of patients to their deaths with the stroke of his pen. Based on the evidence before it, the state court of Tübingen was convinced that Mauthe played a central role in the administrative measures essential to the successful implementation of the killing program—primarily in the form of preparing and sometimes personally signing decrees.
issued by the Württemberg Ministry of the Interior. The court enumerated a list of the incriminating decrees authored by Mauthe, each of which promoted euthanasia in some material respect. The Decree of 6/10/40, for example, required mental health officials in Stuttgart to prepare lists of patients for transport to Grafeneck. Another one (8/9/40) prohibited the Liebenau institution from informing the relatives of transportees of their removal. He issued the decree of 6/5/41 to the Weinsberg mental hospital, ordering the transport of patients to the Hadamar killing center. It was further proven that Mauthe himself had visited institutions in Württemberg in order to complete registration forms that had been improperly filled out. Patients identified by Mauthe on these forms were later transported and allegedly killed. The record teemed with other evidence adverse to Mauthe, including situations in which he overruled exemptions made by other doctors and ordered their transport to Grafeneck. It was also shown that he had pacified the victims’ families with false assurances about their fates.

In its deliberations about Mauthe and his co-defendants, the state court of Tübingen departed from the custom established in earlier euthanasia trials, and elected to apply Control Council Law #10's crimes against humanity (Art. II, 1c) rather than German law to the defendants’ crimes. German law, the court held, was ill-suited to deal with the "mass criminality" perpetrated by the Nazi state. For the court, the German Penal Code (StGB) was not designed to cope with "mass" murder, but "only the murder of a single person." The Code was "built on the individuality of the highest personal legal good—life—and is oriented against the criminal act directed against life." German law, in short, did not anticipate participation in mass murder, "but rather a multiple participation in a single murder;" and since the Code did not anticipate mass murder, in
its eyes mass killings numbering in the hundreds and thousands were “impossible.”

German law, in the presence of Nazi genocide, curled back upon itself. Therefore, Law #10’s crimes against humanity was the appropriate theory of criminal liability to be applied in this case.^^

Mauthe (or his attorney) must have taken note of the Scheuern and Rhine province cases, for he raised the collision of duties as a lame defense at his trial, arguing that he had participated in the euthanasia program only to hamstring its aims from the inside. The Tübingen court acknowledged the legal validity of extrastatutory necessity and collision of duties, but insisted that they could be applied only when “strict requirements” were met in a given case. These included the following:

An actual condition of compulsion must exist such that, according to human judgement, the saving of some victims can only occur by abandoning others, and that those to be sacrificed are harmed without the participation by the accomplice. The accomplice must act with the intention to save and must not be motivated by self-seeking motives. The accomplice must be convinced that only by remaining at his post could individuals be saved. Throughout the entire period of his collaboration, he must exhaust all possibilities for rescue to their uttermost extent. Exploiting his discretion according to the guidelines provided does not suffice. Just as little will it suffice that he restricted his rescue operation to those cases that are not at all dangerous for him. He must also risk his own safety to the very limits of what is reasonable. His collaboration must be restricted to the minimal degree necessary.^'

Turning to Mauthe, the court had little problem concluding that he did not satisfy these requirements. Mauthe, it held, did not collaborate in euthanasia in order to save lives, but out of fear for personal disadvantages he might otherwise face, especially to his professional advancement. Nor did he exploit all opportunities for saving patients, using his freedom of discretion; rather, he expressly avoided saving patients due to his “exaggerated anxiety and bureaucratic indifference.” (In one example, he refused to support an exemption lest the SS investigate or Dr. Stähle should disapprove.) The court
described ten separate instances in which Mauthe failed to authorize discharge for a patient when there was abundant opportunity to do so. These examples belied his claim that he sought every opportunity to rescue patients from transportation to the killing centers.38

Similarly, Mauthe neglected opportunities to extricate children from transport to the Kinderfachabteilung at Eichberg, despite his awareness that children were being killed there. These examples decisively proved that Mauthe, even if he inwardly disapproved of euthanasia, nonetheless colluded in it—not out of a desire to save his patients, but fear for his position. For this reason, the court rejected his collision of duties defense.

In sentencing Mauthe, the Tübingen court counted as factors in mitigation his "weakness," which rendered him vulnerable to "general political pressure and the much stronger personality of his superior, Dr. Stähle." The court even conceded that Mauthe may have been inwardly willing to save patients, but his "anxiety and bureaucratic inhibition" paralyzed his ability to act. For his role in facilitating the killings of 4,000 people, he was given a five-year jail term. Mauthe did not serve this seemingly mild punishment; not long after the trial, his sentence was suspended and Mauthe was released from prison.39

A second physician convicted by the Tübingen court was the acting director of the Zwiefalten mental institution, Dr. Alfons Stegmann, charged with delivering up his patients for transportation and killing. Stegmann claimed he had known nothing about the purpose of the transports until after their departure—an assertion refuted by witness testimony that Dr. Stähle had enlightened him on the reason for the transports in February 438.
1940. Moreover, his deportment during the period of his directorship at Zwiefalten
contradicted his "sabotage" argument. He not only maintained regular contact with the
euthanasia specialist Dr. Ernst Baumhardt, but made regular voluntary visits to the killing
center at Grafeneck. On one occasion, he caught a lift in a GEKRAT bus to go cherry-picking in Winnenden. At one point on this outing, a cigarette pasted to his lip, he
commented to a bystander as a mentally ill woman was loaded onto the bus: "There goes
my bride!" Such calloused detachment from the plight of these doomed human beings
the court described as "cool" and "cynical," belying his claim that he had always resisted
the T-4 killing program. Nor did Stegmann's documented exemptions of patients
capable of work weigh in his favor, since they were fully within the scope of permissible
action as defined by the Berlin authorities. Far more damning was his gratuitous act of
selecting 75 patients for transport from 120 photocopies given him by Dr. Baumhardt.
This act, in concert with others, sufficiently proved he was more inclined to promote than
to resist the killing program.

Despite his clear support of Nazi euthanasia and his proven contribution to the
deaths of hundreds of patients, Stegmann received a trifling jail term of two years. The
court considered several factors in mitigation of his punishment: his collaboration was
"relatively small;" he did not himself concoct the killing program; and he was a young
doctor at the time, installed during the war as director of a large mental hospital, and thus
merely responded to decisions made by his superiors. These considerations, as we have
seen in other cases (e.g., the trial of Mathilde Weber), were typical of sentencing under
German criminal law: real responsibility for institutional criminality was securely lodged at the top of a bureaucratic hierarchy. The farther down the hierarchy a defendant was, the greater the probability that defendant would qualify for extenuated punishment.30

The third and final physician convicted by the court, Stegmann’s successor as director of the Zwiefalten institution, Dr. F., also enjoyed a significant reduction of her sentence. She was charged with committing a crime against humanity for her role in preparing transports of patients from Zwiefalten based on the transport list. The Tübingen court acquitted her in nearly every case, finding no evidence to contradict her claim that she had exempted patients from transfer on her own initiative. In the cases of three specific patients, however, the court declined an outright acquittal. These involved patients killed with lethal injections of scopolamine and trional ordered by Dr. F. At trial, she tried to portray the injections as designed to alleviate the suffering of terminally ill patients, not to induce their deaths. Her self-exculpatory declaration, however, was inconsistent with an earlier confession she had made during an interrogation in Freiburg, in which she had admitted to injecting the moribund patients with lethal overdoses in order to abbreviate their torturous lives. Since she had not caused their deaths “cruelly,” “maliciously,” or out of “base motives” but “solely out of pity,” and since these three humanely-inspired killings were unrelated to the Nazis’ brutal campaign to destroy “life unworthy of life,” they were neither a crime against humanity nor murder under German law. Instead, her acts constituted “manslaughter” under sec. 212 of the German Penal Code.41 Clearly sympathetic to Dr. F., the court sentenced her to a prison term of one-and-a-half years (the minimal legal punishment for each case of manslaughter, or six months per death).
Although the collision of duties defense found no application in the convictions of Mauthe, Dr. S., and Dr. F., one defendant in the Württemberg trial did successfully invoke it to secure his acquittal. This was a medical specialist in psychiatry, Dr. E., indicted for accompanying Mauthe on his trips to various mental institutions in Württemberg for the purpose of completing registration forms on their patients. Dr. E. argued at trial that he and Mauthe made these trips only to strike from the transport lists the names of patients capable of work, and thus, far from promoting euthanasia, had actually restricted it. Finding Dr. E.’s defense unrefuted by the evidentiary record, the Tübingen court acquitted him with reference to a collision of duties.42

The Württemberg trial in 1949 encapsulates in miniature the tolerant spirit of the post-1947 euthanasia trials. When it did not acquit a euthanasia doctor outright, as it did Dr. E., the Tübingen court meted out comparatively trivial sentences for egregious violations of the law of nations. A mathematical computation, for example, throws into shocking bas-relief the court’s lenient attitude toward Mauthe: if we divide the total number of hours in a five-year prison sentence such as Mauthe received (and ultimately did not serve) by the total number of his victims (4,000), we arrive at a figure of around ten hours of jail time per killing. Assigning a ten-hour prison term for a murder is little more than a mockery of the criminal justice system. Willfully or not, it also conveys a message to the rest of society that this type of killing is of a different order of wrongdoing than garden variety homicide—an order of wrongdoing that society may condone, since it lacks the reprehensibility of conventional murder.
In the 1960's, polls of West German citizens indicated that many wished for the prosecution of National Socialist crimes to come to an end. The reason, Herbert Jäger speculated toward the end of the 1960's, was that many Germans regarded the crimes committed during the era of National Socialism as something other than expressions of true criminality. Citing the sociologist Arno Plack, Jäger believed that the “good citizen” did not object to state-sponsored mass murder, but to “non-conformist” murder outside the boundaries of the well-ordered state. Nor was this prejudice restricted to German laypeople. In the twenty years after the war, German courts typically reserved their harshest punishment for the Exzesstäter (excess perpetrators), those killers who committed crimes of violence beyond the scope of what was ordered (auf eigene Faust tut, literally “acting on one’s own fist”). The psychopathic killer received the scorching reprobation of the German courts, while the so-called “small wheels” within the machinery of destruction often flew below the courts’ moral radar screen. For Jäger, one of the preeminent goals of prosecuting Nazi criminality was to cultivate an awareness in the German population that violence performed on the orders of the highest state leadership is criminal. Under this standard, the trial of the Württemberg doctors can only be regarded as a spectacular failure.

IV. The Baden Case (May 1950)

As we saw in the Württemberg trial, the T-4 functionaries in Berlin sometimes worked through local state authorities to accomplish their aims of implementing euthanasia. In other cases, they worked directly with the mental institutions themselves. For this reason, officials in the provincial government sector—especially the health departments within local ministries of the interior—could become essential partners in
the destruction of "unworthy" life. The example of the Landesrat Fritz Bernotat of Hessen-Nassau comes readily to mind; without his indefatigable efforts on behalf of euthanasia, the killing program in Hessen-Nassau would never have functioned with the same harrowing efficiency that it achieved under his guidance. The work of local officials like Bernotat was fraught with a potential for appalling destruction. Otto Mauthe's hands were dripping with the blood of 4,000 disabled patients; Bernotat's victims can be numbered in the tens of thousands.

On May 1, 1950, the state court of Freiburg im Breisgau convened to re-try Otto Mauthe's counterpart in the Baden Interior Ministry, Dr. Ludwig Sprauer, and the former director of the Illenau and Wiesloch psychiatric hospitals, Dr. Josef Artur Schreck. Accused of involvement in the euthanasia program, both defendants had been convicted in an earlier proceeding in November 1948 of crimes against humanity and aiding and abetting murder; both were given lifelong prison terms. Their conviction was duly appealed and the verdict partially reversed by the Freiburg Court of Appeals on technical legal grounds. The case thereafter was remanded to the lower court for re-trial in May 1950.

Dr. Ludwig Sprauer was the director of the Health Department (Department IIIb) of the Baden Interior Ministry, a position he had held since 1938. As director he controlled 12 mental hospitals in Baden: four state hospitals (Reichenau, Emmendingen, Illenau, and Rastatt), six "communal district" hospitals (institutions immediately subordinate to an administrative unit called the Kreis, or "district:" Geisingen, Jestetten, Wiechs, Freiburg, Fussbach, and Hubb), and two religiously-affiliated institutions (the Catholic institution St. Josef's and the evangelical institutions in Kork, near Kehl).
October 1939, Sprauer was summoned to the Reich Ministry of the Interior in Berlin, where Herbert Linden informed him that war conditions required reserve hospitals. Linden then swore Sprauer to secrecy and told him about plans to euthanize incurable mental patients "in the sense of the Binding-Hoche proposals." By "granting" these patients a "mercy death," the necessary beds would be made available for use as reserve hospitals. Linden assured Sprauer that a "legal foundation" for the killing program existed, but that a euthanasia law had not yet been enacted. Till its formal legalization, the program was backed by a September 1939 authorization by Hitler. Determination of patients for killing would be handled on the basis of registration forms that had already been distributed to public health offices and mental hospitals throughout Germany. Sprauer's role was to facilitate the registration and transportation of incurable patients in Baden institutions.47

Despite Sprauer's willingness to collaborate in the killing program, medical personnel throughout Baden resisted its implementation. The court was aware of only two directors of Baden mental hospitals who failed to oppose the operation: Sprauer's co-defendant Josef Artur Schreck and a Dr. Gercke. The rest engaged in a relatively successful plan of sabotage. On one occasion, in early December 1940, a GEKRAT transport leader left the institution of Jestetten with an empty bus because the staff doctor and chief nurse had refused to surrender their patients to him. The director of the Fussbach institution went so far as to don his SS uniform when the GEKRAT busses arrived and launch into a heated argument with the transport leader, the result of which was that only 30 of the 90 patients designated were finally transported. These and other incidents of resistance, however, did not galvanize Sprauer into opposing the euthanasia
program; on the contrary, he scotched resistance wherever it appeared. His tactics of quashing opposition ran the gamut between threats of imprisonment to “collegial” invitations to take extended vacations. On at least one other occasion, he transferred a Dr. L., a staff physician at the Illenau institution who had protested the killing program, to the health office in Karlsruhe.

As in the Rhine province, a sabotage “conspiracy” embracing all of Baden’s directors except Schreck and Gercke developed. These doctors saboteurs resolved to subvert the killing program by discharging patients, transferring them to work positions, or removing them to private institutions where they would be out of harm’s way. They also exempted patients from transport by characterizing them as capable of working. Opportunities arose in the course of this sabotage initiative for Sprauer to cooperate with it. The director of the Emmendingen facility, Dr. Ma., asked Sprauer to authorize exemption of 12 children who were capable of working independently of supervision. Sprauer refused, and the children were transported from Emmendingen to Grafeneck. Sprauer’s obduracy persuaded Dr. Ma. to withhold patients without first obtaining his permission. When Sprauer learned of this, he reprimanded Ma. for his act of sabotage, and warned him that if he continued he would face dismissal, or possibly even his own personal transport to Grafeneck.

The court accepted Sprauer’s representation that the euthanasia program profoundly disturbed him. “A false bureaucratic ambition and submissiveness to authority,” however, impelled his collaboration with the action. Fears that a critical attitude toward the program would prejudice his career haunted him, causing an almost knee-jerk prostration before orders issued “from above.” (In the words of one witness,
what came from Berlin was Gospel for [Sprauer].") "He did not want to lose his job in the Ministry," the court held, "whereafter a few years he hoped to rise to the position of a Ministerial Councillor (Ministerialrat)." The court had no doubt that Sprauer perceived the wrongfulness of the program, and that he even suffered grievous mental stress over it: but his "loyalty to duty" overrode his moral compunction. Periodically, in response to the pleadings of institutional directors, Sprauer reluctantly approved exemptions; but in these cases he usually required that other patients incapable of work be substituted. The court attributed his submissive attitude toward authority to a "character weakness."

Notwithstanding this infirmity in his personality, he was always conscious that the killing program and his actions in connection with it were wrongful.48

In its assessment of Sprauer's conduct, the Freiburg court adopted the by now familiar taxonomy of perpetrators of and accomplices to National Socialist euthanasia. The perpetrators were "Hitler and his henchmen," e.g., Himmler, Bouhler, Brandt, Linden, and Brack. These were the men at the top of the Nazi power structure who "initiated" and "guided" the euthanasia program from its inception—men who acted out of "base motives" and "maliciously" to destroy patients they considered "superfluous eaters." Sprauer's work as the director of the Baden Interior Ministry's health department, on the other hand, classified him as a "typical accomplice" to the mass murders committed by the Nazi leadership corps. By consigning patients to transports that he knew would result in their deaths, Sprauer fulfilled the objective elements of the offense (both a crime against humanity and aiding and abetting murder). His argument that his actions were justified by an extrastatutory necessity (Übergesetzlicher Notstand), inasmuch as any refusal to collaborate would have meant his dismissal from his job and
certain "professional disadvantages" that would have harmed both himself and his family, was dismissed by the court. According to the court, prejudice to one's career was not a compelling legal interest (Rechtsgrüt) under the doctrine of extrastatutory necessity—certainly not one that would justify sacrificing the lives of patients. Any duress Sprauer experienced was legally negligible; under German law, only an "immediate threat to life and limb" rose to a level sufficient to justify or excuse a criminal act. He had no reason to fear for his personal safety, or for the safety of his family, in the event of a refusal to cooperate with the euthanasia program. After a two-day trial, the Freiburg court accordingly found him guilty on May 2, 1950 of both aiding and abetting numerous murders and of crimes against humanity.

Since the death penalty had been abolished in Germany in 1949, the court meted out to Sprauer an 11-year jail term. Within months after he was sentenced for his role in helping to murder 3,000 human beings, the Freiburg prosecutor's office suspended Sprauer's punishment and released him from prison. Simultaneously, the government of Baden-Württemberg awarded him a pension of DM 450 per month. The effort beginning in 1945 to purge the German civil service of former officials of the Nazi government was unraveling as the decade wound down; of the Party members dismissed from their jobs in 1945, increasing numbers of them were reintegrated into the German civil service by the early 1950's. Sprauer was one, but by no means the only, example of this disturbing trend.

One of the decisive proofs against Sprauer's argument that he had always sought to undermine the euthanasia program was his nomination of Dr. Josef Artur Schreck to serve as a medical expert for the operation. Sprauer must have known of Schreck's
supportive attitude toward euthanasia; his work on behalf of T-4 would not disappoint Sprauer’s trust in him. Schreck had not always been an adherent of destroying “life unworthy of life.” The turning point in his thinking did not occur suddenly, but evolved over a span of years between 1916 and 1920. During the “hunger years” of the First World War (the *Hungerjahre*, 1916-18), Schreck was a staff doctor in the Illenau mental hospital, where he witnessed the “torturous martyrdom and mass dying of incurable and curable mental patients from starvation and tuberculosis” brought on by the Allied blockade of Germany. This period of intense suffering and death did not entirely win Schreck over to the cause of euthanasia, however. Not until the work of Binding and Hoche was published in 1920 (*Die Freigabe der Vernichtung lebensunwertes Lebens*) did he embrace euthanasia as a “humane” method for ending the lives of severe mentally handicapped patients. He believed euthanasia should be restricted to two groups of patients: so-called “full idiots” and those who had become feebleminded as a result of accident or illness. Administering a “mercy death” to the latter group, he felt, was particularly humane, because it would spare them the indignities of an institutionalized existence—a deliverance he would himself desire if he were in such a condition. The court noted that Schreck continued to adhere to these ideas until the day of his trial.

Schreck’s contributions to the killing program occurred in two official capacities, as an institutional director and as a T-4 *Gutachter*. Schreck served at various times as director of the Rastatt, Zwiefalten, and Illenau mental hospitals, as well as the temporary director of the children’s ward in the Wiesloch institution. As director at Rastatt, he received registration forms for 580 of his patients in late 1939. Although he, like his colleagues at other Baden institutions, had not been informed of their purpose, he
nevertheless intuited what was afoot, suspecting that a "program along the lines of Binding/Hoche might be involved." Evidence indicated that between 15-20 percent of his patients were capable of work and enjoyed a cognitive life in which they were "responsive" to their environment. This notwithstanding, when Rastatt was dissolved in June 1940 a contingent of the registered patients was brought in seven transports to Grafeneck and gassed. Schreck, who had meanwhile been informed of the purposes of the transport, did nothing to impede it. He tried to placate a distraught nurse by referring to the exigencies of the war, assuring her that it was a "completely humane" proceeding.\(^{51}\)

At the Illenau institution, moreover, Schreck proved himself a devoted adherent of the killing program. In one case cited by the court, Schreck provided a diagnosis of a patient on his registration form that almost guaranteed his transportation, describing him as a schizophrenic "with considerable disintegration of the psychological personality." A physician familiar with the patient challenged Schreck’s assessment at trial, calling the patient a "mild case with no disintegration of the personality." Schreck’s summary of the patient’s length of time in the institution was likewise inaccurate: in contrast with Schreck’s assertion that he had been institutionalized "with brief interruptions" since June 1917, the court found that from 1917 to 1940 the patient had spent as many as 18 years outside hospitals—hardly the continuous institutionalization punctuated by "brief interruptions" alleged by Schreck. Miraculously, this patient survived the killing program, and was at the time of the trial alive and doing productive work.
Schreck's short-term work as director of the children's ward at the Wiesloch institution also incriminated him in the killing program. At the suggestion of Sprauer, Herbert Linden appointed Schreck to this directorship, communicating to him that the children in the ward were to be euthanized. Until its dissolution in June 1941, twelve children were killed, the last one in May. They ranged in ages from three to five and were characterized as "full idiots" beyond treatment. The children were killed with two or three injections of luminal, which induced terminal pneumonia in the victims. The first three killings were performed by Schreck himself, as were the autopsies on their corpses. Defending his actions, Schreck claimed they were motivated by purely humanitarian concerns, since it was "inhumane" to prolong the life of a child who lacked a complete brain or suffered hydrocephaly.

The gravamen of the charges against Schreck, however, was his work as a T-4 Gutachter. After Sprauer had recommended Schreck as ideologically reliable, he was ordered to report to Herbert Linden in Berlin in February 1940. There he and 15 other doctors attended a meeting chaired by Viktor Brack, at which Brack related that due to unspecified "war conditions" the "ancient problem of euthanasia had again become acute." Brack told his audience that the Reich Chancellery had already prepared a law on the subject, but it could not be published during the war, and thus had to be treated as a "secret Reich matter" (geheime Reichssache). The victims were to include all patients under institutional care for longer than five years, excepting war veterans, foreigners, and patients capable of useful work. Photocopies of the registration forms (Meldebogen) were then exhibited to the participants, along with an explanation of how the "medical experts" (Gutachter) were to evaluate them. At the end, all the participants were asked if
they were willing to work as medical experts for the euthanasia program. Schreck told the court he had freely accepted the offer, since the program was in accord with his own philosophy on euthanasia. He hastened to add, however, that he fully believed in the legality of the program when he agreed to collaborate with it.52

From March until December 1940, Schreck assessed some 15,000 registration forms sent him by the T-4 front office, the “Reich Working Group” (Reichsarbeitsgemeinschaft). The first shipment contained 350-400 forms from the Baden institutions Reichenau, Herten, and Emmendingen, among them forms on patients he knew personally. Thereafter he requested that he be sent forms only from non-Baden institutions, in order to ensure his ability to judge them objectively. Notwithstanding his claims that he evaluated each form assiduously, the court rejected any suggestion that an accurate portrait of a patient could be gleaned from the bare-bones registration forms—least of all an adequate basis for determining whether or not a patient was incurable. The court considered Schreck intelligent enough to understand this inadequacy, and thus accountable for making life-and-death decisions based on them.

The Freiburg state court’s legal analysis of Schreck’s crimes closely paralleled its assessment of Sprauer. Schreck, like Sprauer, was deemed an accomplice to murders committed by the real perpetrators—in the court’s own words, the “Berlin planning and leadership circle.” Although the court refused to treat him as a perpetrator, it did consider Schreck’s contributions to the murder of mental patients substantial. These contributions, moreover, were neither justified by Schreck’s alleged belief in a war-time emergency that excused his actions, nor his claim that he had assumed Nazi euthanasia was a rational and humane extension of the Binding-Hoche thesis regarding “life not
worth living.” Declining to pass on the legality of a program faithfully modeled on the Binding-Hoche guidelines, the court stated that the government’s war on the disabled had nothing in common with the arguments of Binding-Hoche—a patent discontinuity of which Schreck must have been aware. Since Schreck must have seen the startling lack of congruence between the two, it followed that he may have been a true believer in the “crass utilitarian consideration” that underpinned the whole operation. “namely, the exclusion of superfluous eaters in the interest of securing nourishment and the need for hospital space.” Schreck, in brief, “placed himself in the service of a project whose justification was summed up in the widely-accepted maxim of the time: Whatever serves the people is correct and permitted.” And yet, despite his willingness to participate in the destruction of “superfluous eaters,” the court did not find that he was fully aware of the illegality of his actions. Rather, he suffered from “legal blindness,” a failure to grasp the criminality of his role in the program that did not rise to the level of an exculpatory “lack of awareness of illegality” (Unrechtsbewusstsein, which would have acquitted Schreck on the basis of a “mistake of law”), but was less morally reprehensible than an outright flouting of the law.

The court’s reasoning here becomes murky. It seems to be saying that Schreck did not fully appreciate the illegality of his actions, but this lack of awareness did not qualify as a “mistake of law” (Verbotsirrtum) sufficient to acquit him of the charges. The court compared the motivational complexes of both Sprauer and Schreck:

While in Sprauer’s case an exaggerated need for authority led to his legal blindness, Schreck succumbed to an inward development, at the beginning of which—and this makes the participation of highly esteemed men and psychiatrists in the operation especially tragic—stood an actual pity for the sickest of the patients. The same man reputed to have a paternal and benevolent attitude toward his patients clearly expressed the view, when filling out forms on his Illenau patients, that valuing a human life was
In this way, the court blurred the contours of Schreck's personal responsibility for his actions, locating their origins in the depraving influences exerted by the killing program and its economistic philosophy on all its accomplices.

The court convicted Schreck, as it had Sprauer, of aiding and abetting murder under German law and crimes against humanity under Law #10 on May 2, 1950. These convictions related to his work as a Gutachter and to his actions as director of the Rastatt, Zwiefalten, and Illenau mental hospitals. With respect to his personal involvement in the killing of the three children in the Wiesloch children's ward, neither of these charges could be proven against him. Even though Schreck had himself killed the children with overdoses of luminal, the court found that his actions were neither base nor malicious. Instead, he was motivated in these three cases by the desire "to deliver them from their incurability and incapacity." Unlike the Berlin authorities, who routinely lied to the victims' families, Schreck had informed the children's families that euthanasia was the best means of ending their child's suffering; thus, his conduct could not be regarded as deceptive (heimtückisch). Because these killings were not prompted by any of the motives required by the German law of murder, they were instances of manslaughter under sec. 212. For the same reason, the children's deaths were not crimes against humanity, insofar as Schreck did not commit them with a sense of "damaging human dignity through the cruelty and pitilessness of his actions." The court sentenced him to a jail term of 11 years. Like Sprauer, he was eventually released from jail after serving only a year of his sentence.54
The Baden case represents both a deviation from and a continuance of the post-1947 trend toward leniency in German euthanasia trials. On the one hand, the Freiburg court refused to accept the defendants’ claim of extrastatutory necessity; on the other, it treated both defendants as accomplices rather than perpetrators, ascribing their motives to an obsequious careerism (Sprauer) and the “tragic” perversion of a once high-minded concern for human life (Schreck). In Schreck’s case, the court’s dismissal of the charges for murder and crimes against humanity as applied to the deaths of the three Wiesloch children even implied that he had acted compassionately to end human suffering.

The trials of euthanasia defendants in the aftermath of the Baden case are notable for their renewed willingness to acquit on the basis of extrastatutory emergency. Beginning in the early 1950’s, moreover, a novel theory won acceptance in West German courts as a defense to the charge of euthanasia-related homicide. That theory—the “exertion of conscience” defense—and its endorsement by West German jurists reveals the extent to which the yearning for an end to the prosecution of Nazi-era crimes had infiltrated the judiciary’s attitudes about euthanasia criminality. We turn to this new series of verdicts and the rationale invoked to support them in the next chapter.

NOTES

2 Telford Taylor, Final Report to the Secretary of the Army, p. 261.
3 61 RGSt. 242 (1927). Much of my discussion of this case is based on George Fletcher, Basic Concepts of Criminal Law (New York: Oxford University Press, 1998), pp. 139-141. As Fletcher observed, the Court’s invention of an extrastatutory ground of justification or excuse profoundly influenced German law in the fifty years following the verdict in 1927. Curiously, the doctrine was not codified in German law until 1975, when it was finally incorporated into the German Penal Code as section 34 (“Justifying Necessity”): Whoever engages in action in order to thwart an imminent risk, to himself or another, to life, limb, liberty, honor, property or other legally protected interest (Rechtsgut), acts not
wrongfully, provided that in comparing the two conflicting interests, the interest protected substantially outweighs the interest invaded. This provision applies only so far as the action is an appropriate means to thwart the risk.

In the late 1940's, when the Collision of Duties emerged as an effective defense in euthanasia cases, this 1975 codification of extra-statutory necessity was not even a gleam on the horizon of German criminal law.

4 See supra, Chapter 5, p. 320.

"JuNSV, Lfd. Nr. 088, p. 255. As he had with Eichberg and Hadamar, Bernotat sought to "coordinate" (gleichschalten) Scheuern with the goals of the Nazi government by staffing it with ideologically reliable medical personnel. Todt, who had served as director of Scheuern since 1921, was not a Bernotat appointee. Nonetheless, some of Todt's comments during the 1930's suggest a receptiveness to National Socialist eugenic tenets. Dick de Mildt cites Todt's speech in commemoration of Scheuern's anniversary in September 1933, in which he celebrated Hitler's "racial care" as "the beginning of the struggle against the ailment from the roots upwards." Todt was likely referring to the regime's sterilization laws that had been enacted two months previously. Todt went on to describe himself and the Scheuern staff as "assistants in building God's empire and in building the new Third Reich." Quoted in de Mildt, In the Name of the People, n. 2, p. 356. De Mildt wryly observes that the court must have been unaware of these statements when it described Todt as a doctor who "treated his patients like a father."

6 See supra, chapter 2, p. 136.


8 On the three-tiered structure of German criminal-legal analysis (die Tatbestandslehre), see supra, chapter 5, pp. 336-37 and note 36, p. 366.

9 JuNSV, Lfd. Nr. 088, p. 261. The "collision of duties" defense is a species of the doctrine of necessity, but is conceptually distinct from extrastatutory necessity. The latter contemplates the sacrifice of one "legal interest" (Rechtsgut) in order to preserve another legal interest deemed superior to it. A person would be justified, for example, in taking someone else's car without their permission in order to drive a gravely ill child to the hospital (assuming, of course, there were no other means of transportation available). A collision of duties, on the other hand, exists where an actor faces two mutually irreconcilable duties and elects to avoid the greater injustice by violating one of them. To have applied the theory of extrastatutory necessity in the Scheuern case would have been tantamount to branding the lives of one group of patients as more "valuable" than those of the group sacrificed—a style of thought reminiscent of National Socialism. This point was not lost on the Koblenz Court; regretfully, its subtlety eluded later courts.


11 JuNSV, Lfd. Nr. 088, pgs. 262, 267. On the court's ambivalent attitude toward the defendants' moral accountability, see de Mildt, p. 148; Friedrich, p. 195.

12 See supra, chapter 4, p. 290 (Kaltenbrunner) and p. 291 ff. (Brack).

13 JuNSV, Lfd. Nr. 102, pp. 476-477.

14 JuNSV, Lfd. Nr. 102, p. 477.

15 JuNSV, Lfd. Nr. 102, p. 478.

16 JuNSV, Lfd. Nr. 102, p. 479.

17 JuNSV, Lfd. Nr. 102, pp. 479-480.

18 JuNSV, Lfd. Nr. 102, pp. 480-481.

19 JuNSV, Lfd. Nr. 102, p. 482.

20 JuNSV, Lfd. Nr. 102, p. 483.

21 JuNSV, Lfd. Nr. 102, pp. 484-485.

22 JuNSV, Lfd. Nr. 102, pp. 486-487.

23 JuNSV, Lfd. Nr. 102, pp. 492-497.

24 JuNSV, Lfd. Nr. 102, p. 499.


26 JuNSV, Lfd. Nr. 102, pp. 502-504.

27 JuNSV, Lfd. Nr. 102, pp. 504-512.

28 JuNSV, Lfd. Nr. 102, p. 513; de Mildt, In the Name of the People pp. 157-158.

29 JuNSV, Lfd. Nr. 102, pp. 514-517.

30 JuNSV, Lfd. Nr. 102, p. 518.
JuNSV, Lfd. Nr. 102, p. 510.

De Mildt. p. 160. See also Ernst Klee, Was sie taten—Was sie wurden, p. 167. In a footnote, Dr. de Mildt lists some of the T-4 luminaries involved in drafting the ill-fated euthanasia law, including T-4 planner Max de Crinis, T-4 Gutachter Valentin Falthausser, T-4 Gutachter and chief of the killing center at Brandenburg-Görden, Hans Heine, T-4 Gutachter and director of Vienna’s euthanasia center Am Spiegelgrund. Erwin Jekelius, T-4 Gutachter and director of the children’s ward at Eglfing-Haar, Hermann Pfannmüller, and numerous other prominent figures in the construction and implementation of the killing program. Although imputing guilt based on association can be a tricky affair, Pohlisch’s sustained contact with the leading figures in Nazi euthanasia from the 1930’s onward cannot but cast doubt on his self-serving protests of innocence at trial.

JuNSV, Lfd. Nr. 102, p. 535. The Supreme Court’s ruling in this case was the correct one. Since its inception in the 1920’s, “extrastatutory necessity” (Übergesetzlicher Notstand) has pertained to things protected by the law, or “legal interests” or “goods” (Rechtsgüter, such as bodily integrity, freedom, honor, or property), which come into conflict in a situation not of the actor’s own making. The classic example is dynamiting a house to prevent fire from engulfing the entire neighborhood. The two legal interests in such a case—preserving the house to be dynamited versus preserving the neighborhood—are in demonstrable conflict with each other. The German law in this scenario would justify a person who destroyed the one house to save the others, since the legal “interest” or “good” of many houses is superior to that of a single house. In such a case of extrastatutory necessity, the doctrine operates to justify the actor’s conduct. In terms of the three-tiered analysis of German law, the actor fulfills the elements of the offense (level one), but his actions are not illegal (level two). In reversing the lower court’s verdict, the Supreme Court for the British Zone was sending an unequivocal message that the doctrine of extrastatutory necessity could not be used to justify the sacrifice of one group of people for another, since human lives were not “legal goods” that could be measured against one another.

De Mildt. In the Name of the People, p. 156. On the origins and purpose of the Supreme Court for the British Zone within the postwar administration of justice in Germany, see de Mildt, note 39, p. 358; Martin Broszat, “Siegerjustiz oder strafrechtliche Selbstreinigung: Vergangenheitsbewältigung der Justiz 1945-1949,” in VfZ, 4, 1981: Wolfgang Benz, “Die Entnazifizierung der Richter,” in Justizalltag im Dritten Reich, eds. Diestelkamp and Stolleis, pp. 112-130. The Supreme Court for the British Zone also reversed the lower court’s verdicts regarding We., R., Pohlisch, and Panse, but on different legal grounds that do not concern us in this chapter. See JuNSV, Lfd. Nr. 102, pp. 538-544.

Friedrich, p. 228.


JuNSV, Lfd. Nr. 155a. In none of the cited instances was it proven that the patient was later killed. This was beside the point, said the court. The cases were not proffered to show that Mauthe had collaborated in killing patients, but only to “prove his minimal engagement in rescuing patients.”

De Mildt. In the Name of the People, p. 107.


Section 212 defines “manslaughter” simply as a killing that does not qualify as murder under sec. 211.


See, e.g., the Treblinka trial (especially the court’s differential treatment of Kurt Franz and Gustav Münzberger). JuNSV, Lfd. Nr. 596 (1965); the trial of Josef (“Sepp”) Hirtreiter, JuNSV, Lfd. Nr. 270 (1951); the Auschwitz trial, JuNSV 595 (1965); and the Einsatzgruppen trial, JuNSV 555 (1963). See also Jörg Friedrich’s discussion of these trials, pp. 350-378. The tendency to heap greater opprobrium on the Excessstäter than the “small wheels” is in part explicable in terms of German law’s preoccupation with the inner state of mind of the perpetrator—although, as Friedrich argues (I believe correctly), the “loyal, obedient, and blandly efficient killer of thousands” is far more destructive than the pathological killer. 456
“You cannot kill a million people with 5,000 sadists,” he avers, because sadists are inefficient. The Nazis understood this, and punished their own Excessäter swiftly and without mercy.


47 JuNSV, Lfd. Nr. 211.

48 JuNSV, Lfd. Nr. 211. The evidence of his awareness of illegality was manifold. The court recounted one incident in which two jurists from the Württemberg Interior Ministry warned him that the euthanasia program was unlawful. Sprauer replied, “Oh, you hairsplitting lawyers!” and justified the program with reference to the “general political situation.” At the same time, Sprauer’s colleagues in the Baden Interior Ministry refused to sign any decrees relating to the program in Sprauer’s absence. The warnings of the jurists and his colleagues’ distancing of themselves from the program combined with a torrent of complaints, protests, and inquiries that flooded into Sprauer’s offices from the relatives of patients who had been killed. All of these factors, the court surmised, must have put Sprauer on notice about the illegality of the operation.

49 The insensitivity of Sprauer’s defense here is noteworthy; it amounted to the assertion that his professional career was a higher legal good than the lives of Baden mental patients.

50 Regarding the effects of the war years on German attitudes toward the mentally disabled, see supra, chapter 1, p. 72 ff.

51 JuNSV, Lfd. Nr. 211. Like Sprauer, Schreck actually witnessed first-hand a gassing of patients at Grafeneck. His complaints afterward dealt not with the inhumanity of destroying human life, but with the dilapidated condition of the Grafeneck premises and the absence of a proper crematorium.

52 JuNSV, Lfd. Nr. 211.

53 JuNSV, Lfd. Nr. 211.

54 De Mildt, In the Name of the People p. 101.
CHAPTER 8

LAW AND POWER: THE GERMAN EUTHANASIA TRIALS, 1950-1965

By "conscience" we mean the aptitude of practical reason born in every person to judge the moral quality of one's own actions. The conscience rests on the immediately evident ancient maxim: one must do good, one must avoid evil. This aptitude of the conscience requires education, namely, the person must learn what in the individual case is "good" and what is "evil". . . . Where in spite of all exertions of conscience a person does not arrive at a clear recognition [of wrongdoing], the full freedom of decision of conscience is more or less prejudiced. Here is applicable the maxim acknowledged by psychology, ethics, and law—that nothing can be desired which was not previously recognized.

- State Court of Dortmund, 1953

Once elevated by Descartes to "master and proprietor of nature," man has now become a mere thing to the forces (of technology, of politics, of history) that bypass him, surpass him, possess him. To those forces, man's concrete being, his "world of life" (die Lebenswelt), has neither value nor interest: it is eclipsed, forgotten from the start.

- Milan Kundera

The West German euthanasia trials of the 1950's and early 1960's occurred during a tumultuous era in German and international history. The United States' goal of integrating into the Western alliance a democratic and pro-American Germany was a pillar of European foreign policy in both the Truman and Eisenhower administrations. As early as 1949, the Pentagon and State Department realized the military inadequacy of NATO troop strength as compared with the Soviets: its undersupplied 12 divisions were dwarfed by the USSR's 27. A solution to this mismatch, in the minds of Secretary of
State Dean Acheson and Pentagon policymakers, would be to rearm West Germany and shore up NATO’s ground forces with German soldiers. Opinion about German rearmament was divided within the State Department; some officials feared French and Soviet responses to any plan to revive the German military. The reservations of these critics, however, were dealt a severe blow with the outbreak of the Korean War. Acheson saw Soviet fingerprints all over the North Korean invasion, and inferred that the USSR might also be willing to launch a surprise invasion in Europe. In September 1950, Acheson proposed at a meeting of French and British foreign ministers the establishment of a transnational European army that would include German troops. Although the Americans’ plan for a “European Defense Community” would ultimately founder in 1954 when the French rejected it, the aim of German rearmament was achieved with the incorporation of a new West German military into NATO in May 1955.³

The desire for Germany’s anchoring in the Western alliance was also shared by West German political figures as various as Chancellor Konrad Adenauer and the leader of the Social Democrats, Kurt Schumacher. The idea that West Germany must have sound democratic credentials if it were to enjoy the most visible badge of sovereignty, rearmament, influenced the German state’s policy on war crimes trials. Obviously, contemporary Germans burdened with allegations of committing Nazi war crimes could not round out the Free World’s bulwark against Soviet communism. The Bundestag’s Christmas Amnesty of 1949 had already freed Nazi defendants sentenced to jail terms of 6 months or less—a decree that affected ca. 700,000 West Germans. On January 1, 1951, it was the Americans’ turn: the U.S. occupation authorities amnestyed Nazi defendants convicted at Nuremberg with sentences less than fifteen years. This decree released
convicted industrialists like Alfried Krupp and Fritz ter Meer, co-founder of the I.G. Farben slave labor concern at Auschwitz. (Krupp, acclaimed throughout West Germany as a national hero, celebrated his release with a champagne breakfast.) By February 1951, every industrialist war criminal had been released. In that same year, the Bundestag promulgated the “131 Law,” deriving its name from Article 131 of the 1949 German Constitution (Grundgesetz, or “Basic Law”). Article 131 had assumed responsibility for regulating the “legal condition” of former Nazi bureaucrats, many of whom had fled eastern Germany with the collapse of the Third Reich and were now unemployed in the western part. Others had been expelled from the civil service by de-Nazification procedures for their proven Nazi past; at least one-third (100,000) of the bureaucrats covered by Article 131 had been classified as “compromised” (belastet). The 1951 law based on Article 131 was a coup for this group of erstwhile Nazi functionaries. It required federal, state, and local governments to allocate at least 20 percent of revenue paid for salaries to employ the 131 beneficiaries. It also provided that retirement-aged beneficiaries were entitled to pensions from the government. Although the law excluded from its purview former officials classified as “major offenders” (categories 1 and 2), in reality very few of the “131’ers” (1,227) were affected by the restriction. In this fashion, former Gauleiters and Security Service commanders who had successfully concealed their past and received mild classifications were able to reenter the West German civil service.\footnote{These developments in the early 1950’s were both symptoms and causes of a nation-wide amnesia that stole over West Germany concerning its recent genocidal history. In the years that followed, ex-Nazi officials were reabsorbed into German}
society, many of them into conspicuous positions in state and local government.

Although the public's interest in prosecuting Nazi war criminals was sparked in the late 1950's-early 1960's, a renewed commitment to bringing these individuals to justice rarely extended to former euthanasia personnel. At the same time, in those trials that did take place, German courts acquitted euthanasia defendants with reference to extrastatutory necessity and a new theory to justify acquittal: the defendant's inability to "exert his conscience" sufficiently to recognize the illegality of his actions. This new defense became another implement in the West German judiciary's toolbox to exonerate euthanasia killers.

I. The Renewal of the Collision of Duties Defense

A. Theologians for Acquittal: The Hannover Province Case (July 1950)

The doctrine of extrastatutory necessity, used as a means of acquitting euthanasia doctors, was in temporary eclipse in the Württemberg and Baden cases. In July 1950, the eclipse came to a dramatic end in a series of cases that acquitted entire slates of defendants, many of them deeply involved in murdering disabled patients during the war. In retrospect, it is clear that these trials signify the high water mark in the history of euthanasia acquittals by German courts.

The verdict in the first of these trials was published in late July 1950 by the state court of Hannover. The defendants were three officials in the provincial government of Hannover: Dr. Ludwig Gessner, former governor of the Hannover province, and two of his departmental chiefs within the public health department, Dr. Georg Andreae and Dr. F. This trio distributed decrees of the Reich government for the province of Hannover, by means of which patients were transported to transit centers (Zwischenanstalten) before
being transferred to killing institutions. For their roles in this apparatus of destruction, the defendants were charged with aiding and abetting murder and crimes against humanity.

Euthanasia came somewhat late to the former Hannover province. When the Berlin authorities decided during the summer of 1940 to include the province in the killing program, it had already been implemented for some time in Pomerania, Vienna, Freiburg, Tübingen, Württemberg, Hessen, Saxony, and the Rhine province. Responsibility for inaugurating the program that summer in the Hannover province fell to the three defendants. At the time, the provincial government administered the mental institutions at Göttingen (700 patients), Lüneburg (1,100 patients), Osnabrück (700 patients), Wunstorf (500 patients), and Hildesheim (1,200 patients). In addition to these public hospitals, the Hannover province contained religiously-affiliated institutions, including one on whose board of directors Dr. Andreae served. In some of these hospitals the provincial government accommodated disabled patients from the Hannover province (e.g., 170 “feebleminded” women housed in the Himmelsthür facility near Hildesheim). Hannover patients were also to be found in institutions outside the borders of the province: 40 patients were lodged in the Wittekindshof institution near Oeynhausen, 70 at Tillbeck, 50 at Dorsten, and a handful at Sandhorst near Aurich. The grand total of patients entrusted to the provincial government for care amounted to 7,000; of this number, ca. 4,000 were within the province’s own institutions, while 3,000 were housed in contracted institutions. All of these hospitals, provincial, religious, and contracted, would be swept up in the T-4 euthanasia plan.6
In July 1940 the first registration forms poured into the Hannover province from Berlin, sent either directly to the province’s mental hospitals or to the provincial government for further distribution. An accompanying instruction sheet ordered the provincial administrators to have the forms completed and returned to Berlin by August 1, 1940. In February 1941, the first transport lists arrived for the institutions of Göttingen, Lüneburg, and Hildesheim, containing the names of 200 patients. Each of the three institutions had to select 120 patients from the lists of 200 and prepare them for transfer. Transports based upon these lists occurred on March 7 (Lüneburg and Hildesheim) and March 11 (Göttingen). The first transports of 121 patients from Göttingen on March 11, 1941 went to the killing centers of Sonnenstein and Hadamar. The patients dispatched to Sonnenstein were gassed in April 1941, those to Hadamar in June 1941. Other institutions were obliged to transport their hand-chosen patients on April 22 and 24 (Osnabrück) and April 23 and 24 (Wunstorf). A third wave began in July and August 1941. By the end of the first phase in the euthanasia program, 1,669 patients had been transported from provincial and contracted institutions within the Hannover province from a total patient population of 7,000. All transports were conducted, at least in part, by T-4’s GEKRAT. Even after Hitler had officially ended euthanasia in August 1941, more than 12 transports from Hannover province institutions occurred. As late as February 16, 1943, 25 patients were transported from Osnabrück to the Pomeranian institution of Meseritz-Obrawalde. Although the defendants were originally charged with these later transports, as well as a transfer on September 21, 1940 of 185 mentally ill Jews from the Wunstorf institution to an “unknown destination” in Poland, the court refused to consider them in its assessment, thus restricting their liability
to the transports between March 1941 and August 1941. (The court found no evidence that the defendants were aware of the purposes behind either the transport of Jewish patients or the later transfers.)

The governor of the Hannover province, the defendant Ludwig Gessner, first learned about the euthanasia planned for the region in early summer 1940, shortly before Berlin sent registration forms to the province’s mental hospitals. Even prior to this time, he had heard rumors that patients were being destroyed in other parts of the German Reich. In response to his inquiries with the Berlin authorities, he received a visit in June 1940 from two members of the Reich Chancellery. These men informed Gessner of plans to implement "humane" euthanasia in the Hannover province. When Gessner inquired about the legal basis for such a measure, he was told a law had not yet been decreed because Hitler feared its impact on foreign propaganda. Nevertheless, Hitler’s full authority stood behind the program. At this point, according to the Hannover state court, Gessner resolved to do everything in his power to thwart the extension of euthanasia to his own province. He contacted his subordinate within the provincial administration for mental hospitals, Dr. Georg Andreae, about compiling a list of reasons describing why euthanasia was impracticable in the Hannover province. Gessner then sent a memorandum to the Reich Minister of the Interior, Dr. Wilhelm Frick, setting forth his objections to the program. In the memo—drafts of which were unavailable to the
court, as they were allegedly destroyed in a fire that gutted the state office buildings in 1943—Gessner expounded six reasons for his principled opposition to the killing program:

1. Killing mental patients did not promote the philosophy of the Nazi Party. This occurred much more through hindering the congenitally ill from reproducing by sterilization.
2. The financial burden of caring for the mentally disabled in the Hannover province was bearable, in part due to subsidies from private payors. Thus, the euthanasia measures were not needed from an economic standpoint.
3. Neither diagnoses nor prognoses with respect to mental illness were certain enough to justify the extreme measure of killing patients.
4. The euthanasia measures could produce internal political problems, especially since the church and a significant percentage of the population clearly condemned euthanasia.
5. It is unclear how these ideas, once set in motion, might ramify further, and to which group of patients the exterminatory philosophy of euthanasia might next be applied [i.e. a "slippery slope" argument].
6. The euthanasia program would bring large numbers of health care professionals into a crisis of conscience.

Conspicuously absent from the memo, as the court noted, were ethical and religious reasons for staying the hand of euthanasia. At trial, Gessner explained this absence with reference to the ideological disposition of his audience: only practical considerations would have had any chance of swaying the true believers within the Berlin government.

Quite apart from the ethical issues involved, Gessner’s six objections were eminently sensible. Perhaps for this reason they had no chance of influencing the decisions of the Berlin authorities. Although Frick was susceptible to Gessner’s argument, Hitler, who had apparently been informed of the memo’s contents, dismissed his misgivings and insisted on proceeding with euthanasia. Gessner contacted the president of the Hannover province, a man who had boasted he had the ear of Hitler, about persuading the Führer to reconsider the killing program for the province. Neither

* Several witnesses at trial vouched for the existence of the memorandum, including Dr. Walter Creutz, already acquitted in an analogous “sabotage” plan in the Rhine province.
he nor his successor agreed to approach Hitler about the subject. Gessner's remonstrance with Linden likewise had no success. In December 1940-January 1941, the head of the Rhine province system for mental hospitals, Walter Creutz, visited Gessner and Dr. Andreae in Hannover. The purpose of the visit was to discuss common strategies they could pursue to minimize the destructive effects of euthanasia. They came to the conclusion that the three governors of the provinces of Hannover, the Rhine, and Westphalia had to be persuaded to oppose the killing program. This proved to be a pipedream, as we saw, when the governor of the Rhine province, Haake, declined to support the resistance after learning that the Führer backed the operation.  

The court accepted the defendants' representations that their efforts to curb the euthanasia program were thwarted at every turn. Departmental chiefs within the Reich Ministry of the Interior reacted with "horror" when Gessner discussed with them the possibility of sabotage. Gessner sent Andreae to Berlin to inquire further about the legal basis for the operation, where he met with Werner Heyde. Andreae communicated to Heyde his and Gessner's qualms about euthanasia, to which Heyde replied that the system of transit centers would reduce the risk of error. As for the legality of the program, Heyde showed Andreae Hitler's euthanasia decree of September 1, 1939, but reminded him of the confidentiality of the matter. Andreae later relayed these details of his interview with Heyde to Gessner. Together, they agreed there was nothing further they could do to deter the implementation of the program in the Hannover province, since it had the unqualified support of Hitler.
When the first transport lists arrived in Gessner’s office in February 1941, Gessner ordered Andreae to summon the directors of the three institutions affected (Göttingen, Lüneburg, and Hildesheim) to Hannover to discuss the situation. Andreae was to impress upon the directors Gessner’s oppositional attitude toward the euthanasia plan. At trial, the directors in attendance at this meeting testified that Andreae made such a “depressed impression” on them that they immediately discerned his opposition to the killing program. From the very beginning of their colloquy, Andreae made clear to them Gessner’s critical attitude. One of the directors, a Dr. Gr., expressed his belief that “such a thing could not be desired by the Führer.” Andreae thereupon revealed to him the existence of the Hitler decree that Heyde had shown him. (Later, Dr. Gr. would write a letter to the director of the Osnabrück institution, reiterating his unshakable belief that Hitler knew nothing about the program, and that his “name was being abused” to implement it.) He then gave each director a list with the names of 200 patients, from which they were to select 120 for transfer.¹⁰

In the months ensuing after this February 1941 colloquy, Andreae consulted with Dr. Heyde to obtain exemptions of certain patients from transport. Once he had wrested Heyde’s permission from him, Andreae reduced to writing the categories of patients to be exempted and attached them to a decree signed by Gessner, which was then forwarded to Hannover mental institutions along with the second series of transport lists on March 25, 1941. The categories of patients to be exempted were those suffering from war-related injuries, age-related senility, dementia, or infectious illness; patients incapable of train transportation; and, finally, workers essential to the operation of the institution.

According to the court, Andreae strove to expand the range of exemptions from transport.
In an April 1941 letter to the directors of the province's mental hospitals, he related that not only patients suffering war injuries were to be withheld, but also all army veterans whose front-line military service could be verified (e.g. through possession of the Front Warrior's Cross or evidence of war wounds). When the Berlin authorities caught wind of this new exemption, the T-4 transport office (in its guise as GEKRAT) objected, claiming that in the tenth transport lists for the Göttingen institution three patients were deemed front veterans and withheld from transport. The same occurred with other transport lists in the province. In a May 1941 letter to the provincial government, GEKRAT asserted that exemptions could not be conducted solely because a patient served at the front; exemption extended only to patients whose mental illness was caused by injuries suffered in the war. The state court of Hannover cited GEKRAT's letter as evidence of the thoroughness with which the Berlin offices scrutinized the province’s exemptions—indicating the considerable limitations on the defendants’ freedom of action.11

In response to GEKRAT’s criticism, Andreae negotiated with Dr. Heyde a new set of criteria for exemption that would be acceptable to Berlin. Andreae set forth the new standards in a letter to the directors of Hannover’s mental hospitals:

The following may be withheld from transport:

1. War-injured.
Under this category fall not only pensioners, but also those who can be proven to suffer from a [war-related] wound . . . .
Participants in the war who have received war decorations, e.g. the Iron Cross 2nd Class, Decoration of the Wounded. This does not include the War-service Cross nor the Front Warrior Decoration.
2. Participants in the war who have acquired special decorations or recognition in the field, without being in possession of decorations. The decision I retain personally for myself [i.e. Andreae].

9. Patients with a sound capacity for work.
10. Other patients who enjoy special grounds, like capacity for imminent discharge, significant retention of personality, a heart-felt relationship with their relatives or an exceptional hardship for them. I will make the decision about these groups.\textsuperscript{12}

By the end of the euthanasia program in the Hannover province in August 1941, the court found that only 231 deaths attributable to euthanasia killing could be proven "with certainty" (3.3 percent of all institutionalized patients in the province). However, the court believed the actual number of victims was much higher. Its opinion was based on statements made by the Hadamar T-4 doctor, Hans-Bodo Gorgass, who testified that ca. 90 percent of the 1,669 patients transported to killing centers during the first phase were destroyed. If Gorgass' estimate was accurate—and the court believed it was—then the figure had to be adjusted to 1,500 victims, or 21 percent of the province's institutionalized population.\textsuperscript{13}

The indictment charged Gessner with crimes relating to his role in signing the order that implemented the killing program in Hannover province (decree of March 25, 1941) and otherwise promoting the transport of patients to their deaths. Similarly, Andreae was charged with relaying the transport order to the directors of the Göttingen, Lüneburg, and Hildesheim institutions and distributing transport lists. He was also accused of issuing a series of orders, which he either drafted or signed himself, that promoted the implementation of transport in the province. (The prosecutor withdrew additional charges for Andreae's participation in the transport of Jewish patients in September 1941 and 25 patients from Osnabrück to Meseritz-Obrawalde.) Dr. F., the medical departmental chief in the provincial government, was charged with overriding the reluctance of one institutional director at the directors' meeting in February 1941.
admonishing him he had no choice but to transport his patients. He was also charged with promoting the killing program by signing transport orders and refusing to agree to exemptions proposed by some of the Hannover institutions.

In its deliberations on the evidence, the state court of Hannover was visibly sympathetic to the defendants. Although it conceded the defendants' role "as intermediate authorities" in transmitting the Berlin decrees to the provincial hospitals, on the basis of which patients were transported to their deaths, the court insisted the defendants acted independently "only in the cases of exemptions, which, far from advancing the killing program, actually constricted it." The defendants' guiding principle throughout was "to defend the most vulnerable of the patients from transfer to the killing centers . . . ." In this respect, the court held, "they succeeded to a large degree." The court sketched the familiar dilemma facing the defendants in 1941: they could either resign their posts and thereby abandon their patients to certain disaster, or they could remain at their posts and rescue as many as possible. Through no fault of their own, the defendants were caught in a "tragic situation," in which either alternative they chose would result in the "severest consequences." In a remarkable passage, the court confessed to the inability of the law to deal adequately with this "conflict of conscience." Nothing in the German Penal Code afforded a solution to this dilemma. The excuse of necessity was inapplicable, since the defendants feared no danger to themselves in the event of their resignation. Berlin would not only have accepted Gessner's withdrawal, but would have encouraged it, since it would have vacated his position for a more ideologically suitable replacement.
Finding cold comfort in the German Code, the court turned to "the literature" of German jurists like Eberhard Schmidt and Helmut von Weber, who believed an "extrastatutory justificatory ground" existed in such cases. The court quoted Schmidt’s statement in a 1949 article: "The state may not charge the commission of an illegal act against a person in a situation of moral distress, who without moral fault is forced to commit an illegal act, the noncommission of which would burden his moral conscience."[^14] The opinion notes that the Schwurgericht (lay assessors within the state court) adopted Schmidt’s position. Complementary with Schmidt’s statement, the court invoked the mystical language of Helmut von Weber, cited two years previously by the state court of Koblenz in the Scheuem case:

> The solution of such conflicts can be found only in the conscience: the individual must come to terms with his God about it. The legal order provides no standard for its solution. On account of this deficit in competence, however, the decision made by someone after earnest examination of his conscience should not be criminalized.

The Hannover court expressed its agreement with this mystagogic interpretation, holding that "whoever therefore decides in such a conflict to remain at his post, at the price of participating in a criminal operation in order to rescue whoever can be rescued, should be excused from criminal wrongdoing."[^15]

The prominence of theology in the court’s verdict was made even more conspicuous by the testimony of Protestant ministers during the trial. Asked about the church’s view of the defendants’ actions, Pastor D. of the Inner Mission replied "it was solely a matter for the individual person . . . to make a decision that he would be able to defend before his conscience and before his God." Pastor D. retailed the example of the Württemberg

[^14]: The reader will recall that the doctrine of extrastatutory necessity was not codified in the German Penal Code until 1975.
brothers who, refusing to be a party to euthanasia, quit their posts in protest. The price, however, was a higher mortality rate among the patients of their hospital. In his view, the “higher task” was to remain with one’s patients and to do everything possible to shield them from harm—a view that Pastor D. claimed the deceased Pastor von Bodelschwingh of the Bethel institution had shared. Such testimony further convinced the Schwurgericht “that the actions of the defendants are morally justified.” The defendants were therefore acquitted by reason of an “extrastatutory collision of duties that excludes fault” (übersetzlichen Schuldauuschlussgrundsatz der Pflichtenkollision).

Much of the court’s rationale in the Hannover province case derived from the alleged moral probity of the defendants and the (relatively) low mortality rate among provincial hospitals, for which the defendants were given partial credit. As Dick de Mildt rightly observes, since the documentary record was largely destroyed during the war, much of the evidence favorable to the defendants was obtained from the defendants themselves or from their medical colleagues, some of whom (like Creutz) had faced similar indictments for their participation in the killing program. Each of the defendants had longstanding affiliations with the Nazi Party, to which he owed his professional advancement in the provincial ministry. All three of them were members of the bastion of ideological Nazism, the SS. Despite these allegiances, the court accepted witness accolades about the defendants’ decency and professionalism on their face. In Dr. de Mildt’s words, “such an approach made the exoneration of the former ‘euthanasia’ accomplices an almost foregone conclusion.”
Quite apart from its questionable assessment of the defendants’ professional record, the court’s treatment of the “collision of duties” defense is conceptually fuzzy. Typically, a collision of duties involves a situation in which an actor confronts two mutually irreconcilable legal duties; by performing one, the actor necessarily violates the other. In its verdict the court does not specify the conflicting duties. The defendants assuredly had a legal duty not to collude in the destruction of their patients; but in what sense did they have a legal duty to rescue as many patients as possible? The example of the Württemberg religious order cited by Pastor D. is illustrative here: the brothers refused to collaborate in the killing, but their “distancing” of themselves from the crime violated no law. Although Pastor D. opined that the brothers were derelict in satisfying the demands of the moral law—an opinion the court apparently shared—they cannot be accused of violating a legal duty, which is precisely what the collision of duties requires. This conceptual obscurity in the court’s position may have propelled it into the arms of theology for a solution: where the law afforded no relief, God would.

B. Expendible Life Revisited: The Andernach Case (July 1950)

The spectacle of euthanasia accomplices leaving German courtrooms as free and morally rehabilitated men reached its nadir in the re-trial of the director and staff doctor of the Andernach mental hospital in July 1950. The director was Dr. Recktenwald, who had occupied that position at Andernach in the Rhine province since 1934; his subordinate, Dr. Kreitsch, had worked as the chief doctor of the Andernach men’s ward since 1932. In July 1948, they were both charged and prosecuted for aiding and abetting murder and crimes against humanity for their contributions to Nazi euthanasia. A year later their appeal finally made it to the appellate court of Koblenz, which reversed their
conviction and remanded the case to the state court of Koblenz for re-trial. Their acquittal in the second state court proceeding firmly cemented the case within the strain of euthanasia verdicts that not only exonerated their defendants, but transformed them into champions of higher virtue. Further, the case is without peer for its keen interest in the defendants’ state of mind during their participation in the Nazi euthanasia program.

Rhineland mental hospitals received their first registration forms from the Reich Ministry of the Interior in June 1940. The secrecy draped over the killing program concealed its true purpose from the institutional directors. Many of them assumed the forms were being compiled for statistical reasons; others believed they were designed to register workers for the armaments industry. Recktenwald thought the forms were part of a planned division of mental institutions into nursing homes for more advanced cases and mental hospitals for less severe patients. Kreitsch assumed the forms related to a Reich card index maintained on mental patients. Guided by these erroneous assumptions, doctors throughout the Rhine province, including the defendants, filled out the forms and returned them to Berlin. When the provincial ministry discovered the actual reason for the forms, as we have seen in our discussion of the Rhine province “sabotage” plot, Walter Creutz, the State Councillor and Department Chief for the Rhine province's system of mental institutions, took affirmative steps to hinder the extension of euthanasia to the Rhineland. His efforts, however, miscarried when state governor Haake refused to oppose a measure supported by Hitler. The Berlin authorities demanded that the Andernach and Galkhausen institutions be converted into transit centers for assembling the patients designated for euthanasia. The two facilities were chosen because of their proximity to arteries of transportation: with ready access to the autobahn and the German
rail system, T-4 could more easily transfer the doomed patients from the transit centers to
the killing institutions. Only the directors of Galkhausen and Andemach were to be
initiated into the killing program; all other staff members were to be kept in the dark.18

When Creutz informed Recktenwald of the operation, Recktenwald allegedly
recoiled in revulsion and threatened to quit. Creutz besought him to remain in his job and
save as many patients as he could. He then told Recktenwald about Werner Heyde’s oral
promise to him that a subsequent exam could be performed in the transit centers, on the
basis of which patients might be exempted from transport. Such exams would afford
them an opportunity to save patients who would otherwise be killed. Creutz’s suasion
was effective, in part because he told Recktenwald that Dr. Kreitsch and another doctor
had been designated to perform the subsequent exams at Andemach. According to the
court, after his conversation with Creutz Recktenwald spoke with other physicians about
his “crisis of conscience.” All told him he ought to remain in his job and collaborate with
Creutz’s sabotage plan. An attorney friend from Wuppertal explained to him that mere
participation in the operation to oppose and counter it did not fulfill the elements of
homicide. These inputs apparently tipped the scales even further in favor of his
participation. He agreed to remain director of Andemach in order to work at
crosspurposes with the euthanasia program.

On March 29, 1941, Recktenwald attended a meeting of the directors of
Rhineland mental hospitals in Grafenberg held by Walter Creutz.19 At this meeting,
Creutz revealed the scope of the euthanasia program, then unveiled his plan to mount a
concerted sabotage of it. After securing the assent of all the participants to his plan,
Creutz described how they could minimize the number of transportees by consciously
bringing as many patients as possible within the exemptions Berlin had allowed. This could best be accomplished by exploiting the vagueness of Berlin's directives in subsequent examinations conducted in both the home institutions and the transit centers. Creutz urged his listeners to practice chicanery as needed in order to save patients' lives: thus, where appropriate, they were to characterize the condition of patients injured in accidents as being combat-related. Throughout his presentation, Creutz emphasized the need for caution, since the Berlin authorities, he warned, would analyze their exemptions and might require Creutz personally to justify them. In the sabotage plan Creutz outlined, Recktenwald and Kreitsch confronted the most "thankless task:" they were to devise some way of exempting patients transferred to their transit center of Anderach who had been deemed "hopeless" by their home institutions.30

For intensity of interest in a defendant's psychological makeup, none of the postwar trials of euthanasia defendants matched the Koblenz court in the Recktenwald case. The court was impressed with Recktenwald's "humanistic education," which supposedly inoculated him against the "realistic utilitarian thinking" of Nazi euthanasia. The court moreover stressed Recktenwald's pioneering work in modern psychiatric therapy. He was the first director of an institution in the Rhine province to apply "the most modern methods of healing to 'hopeless' cases," including work, insulin, and shock therapy. "It would have been foreign to his life's work," the court maintained, "if he who had dedicated his life to the mentally ill and had observed a strict professional ethos, should now violate all his sacred principles and his life's work by killing the very patients so dear to him ..." Recktenwald had never quailed about expressing his critical attitude toward the euthanasia program, an attitude he shared with his friends and most
intimate colleagues, but also with T-4 potentates like Hefelmann, v. Hegener, Heyde, and Paul Nitsche. These Nazi worthies were aware of Recktenwald’s position, and complained about it. Heyde and some of his colleagues met in Düsseldorf to reexamine some of the patients Recktenwald had exempted from transport.

As for Dr. Kreitsch, the court described him as enjoying the “complete faith” of Recktenwald. Creutz regarded him as a staunch opponent of euthanasia, and for this reason appointed him to conduct the subsequent examinations of patients in Andernach. Based on his known antipathy for the killing program, Kreitsch was inserted as a monkey wrench to disrupt the “smooth functioning” of the operation. His task was to examine the patients earmarked for killing by the Berlin Gutachter, and to propose to Dr. Recktenwald possibilities for their exemption. One witness testified that Kreitsch had confided in him his uncompromising rejection of euthanasia, referring to it as a Schweinerei (disgrace).²¹

In the eyes of the court, the heart of the prosecution’s case against Recktenwald and Kreitsch was their collaboration with the transport of patients from Andernach to Hadamar in 1941. Between May 9 and July 11, 1941, some 517 patients were sent from their home institutions (Ursprungsanstalten) in the Rhine province to the transit center at Andernach. After July 11 until the cessation of euthanasia in September 1941, another 352 transportees arrived there from the same home institutions. Upon arrival at Andernach, Recktenwald examined each patient as well as the accompanying medical records. Although he had been sent the “worst material,” he and Kreitsch subjected the patients to work therapy treatment, managing in some cases, contrary to all expectations, to enable the patient to perform “productive work,” which Recktenwald then used as a
ground for exemption. "This intensive treatment of the transferred patients," the court remarked, "already violated Berlin's orders, because Berlin had permitted only a subsequent exam in the transit center, not treatment of the patients removed there." Of the 517 patients transferred to Andernach until July 11, Recktenwald and Kreitsch exempted 42 of them from transport to Hadamar. The court was convinced that several of these exemptions were patent acts of sabotage. It reconstructed the final lists of the numbers of the disabled later transferred to Hadamar, arriving at a figure of 447 patients ultimately killed in Hadamar after transport from Andernach. Due to Hitler's order in late August 1941 to stop the killing program, the additional 352 patients transferred to Andernach after July 11 were spared killing in Hadamar. The court added this figure to the 42 patients exempted by the defendants (including 26 who had died in the meantime of natural causes) to reach a grand total of 420 patients rescued by them from the euthanasia program, or 50 percent of the patients originally earmarked for killing.22

We may question the court's fuzzy math in arriving at this percentage, but there is no disputing the court's admiration for the defendants' achievement—especially as compared with other provincial German health systems during the war. As the Düsseldorf court had in the Creutz trial, the Koblenz court cited the example of Professor Gu., the head of the Vienna health system, who had refused in 1940 to collaborate in the killing program. Berlin responded, as we have already seen, by replacing him with a more pliable representative. The result was the extermination of one-half of Vienna's disabled patients. One witness, the chief doctor at the Bethel institution, testified that the staffs of two institutions, Stettin and Zwiefalten, had refused to complete the T-4 registration forms. Consequently, teams of SS doctors arrived at the hospitals to perform
their own examinations on the patients, resulting in their near total destruction.

Comparison with the other Rhine province transit center, Galkhausen, also redounded to Recktenwald’s credit. Of the 542 patients transported to Galkhausen, the medical staff exempted 24 and discharged two—figures that fall short of Andernach, which had exempted 37 of the 517 patients and discharged five. At trial, witnesses—all of them doctors—declared that to abandon the patients and forego the opportunity to save at least some of them would have been an act of desertion.

In assessing the defendants’ culpability in furthering the criminal aims of T-4, the court found no evidence that either man promoted the killing program through his actions. They did not select patients for transport to Andernach: this had been done chiefly by the Berlin commission under Professor Paul Nitsche. The subsequent examinations undertaken by the defendants did not facilitate the program, but rather stymied it by exempting some patients who would have been transported to their deaths but for the exams. The critical issue, however, was the defendants’ role in transporting patients not considered suitable for exemption. These non-exemptions, the court held, did not promote the euthanasia program, since they involved the most “hopeless” cases: their exemption would have aroused the suspicion of the Berlin authorities, who would surely have sent their own commission to Andernach to examine and transfer the patients to Hadamar. Had Recktenwald exempted all the patients transported to Andernach, regardless of their condition, he would have endangered Creutz’s sabotage plan; Berlin would have recognized immediately what Creutz and his fellow saboteurs were doing. Far from promoting Berlin’s design, Recktenwald made extraordinary contributions to foiling it, especially by applying his modern therapeutic measures to improve the
conditions of some severely ill patients to the point where he could justify their exemption. This was an important point for the court: Recktenwald managed to rescue patients whom his co-conspirators in the sabotage plan "had not dared to retain." For this reason, Recktenwald and Kreitsch’s role in the province-wide sabotage plan was "essential" and "decisive."^23

Recktenwald and Kreitsch were finally acquitted on the basis of a collision of duties. On the one hand, they had the legal duty "to use their medical arts for the healing of their patients to the best of their ability;" this duty could only be satisfied "if they participated in the operation and accepted the necessity of surrendering the unsavable." Had they withdrawn their participation, they would have been replaced by zealous auxiliaries of T-4, and the "majority of the rescued patients would have been destroyed." On the other hand, they had a legal duty to abstain from participation in the killing of patients. This second duty, in the view of the court’s Schwurgericht, was subordinate to the overriding duty to save patients. To hold the defendants criminally liable for aiding and abetting murder under these circumstances would violate the "natural sense of justice" (natürliches Rechtsempfinden). Insofar as the court restricted its rationale for acquittal to the collision of duties, its decision was defensible. In a strange obiter dicta, however, the court also justified its acquittal of the defendants with reference to preserving the "higher legal good" (Rechtsgut)—i.e., the lives of the healthier patients—by sacrificing the lesser good—i.e., the lives of the "hopeless" cases. Such a sacrifice, the court stated, "is not illegal;" it is comparable to the case of a doctor aborting the life of a fetus (the lesser legal good) to save the life of the mother (the higher good). By injecting this reflection into its verdict, the court suggested that the value of human lives
could be measured against each other, and one group legally proclaimed superior to the other. Such a style of thought, as noted in connection with the Creutz trial, is redolent of the Nazis' own hierarchy of valuable and less valuable groups of human life. It suggests that, however subtle or unconscious, the judges shared an affinity with the Nazi thought world that affected their deliberations on the defendants' complicity in murder.\(^{24}\)

The power of non-legal factors to shape and even determine the outcomes of trials is peculiarly evident when we consider the diametrical interpretations of the factual record. Recktenwald and Kreitsch emerged from the Koblenz courtroom not only assoiled of all wrongdoing, but as moral heroes. That this interpretation was not the only one deducible from the evidence is demonstrated by the defendants' conviction in the first trial. With reference to the same factual record, the Koblenz court arrived at a dramatically different conclusion:

[The defendants] consciously let themselves become engaged in the murderous undertaking of the euthanasia program. They willingly, if reluctantly, accepted the role designed for them . . . and by and large performed it as expected of them. By doing so they made an essential contribution to the euthanasia program and were links in the chain which runs from the "Führer Chancellery" and the Reich Ministry of the Interior down to the gas chamber and the crematorium in Hadamar.\(^{25}\)

In the theoretical discourse of Critical Legal Studies, such a dissonance among interpretations of the same evidentiary record is called "flipability." The term is a playful but trenchant critique of the indeterminacy of legal "facts" and doctrines—an idea that challenges at its root the very idea of value-free adjudication.\(^{26}\) The "flipability" of legal decisions points to the role of non-formalistic factors in legal reasoning, e.g., social, economic, or political considerations that are the \textit{de facto} motors driving judicial process. The force of these extra-juridical factors may operate consciously or unconsciously within the mind of the judge, and in different degrees of intensity at various times.
Again, it cannot be stressed enough that the German judges in these cases were steeped in a cultural milieu thirsting for a break with the recent National Socialist past, and yearning for a fresh start at a renewed German nationhood. It is probably impossible to prove a half-century later that the Koblenz judges desired to acquit the defendants independently of the evidence against them. The context of the trial, however, cannot be disregarded in our efforts to understand how German courts interpreted euthanasia crimes. That context included the defendants' earlier conviction; the increasing incidence of acquittals of euthanasia defendants with reference to a "collision of duties;" the growing Cold War that pitted the U.S. against the Soviets; the growing popularity in western Germany of right wing radicalism; the restoration of many former Nazi civil servants to their jobs; and, one month before the defendants' retrial, the outbreak of the Korean War. All these factors should be considered in light of the logic of the court's opinion on re-trial, including its dubious insistence that the defendants "saved" 50 percent of their patients. When we do so, it is hard to escape the conclusion that, wittingly or not, the Koblenz court contributed to the ruin of postwar retribution for these monstrous crimes.

C. Leniency and the True Believer: The Eglfing-Haar Case (March 1951)

In the short-lived 1961 proceedings against the chief of the Führer's Chancellery, section IIb (responsible for the children's operation), Dr. Hans Hefelmann, a schoolteacher named Ludwig Lehner testified about his visit to the Eglfing-Haar mental hospital during the war. In the course of his visit, the institution's director, Dr. Hermann Pfannmüller, escorted him to the children's ward. Along the way, Pfannmüller's
language was peppered with references to "life unworthy of life." Arriving in the ward, he pulled a child out of his bed and showed it to the onlookers. The witness described the incident as follows:

He took [the child] like you would a rabbit. I would estimate that the child was around three years old. He was totally emaciated and shriveled and, as was obvious even for a medical layman, on the verge of starving to death. Pfannmüller said this was the easiest method, since you did not need gas or anything else. . . . Today it is almost impossible to talk about this matter, the remembrance will not leave me. I can still see this doctor in a white coat standing before us with a satanic expression on his face, exhibiting this starving child, . . . and declaring with a laugh that it is the simplest method.

Lehner's testimony in 1961 closely tracks his account provided to the U.S. tribunal in the American Doctor's Trial 14 years earlier. The earlier testimony, however, paints a grimmer and more disturbing portrait of Pfannmüller:

In ca. 20 children's beds lie children between the ages of one and five. Pfannmüller, who called them a burden on the body of the Volk [Volkskörper], recommended their destruction through gradual starvation. With these words he withdrew a child from its small bed . . . . While he exhibited the child like a dead rabbit, he stated with the air of an expert and a cynical grin: "With this one it will only be two or three more days." The image of the fat grinning man, in his pudgy hand the whimpering skeleton, surrounded by the other starving children, I can never forget.27

Pfannmüller, we will recall, testified as a defense witness at the Doctors' Trial.28 In March 1951, it was his turn to stand before the bar of justice, charged with murder for his role in expediting transports of patients to killing centers and for the deaths of children in the Egling-Haar children's ward. At the time of his trial, Pfannmüller was in his mid-sixties, and thus belonged to the cohort of Nazi doctors subjected to the traumas and privations of the First World War. Unlike most of the doctors in the present study, who typically joined the Nazi Party after 1933 for career-related reasons, he was an "old fighter" (alter Kämpfer) who had joined the Party in the early 1920's. From 1922 until 1925, he held the Party office of Kreisleiter (district director), in the capacity of which he was active as a speaker at election assemblies. Temporarily leaving the Party in the mid-
twenties, Pfannmüller re-joined it in 1933 at the request of the mayor of Kaufbeuren. Thereafter he resumed his work as a speaker employed by the Racial-Political Office for Hereditary and Racial Questions. In addition to his Party membership, he also held the rank of Truppführer in the SA. His reputation as a devoted Nazi and medical expert earned him appointment to the Office for Technology, in which he was tasked with medically examining the "talented" children of soldiers killed in action in order to determine whether they were genetically "worthy" of preferential investment by the Office. The Nazi Party recognized his skills by using him as an expert lecturer (Fachredner) in public meetings. The aim of his lectures was to "instruct" the German population on the contents of the recently promulgated Hereditary Health Law from the perspective of "racial-political" and "hereditary-medical" concerns.29

At trial, Pfannmüller told the court he had become involved in the euthanasia question after the death of his father. The elder Pfannmüller suffered from an immedicable kidney disorder that caused him terrible pain until he received a lethal injection from his attending physician. This experience was seared into Pfannmüller Junior’s mind, as were his experiences during the Great War as a doctor in the psychiatric hospital in Homburg, where he witnessed the deaths of patients "like flies" from malnutrition "under the most horrifying conditions." According to Pfannmüller, the highest mortality rate affected the "working patients," while the incurable non-working patients, the "human corpses," survived. After the war, still affected by his experiences, he delved into the literature on euthanasia, especially the work of Alfred Hoche and Karl
Binding. This work left a lasting impression on Pfannmüller’s thought. He even had occasion to meet Hoche during a Congress in Freiburg in 1922. In this fashion, as related in his own words, he became a firm adherent of euthanasia.

Pfannmüller came to Eglfing-Haar via a circuitous route. In 1930, he became deputy director of care for the Kaufbeuren mental hospital, working simultaneously as a consultant in a clinic for the emotionally-disturbed in Augsburg. In 1936 he became medical director of the consultation office for Hereditary and Racial Care in Augsburg’s health department. He remained in this position until 1938, when the Bavarian government appointed him director of the mental institution of Eglfing-Haar, a position he held until the end of the war. In November 1939 Pfannmüller submitted a report to the public insurance examining board regarding the maintenance of “life unworthy of life” in state hospitals. He voiced his opinion on the need to “eradicate” such patients with lapidary clarity:

As a confessionally unattached and fervent National Socialist director of a mental hospital, I feel myself obligated to demonstrate an actual conservation measure that is suitable to influence favorably the economic standing of the institutions. In this position, I believe it appropriate to refer clearly to the need for us doctors to grasp the importance of eradicating life unworthy of life. Those unfortunate patients who live only a shadow life of a normal human being, who have become perfectly useless for social membership in the human community by virtue of their illness, whose existence is to themselves, their relatives, and their surroundings a torment and a burden, must be subjected to rigorous eradication.30

Pfannmüller went on, in a passage evocative of Oliver Wendell Holmes’ opinion in *Buck v. Bell:*  

Precisely these days, in which the heaviest sacrifice of blood and life is demanded of our most valuable men, teach us emphatically that it should not be possible on economic grounds to fill institutions with living corpses for the sake of a high principle of medical

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30 See chapter 2.
care that is no longer relevant. For me it is unimaginable that the best, blooming youth
die at the front while incorrigible asocials and irresponsible antisocials have a secure
existence in our institutions.

The "high principle of medical care" Pfannmüller refers to is the physician's devotion to
the well-being of the patient, as enjoined by the Hippocratic Oath.

Sometime in the summer of 1940, he attended a meeting in Berlin to discuss the
overcrowding in German mental institutions and ways to provide health care to patients
amenable to treatment. In attendance were Philip Bouhler, Reich Health Leader
Leonardo Conti, Viktor Brack, Karl Brandt, and Herbert Linden. At this meeting,
according to Pfannmüller, Bouhler revealed that all institutionalized patients were to be
medically evaluated in order to separate the incurable patients from those responsive to
treatment. The incurables would ultimately be accommodated in facilities specially
equipped for their care. For this purpose, registration forms would be distributed to all
institutions, which were to be filled out and returned to the Reich Working Committee in
Berlin. Here, expert commissions would review the forms to determine whether the
patient should be transported to the special facility.

At Eglfing-Haar, Pfannmüller distributed the forms to his staff doctors and
explained to them the guidelines to be observed in filling them out. Interestingly, he also
swore them to the strictest secrecy. After his doctors had completed the forms and
returned them to Pfannmüller, he examined the patients himself to guarantee the accuracy
of the report. He then sent the forms with his signature to Berlin. In September 1940,
Berlin notified him that a certain number of incurable patients were to be transported on
orders of the Reich Defense Commissar. He was to prepare the patients whose names
appeared on the transport list for a trip lasting several hours. The Charitable Patient
Transportation Service, Inc. (GEKRAT-GmbH) in Berlin would contact him with dates for picking up these patients. The court could not determine whether Pfannmüller knew of the true purpose behind the first transport, the patients of which were almost without exception destroyed. However, it was proven that after the first transport had left, Bouhler visited him at Eglfing-Haar and showed him Hitler’s decree of 1 September 1939, at the same time explaining that the patients being transported were to receive a “mercy death.” Despite Bouhler’s disclosure, Pfannmüller continued to prepare his patients for transfer to the killing centers at Grafeneck and Hartheim. Nearly all were killed. The last transport before the cessation of the official killing program in August left Eglfing-Haar in June 1941.31

According to the court, Pfannmüller was aware that at least 918 of the patients who left Eglfing-Haar were being transported to their deaths. Exact figures regarding how many of these transportees were actually killed were unavailable, since Pfannmüller incinerated the institution’s records before the arrival of American troops.

In addition to his complicity in sending his patients to the killing centers, Pfannmüller was charged with collaborating in the destruction of handicapped children. In October 1941, he installed a children’s ward at Eglfing-Haar to receive the so-called “Reich Committee children,” that is, children designated for killing by T-4’s bogus “Reich Committee for the Scientific Registration of Severe Hereditary Ailments” (Reichsausschuss zur wissenschaftlichen Erfassung von erb- und anlagebedingten schweren Leiden). The determination was made by an “expert council” of three psychiatrists, which was then conveyed to the child’s home institution. The designated children were either killed on the spot or transferred to a children’s ward designed, like
Pfannmüller’s, for the express purpose of killing them. The ward at Eglfing-Haar accommodated on average between 50 and 60 children. When the “treatment authorization”—a euphemism for the killing order—arrived from Berlin, Pfannmüller examined the affected children; if he was satisfied that the child was incurable, and thus a specimen of “life unworthy of life,” he authorized his staff doctor to euthanize the child. From October 1941 until late April 1945, at least 120 children, ranging in ages from a few months to 16 years, were killed with overdoses of luminal (usually sprinkled in their food) or with injections of morphine and scopolamine. Death typically supervened within 3 days, although some patients suffered longer death throes, dying of acute pneumonia after three weeks. The advantages of these forms of killing, by Pfannmüller’s own admission, resided in their close resemblance to natural causes of death—a charade important to the success of the operation, as it hoodwinked parents who visited their children on a regular basis.

Around the time that the “special treatment” was administered, the parents or relatives were notified that their child was incurably ill. A short time later, a letter arrived informing them their child had died and the burial already concluded. In no cases were the bodies returned to the next of kin. The terse letters often cited pneumonia or tuberculosis as causes of death. On Pfannmüller’s orders, the corpses of the dead children were dissected and their brains sent to a research center in Berlin, where they were processed into cross sections. In at least two cases involving severely deformed children, Pfannmüller himself gave the lethal injections.
Medical personnel in the children’s ward were instructed to observe absolute secrecy about the activities of the ward upon pain of severe penalty, including death. The nursing staff was sworn to secrecy about the ward’s use of luminal.

Pfannmüller’s defense insisted that euthanasia was justifiable on ethical and moral grounds. Euthanasia might be debated and discussed, as it had been for centuries, but attaching criminal liability to its practitioners was precluded. As he had at the U.S. Doctor’s Trial, he struck the pose of a humanitarian committed to the welfare of his patients. Although the Munich state court refused to accept these arguments as a basis for acquittal, it did treat Pfannmüller with kids’ gloves he hardly deserved. First, in the face of evidence that showed Pfannmüller’s calloused attitude toward the mentally disabled, the court characterized him as an accomplice, not a perpetrator, because he “by no means had the animus auctoris [intent to act for one’s own purposes],” and “stood outside the actual circle of those who drove forward these mass killings of mental patients.” Second, Pfannmüller could be convicted only of aiding and abetting manslaughter, not murder, because he was unaware “of those circumstances of the crime which made the killing of the transported patients either malicious or cruel” as required by the German law of murder. Acknowledging that the overarching euthanasia program was a “malicious and cruel procedure,” the court refused to characterize Pfannmüller’s role in it with the same language. In a perplexing maneuver of legal sophistry, the court conceded that he had been aware the patients and their relatives were being deceived about the goals of the transports, but held it was unproven that he had been personally aware of “the methods of selection, the fundamentals according to which the selections
were made, and the entire tactics of deception outside his own institution.” Apparently, in the eyes of this court, such knowledge was essential to finding him guilty of aiding and abetting murder for organizing transports of his own patients to their deaths. All that could be proven was that he aided and abetted a form of killing that fell short of legal murder—namely, manslaughter (*Totschlag*). Third, the court inexplicably denied that the destruction of disabled children in the Eglsing-Haar ward amounted to murder, since none of the conditions for murder specified by sec. 211 were present: the killings were neither base, malicious, nor cruel. In fact, the court accepted Pfannmüller’s self-portrayal as an advocate of euthanasia for “humane” motives. The stigma of a judicial determination of reprehensible action would not accrue to Hermann Pfannmüller.\(^\text{32}\)

Finally, the Munich state court paid him the courtesy of acquitting him of any wrongdoing for his role in starving patients to death through a premeditated system of reduced food rations. Due to dislocations caused by the war, the Bavarian Interior Ministry published an order on November 30, 1942 instructing the directors of Bavarian mental hospitals to provide a “special ration” (*Sonderkost*) for their non-working patients. This special ration was to be stripped of fat and meat, and consisted of little more than boiled vegetables and water. The court timidly referred to the special ration as a means of transferring essential nutriment from non-working to working patients. In fact, at the conference of directors that preceded publication of the November decree, Dr. Valentin Faltlhauser, director of the Kaufbeuren mental hospital, declared that after cancellation of the formal euthanasia program in August 1941 wiping out patients could now be done by gradually starving them to death. The *Sonderkost* was Faltlhauser’s brainchild, and he

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*The court’s view of Pfannmüller stands in stark contrast with Viktor Brack’s testimony at the Doctor’s
left no question that it was intended to cause the patient’s death within 3 months. Not surprisingly, Pfannmüller offered a more benign interpretation of the special ration: it was designed only to guarantee the working patients an extra portion to compensate for their higher expenditure of calories, not to cause the deaths of non-working patients through starvation. He claimed that he had personally instructed his chief cook to supplement the *Sonderkost* with meat and fat, and that he had even sampled it on several occasions. The court accepted Pfannmüller’s account without demur, calling the *Sonderkost* “meager fare,” but denying that it caused malnourishment, since the addition of fat in the preparation furnished the necessary amount of protein. Because Pfannmüller’s aim with the *Sonderkost* was not to starve bedridden patients, the court acquitted him of all deaths associated with it.

Notwithstanding his documented collaboration in the murders of patients, the Munich court convicted Pfannmüller of aiding and abetting manslaughter. In considering his punishment, the court reprised Pfannmüller’s stylized self-portrayal as a humanitarian—and did so in the cadences of Social Darwinism: “On the basis of his experiences within his own family and during his time as a doctor in mental hospitals in the First World War, he became convinced that the killing of incurable patients was a deliverance for them. *It was a measure tantamount to a natural selection process.*” (emphasis added) Moreover, the court considered it a factor in mitigation that Pfannmüller, like all Germans under Nazism, was no doubt influenced through war propaganda to assign a reduced “moral value” to human life, thus transmuting the act of

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Trial, where Brack identified Pfannmüller as an important cog in the euthanasia machine.

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killing into something trivial. In view of these mitigating factors, as well as his “grave” illness and advanced age, he was sentenced to a five-year prison term. This sentence was further whittled down to two years after crediting him with time already served.

The Pfannmüller case, although not acquitting its defendant outright, was nonetheless a scandalous travesty of justice in the postwar era. The case indicated the German judiciary’s willingness not only to treat egregious offenders as accomplices (a trend emerging already in the late 1940’s), but to deny altogether that their actions were murder under German criminal law. The novelty of the Pfannmüller case, as a German expert on Nazi criminality, Willi Dressen, has asserted, is its denial of the element of “malice” *(Heimtücke)* in its assessment of euthanasia killing. As we have seen in our analysis of the German cases, courts rarely found that defendants acted out of “base motives.” However, in most of the trials we have examined (except those in which defendants were acquitted), German courts upheld the existence of “malice” in order to find defendants guilty of aiding and abetting murder *(Beihilfe zum Mord)*. The Pfannmüller case changed the complexion of this assessment. In the ensuing years covered by our study, no euthanasia doctors would be convicted by West German courts of murder. Pfannmüller’s trial was a decisive step down this path toward leniency and acquittal.

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“Malice” under German law is a term of art, meaning that a defendant has killed or collaborated in killing in a manner that exploits the vulnerability of the victim. Secretly lacing a victim’s food with poison, for example, qualified as a “malicious” killing in the earlier cases. See supra, chapter 5.
II. The Turn of the Screw: the “Exertion of Conscience” Cases

On March 18, 1952, the West German Supreme Court (*Bundesgerichtshof*) issued a verdict that would have a profound effect on the adjudication of euthanasia trials thereafter. The High Court held that a defendant could be punished for a criminal act only if he or she was capable of conforming to the law’s requirements. Where a perpetrator, after maximum exertions of the understanding, could not reconcile the demands of the law with the demands of the perpetrator’s own conscience, punishment could not be meted out if the perpetrator chose to follow his or her conscience in violation of the law. So long as the defendant acted “conscientiously,” no criminal liability would follow.\(^{34}\)

The Supreme Court’s holding would offer regional courts fresh opportunities to acquit euthanasia defendants in the years after 1952. A trio of cases decided in December 1953 premised their acquittals on this “exertion of conscience” doctrine. An analysis of the opinions reveals that, as in the extrastatutory necessity/collision of duties cases, the outcomes of these trials were conditioned less by the neutral application of legal theory to the facts than the court’s preexisting will to acquit.

A. The Conscientious Childkiller: The Sachsenberg Case (December 1953)

Among the first cases to acquit a euthanasia defendant on the “exertion of conscience” defense was that of Dr. Alfred Leu, a physician at the Sachsenberg psychiatric hospital near Schwerin in the province of Mecklenburg, where he had worked from 1929 until April 1945. In his first trial in October 1951, Leu was charged with complicity in the murders of adults and children at the Sachsenberg institution. His defense was the classic “sabotage” argument: he collaborated in the killings only in order...
to minimize the damage and save as many as possible. Had he resigned his post, a more zealous doctor would have replaced him, resulting in the deaths of still more patients. The state court of Cologne accepted this argument, holding that it would be a miscarriage of justice to convict a defendant ensnared like Leu in a "tragic predicament." Leu was acquitted and his case appealed to the German Supreme Court, which reversed and remanded it for retrial.

In its findings of fact on re-trial, the Cologne state court found that Leu filled out the first shipments of registration forms without knowledge of their purpose. He did not learn of the euthanasia program until late 1940-early 1941. With the disclosure, he realized that open refusal to complete the forms would invite a visit from a commission of SS doctors, whose ideological zeal would ensure that two-thirds or more of his patients would be registered for the killing program. He resolved to continue filling out the forms in order to accentuate, where possible, his patients' capacity for work. In this way, he could bend and distort his reports to save patients who otherwise would fall prey to the assessments of an SS physician. He felt obligated by his "medical conscience" to contribute to the destruction of hopeless terminal cases so as to save patients still amenable to therapy. This was the strategy Leu followed henceforth, the court found.

On one occasion in early 1941, Leu added the names of three newly arrived patients to a transport list. They, along with a collection of patients from Leu's nursing station, were taken to the killing center at Bernburg and gassed.35

In summer 1941 the military confiscated the Lewenberg mental institution for use as a military reserve hospital. Lewenberg was the site of a Kinderfachabteilung, or children's ward, designed to euthanize handicapped children. With the conversion of
Lewenberg into a military hospital, the 280 patients of this children’s ward were sent to Sachsenberg, where they were accommodated in Leu’s empty nursing station. (His station had been depopulated by the transports to Bernburg.) Sachsenberg’s director, Dr. Fischer, appointed Leu head of the new children’s ward, and reported the appointment to the Reich Ministry of the Interior. In September 1941, the Reich Chancellery summoned Leu to a meeting in Berlin with the directors of the Reich Committee, Drs. Hefelmann and von Hegener. During this meeting, the Committee’s directors told Leu that the new ward in Sachsenberg under his supervision would undertake the destruction of disabled children. Leu claimed at trial that he declined his participation in the planned measures, a refusal that Hefelmann and von Hegener accepted. This notwithstanding, a few weeks later “treatment authorizations” arrived at Sachsenberg from the Reich Committee, identifying ca. 180 patients in Leu’s children’s ward for euthanasia. The Reich Committee’s chief medical experts had chosen these patients based on forms submitted to them by the former head of the ward at Lewenberg.

In a subsequent meeting with Hefelmann and von Hegener, Leu was told he could exempt five percent of the children from transport without any further justification. They also permitted him to withhold other children from transfer, so long as he could support the exemption in writing to the Reich Committee in accordance with the applicable guidelines (i.e., educability of the exempted child). Returning to Schwerin, Leu decided to assume responsibility for the killing program in the ward. Leu claimed he knew the killing program was wrong, even if it were sanctioned by a valid law; on the other hand, cooperating with it was the only way to rescue some of the children from death. The court sketched Leu’s dilemma as a prototypical collision of duties: “The defendant stood
before a choice: either to distance himself from the killing and refuse the order given by Berlin, thereby abandoning two-thirds of his department to destruction; or to carry out the extermination orders, thereby participating in the deaths of some children in order to rescue a considerable number of other patients who would otherwise be killed." Leu felt compelled by his conscience to "sabotage the goals of the Reich Committee and the euthanasia program it sponsored." He thus believed it was his duty to collude in the destruction of a "limited" number of patients to save others.36

Having made his decision, Leu spoke with the Sachsenberg director, Dr. Fischer, about detailing experienced nurses to the operation. Leu chose the four nurses himself, whom he initiated into the plan to kill "incurable" children on orders from Berlin. The children would be dispatched with excessive dosages of veronal and luminal. Afterwards, he swore each of the nurses to silence about the program. When the first lists of patients arrived from Berlin, they contained the names of 180 children. The court found that Leu exceeded the Reich Committee’s guidelines in exempting 110 children from euthanasia. The remaining 70, described by one witness as being in a "horrible" physical state, were killed in the ward.

In the striking incongruity between the adverse evidence of criminal wrongdoing and the final verdict of acquittal, the Leu case may be unique among German euthanasia trials. Statements by Leu in support of the euthanasia program were abundantly documented. Several witnesses testified that Leu had professed to them his unwavering commitment to euthanasia. Other witnesses stepped forward to incriminate Leu, claiming that they personally witnessed unaccountable deaths in the departments under his supervision. These witnesses attested to their convictions at the time that Leu had
induced the patients' deaths through overdoses of narcotics. Their conviction rested on the observed fact that patients who seemed perfectly healthy were dead only days later. A staff doctor at Sachsenberg, a Dr. Br., described how he had witnessed events in Leu's stations that convinced him the defendant was murdering his patients with overdoses. Dr. Br. had been so upset by these occurrences that he spoke of the Sachsenberg facility as a "murder institution." He believed Leu continued to kill adult patients after the Kinderaktion had been set in motion. Another witness claimed Leu had killed between 200-300 adults at Sachsenberg with overdoses of veronal—a charge he had supposedly leveled against Leu sometime in 1941. Leu had denied the charge at the time, but had characterized euthanasia of incurable patients as a "welcome measure." During their meeting with the authorities in Berlin, Leu denounced this witness and Dr. Br. to the Reich Committee. Hefelmann and von Hegener responded by praising Leu as a "great guy" who "acted entirely in accordance with the wishes of the Reich Committee."

Leu's defense against these allegations during his trial was predictable: he had projected the appearance of an adherent of euthanasia in order to avoid suspicion. Had he gone public with his inward opposition to it, his reports to the Reich Committee would have been analyzed with a fine-tooth comb, thus jeopardizing his sabotage scheme. To the charges that adult patients were killed with overdoses of narcotics, Leu replied the witnesses had misinterpreted their brief glimpse of patients in a drug-induced deep sleep, mistaking them for patients on the verge of death. Leu explicitly denied authorizing the killing of adults with excessive dosages of veronal or luminal. The narcotics he administered were all in the medically prescribed doses to alleviate chronic motor restlessness. The Schwurgericht (lay assessors), although finding the witness testimony
credible, nonetheless refused to accept it. According to the Schwurgericht, the witnesses were not in a position to observe and report accurately on occurrences in Leu’s station. They knew nothing about the patients’ medical histories or the narcotics prescribed for them; they made no inquiries of the nursing staff nor ascertained the actual cause of death through an autopsy. Fatal to the acceptance of their testimony was the witness’ inability to cite a single verifiable case in which drug overdoses caused by Leu resulted in a patient’s death. To the witnesses’ adamant claim that healthy patients who entered Leu’s station were seen shortly thereafter in a coma-like state followed by reports of their deaths, the court responded the witnesses may not have truly seen what they thought they saw. The patients’ condition might have been due to liberal doses of narcotics given to suppress their violently restless motor, as Leu had claimed. The court stated that the witnesses may have seen these tranquilized patients. Their subsequent deaths, as Leu had argued, may have ensued as a result of prolonged sleep that weakened the patients through inactivity and malnutrition, making them more susceptible to illness. The court accepted this far-fetched and self-serving scenario as “unrefuted” against Leu.37

Acquitting Leu of the charge of killing adults at Sachsenberg, the court next turned to the children’s ward killings. Here, the court appeared to accept Leu’s representation of sabotage in toto. Leu, the court held, had participated in euthanasia only to save as many patients as possible. He could not, however, have carried off the deception unless he conveyed the impression of being an ardent supporter of euthanasia. This could be accomplished only by characterizing some of the children in the forms as incurable and incapable of work. Although this characterization effectively sealed the child’s fate, any other characterization would have excited Berlin’s attention, and his
sabotage plan would have been betrayed. He would then have been dismissed from his position and a more ideologically committed doctor appointed to succeed him. He sacrificed children “who were, from a psychological standpoint, completely below the zero line” in order to rescue other patients. Despite numerous witnesses who testified that Leu was a true believer in unswerving service to the killing program, the court accepted Leu’s claim that he had to convey this impression to everyone around him, lest his opposition plan be foiled. Using the language of the theater, Leu had a “role” to play in this moral drama. A lack of collegial solidarity in Sachsenberg, moreover, may have deterred Leu from sharing his mind with his colleagues. In sum, the court endorsed Leu’s defense that his “actual inner attitude” toward euthanasia was critical and oppositional, not supportive.

With respect to the undisputed killings in the children’s ward, the court refused to consider them base or malicious. Respected scholars like Binding and Hoche had debated for decades the permissibility of “delivering from their vegetative existence” severely ill patients. Leu was aware of this debate, and his ideas about euthanasia reflected the academically serious—and non-reprehensible—thoughts of sober men. He was also familiar with the results of the Melzer survey conducted in the early 1920’s, indicating that many parents advocated the “mercy killing” of their severely handicapped children on humanitarian grounds. Leu’s attitude toward the deaths of these incurable patients was thus not “base” as defined under the German law of murder. Nor was it malicious, since Leu did not exploit the victims’ vulnerability in a reprehensible manner. Since Leu’s involvement in the killings did not constitute murder, the only charge he faced was the lesser included offense of manslaughter.38
At this point in its verdict, the court could have simply acquitted Leu on the basis of a collision of duties. It had already set forth, albeit implausibly, a fact pattern that led to such an interpretation. Instead, the court introduced a new exculpatory rationale into euthanasia adjudication—the “exertion of conscience” defense. The court began by citing the “landmark” decision of the German Supreme Court from March 1952, in which the High Court held a criminal action punishable only if the perpetrator chose a wrongful alternative, even if he had had the ability to choose the legal one. This holding, said the Cologne state court, presupposed that an actor could recognize right and wrong in the actions available to him. Only if the actor was a “free, responsible, and morally self-determining person able to decide between right and wrong” could he be held accountable for behaving wrongfully. At the same time, the actor had the duty to “exert his conscience” in a degree commensurate with his life experience and professional training, in order to determine if a contemplated action was legal or not. Conversely, if an actor faced with a conflict between the demands of the law and the demands of his conscience chooses to follow his conscience, then he cannot be held criminally liable. His immunity to criminal guilt, however, assumed that “he has exerted the intellectual and moral powers of his conscience in order to recognize what is right or wrong, and acts in accordance with this insight.”

This “exertion of conscience” defense became the crux of Leu’s acquittal. The law required Leu to refrain from killing; yet, his conscience enjoined him to collaborate outwardly in it for the purpose of rescuing patients. Leu had “exerted his conscience” to
its utmost extent, and felt that he had to follow its insistent voice. On this ground, Leu was exonerated of all criminal charges related to the deaths of children in the Sachsenberg ward.\textsuperscript{39}

From both a legal and a moral perspective, the Leu verdict may be the most obnoxious travesty among the post-war euthanasia trials. In contrast with some of the other defendants acquitted after 1947 (such as Creutz and Recktenwald), Leu had not only transferred patients to their deaths in the killing centers, but had organized and administered euthanasia \textit{with his own wards}. Yet, the Leu decision provided German courts with yet another rationale for acquitting medical killers.

\section*{B. Doing Away with the Monsters: The Uchtspringe Case (December 1953)}

At roughly the same time as the Cologne court freed Alfred Leu, the state court of Göttingen applied a similar rationale to the cases of two doctors implicated in euthanasia killings, Gerhard Wenzel and Hildegard Wesse. Wenzel was accused of either personally administering or authorizing nursing staff to administer poisonous dosages of morphine to 130 children during his tenure from June 1941 to August 1943 as director of the children’s ward at the Uchtspringe mental hospital (near Magdeburg). His co-defendant was his successor in the directorship of the children’s ward. Dr. Hildegard Wesse (wife of the ill-starred T-4 doctor Hermann Wesse), charged like Wenzel with killing ca. 60 disabled children with overdoses of morphine, but also with giving lethal injections to 30 female patients.

In May 1941, Wenzel was serving as head doctor on a Luftwaffe field air base in France, when he was summoned to the \textit{Führer’s} Chancellery in Berlin. On arrival he was received by Hefelmann, von Hegener, and the director of the Uchtspringe mental...
hospital, Dr. B. During their discussion, Wenzel was asked about his attitude toward the euthanasia of "fully idiotic children." He replied that these "life forms" (*Lebewesen*) were an "onerous psychological burden" for their doctors, nursing personnel, and their families. During his stint as a doctor at Uchtspringe, Wenzel was often approached by parents requesting that he "deliver" their child from its suffering. Based on these experiences, he considered euthanasia an ethically defensible solution to incurable suffering, provided that it was regulated by a legal procedure. Hefelmann replied that a legal basis for euthanasia had been established, at which point he read the Hitler order and the draft of a euthanasia law to Wenzel. For "war-related reasons" the law was unpublished, although, Hefelmann assured him, it was known within the state service. Hefelmann outlined the work of the Reich Committee, then informed Wenzel he was being declared "indispensable" and reassigned to the children's ward in Uchtspringe. As the ward's director, he would receive transports of mentally handicapped children whom he was to observe and later report on to the Reich Committee. The report would summarize the patient's condition with special attention paid to their responsiveness to treatment. The incurable children were to be killed, while doubtful cases would be reserved for further observation or discharged. Wenzel accepted the job offered him and returned to his unit in France.40

A few weeks later, he reported to Uchtspringe's children's ward, which housed 350-400 children in four separate buildings. He remained there (with one interruption in his service) until August 1943, when he tendered his resignation. During his time as director of the ward, the court estimated he had prepared 1,000-2,000 reports, characterizing as incurable ca. 80 children. The euphemistically worded "authorizations
for treatment" arrived from Berlin for these children. They covered upwards of 120 (and as many as 130) children, thus exceeding Wenzel’s reports of “incurable” by at least 40 cases. Wenzel explained the discrepancy with reference to special transports from the East to Uchtspringe of “fully idiotic” children, whose condition had already been reported to the Berlin authorities. Wenzel understood the word “treatment” in the Berlin authorizations to mean “putting to sleep” (i.e., kill). He passed on the authorization to the station nurse, who gave the children an overdose of luminal in their soup or milk in accordance with Wenzel’s instructions. This overdose caused the patients’ death within a few hours. Sometimes Wenzel ordered the ward nurse to inject the children with morphine; on occasion he injected them himself. He concocted false causes of death in the notices sent to the children’s parents, partly because euthanasia was top-secret, partly to spare their feelings.

Wenzel’s defense at trial was that he had believed at the time in the ethical permissibility of euthanasia. Eminent cognoscenti had discussed it for decades, and it had won not a few respected proponents. He had accepted the expertise of the Reich Committee, the leaders of which were represented to him as the leading experts in the field. Procedurally, every safeguard against abuse had been observed. His involvement in killing was purely scientific and humane. For these reasons, he argued, he should be acquitted on the basis of a mistake of law (Verbotsirrtum).

Previous euthanasia defendants had, of course, raised similar arguments. Typically, however, German courts until the Uchtspringe trial had rejected this defense, claiming that no matter how much support for euthanasia was marshalled by the Nazi authorities, a reasonable person could plainly see that the mass murder of defenseless
patients violated the "natural moral law," which was superior to the positive law of the Third Reich. Since natural law was accessible to all rational beings, all were bound by its prescriptions and prohibitions, no matter what the law of a particular government commanded. The Göttingen state court did not deny the existence or obligatory quality of the natural law; instead, it adopted a highly subjective analysis of the actor's ability to discern whether his conduct violated the law or not. An actor's duty to "exert his conscience" hinged on "the circumstances of the case and the life and professional background of the individual." This meant that the actor had to "mobilize all his intellectual powers of recognition and all his conceptions of value . . . to develop a judgment about the legality or illegality of a certain action. If, notwithstanding [such exertion], he is unable to perceive the illegality of his action, his error is unavoidable, and he cannot be held criminally liable for it."^1

The court found that Wenzel fell into this category of actors whose exertions of conscience were incapable of grasping the wrongfulness of their actions. During his meeting in Berlin with Hefelmann and von Hegener, it was explained to him that a euthanasia law existed and was known throughout the civil service, although it remained unpublished. The court accepted his claim that he had trusted in the representations by the "leading men" of the Führer's Chancellery. These considerations were the prelude to an extraordinary disquisition by the court on "life unworthy of life," the destruction of which, the court noted, could not be regarded "a priori" as "immoral." In the pre-Christian era, authorities as various as Plato and Seneca had expressed support for destroying "monsters" (Monstra). Under the influence of the Catholic Church, which branded euthanasia a hubristic intervention in affairs better left to God, the destruction of
unworthy life entered a period of eclipse. Nevertheless, there was evidence of its resurgence in the late Medieval era in Thomas More's *Utopia* (1516), which "discusses the putting to sleep of incurable patients . . . in a way that reveals the social thought [of the time]." In his *Table Talks*, Martin Luther had advocated drowning a 12-year-old child believed to be a "changeling," since it was legal to kill a mere "piece of flesh" that had "no inner soul." The court admitted that German law in the modern period had criminalized such killing, but added that "permitting [it] is not entirely strange to [German law]." The court cited 19th-century authorities like the Pandects and the Prussian General State Law, which had given special dispensation for "doing away with the monsters." Even the Braunschweig Penal Code of 1840 had punished a mother convicted of killing her baby "lacking human form" to a *de minimus* fine and jail term of six weeks.

The court even cited the shopworn precedent of Binding and Hoche to show how earnestly the subject had been taken up in the interwar years. It quoted from *The Permission to Destroy Life Unworthy of Life* that "it cannot be forbidden from a legal, social, ethical, nor from a religious viewpoint to destroy these individuals, who form the horrid counterpicture of authentic humanity, and who in almost every case arouse the horror of those they meet." On the contrary, "it strains the concept of humanity to want to preserve life unworthy of life unconditionally." According to the court, these ideas were endorsed by many other authorities, including German, Swiss, and Danish politicians during the 1920's, as well as theologians like Dr. Thranzendorf, who chided a culture that would "let capable people go to rack and ruin in favor of incapable members of the society, for whom new palaces were built and who lived a carefree life at the
expense of the healthy taxpayer.” The opinions of learned jurists, doctors, politicians, and theologians moreover confirmed the intuitive feelings of the German people. The Göttingen court referred to the high percentage (73 percent) of parental support for covert euthanasia expressed in the 1920 Melzer survey. One father quoted by the court wrote: “Certainly there be many who deplore the barbarity and heartlessness [of euthanasia], but that is of course the outpouring of a false humanity; the outsider cannot in such cases pass judgment . . . .” For the court, this overwhelming support for euthanasia “cannot simply be shrugged off.”

These ruminations led the court to conclude that euthanasia “cannot be called . . . a measure that contradicts the general moral law, or the fundamental ideas of justice and humanity.” Wenzel was aware that “leading minds” had approved the “release” (Freigabe) of “life unworthy of life.” In view of this broad, centuries-old support for the idea among distinguished thinkers and the public at large, how could Wenzel be charged with knowingly violating the natural law when he put these ideas into practice? Nor could Wenzel have “exerted his conscience” sufficiently to grasp the illegality of the Reich Committee’s program: it had all the outward indicia of “orderliness,” including panels of expert evaluators who enjoyed reputations for working “carefully and conscientiously.” Although the procedures may not have conformed perfectly to those prescribed by Binding and Hoche, Wenzel could not be charged with knowledge of these minor deviations. Insofar as Wenzel’s experience with the bureaucratic guidelines that structured euthanasia was concerned, “the procedure offered . . . security against abuses
and gross errors.” Since Wenzel “could not have arrived at a different result by a more conscientious examination [of the matter],” he had to be acquitted of the killings in the Uchtspringe children’s ward.42

Wenzel’s replacement as director of the children’s ward, Dr. Hildegard Wesse, came to Uchtspringe from the University Clinic for Children in Leipzig. Prior to this appointment, she had been the director of the men’s department in the Waldniel institution. In August 1943 she arrived at Uchtspringe as Wenzel’s successor. She did not immediately assume the directorship of the children’s ward, however; this position was held by her husband, Hermann Wesse, until he was inducted into the German army in December 1943. At this time, and with alleged reluctance, she became director of the children’s ward, a position she held until July 1945. She had first become aware of the euthanasia program during her work at the Waldniel institution, when her husband became director of the Waldniel children’s ward in October 1942. Around this same time, on orders from the Reich Committee, he had initiated the euthanasia of “fully idiotic” children in the ward. At trial, she claimed her husband only acquainted her with his work in broad strokes, because he wanted to spare her, as a woman, so grave a “psychological burden.” A lesser gentleman, Dr. Werner Catel (a member of the planning committee for the children’s euthanasia and one of its three expert evaluators), provided her with more detailed information during her stint at the Leipzig Clinic. He told her inter alia that three experts (one of whom was Catel himself) had been charged with overseeing the program. He reassured her that only “full idiots” were being targeted, and that killing could go forward only when all three experts had agreed the case was hopeless.
When she was appointed to replace her husband in the children’s ward, Hildegard Wesse claimed she had misgivings—not because she disapproved of euthanasia, which she affirmed in theory, but because she did not know if she was equal to the task of carrying it out herself. She eventually accepted the appointment, however, and thereafter carried out the same type of killing that Wenzel had committed before her. Thus, from January 1944 to January 1945, she prepared 400-500 reports on the ward’s children for review by the Reich Committee. Like Wenzel, she offered her prognosis on the children, characterizing them either as incurable or as capable of improvement. Since the Berlin authorities generally followed her recommendations, she assumed the Committee’s experts were carefully examining each case she submitted. When Berlin sent “treatment authorizations” to her for ca. 60 children, she instructed the floor nurse to give the children doses of luminal or trional tablets in their food. The children lost consciousness and died after a couple of days. For hardier children she ordered morphine injections, which were administered either by the nurse or by Wesse herself. After their deaths, Wesse sent notices to the children’s families listing fabricated causes of death. She had no compunction about this, since she felt it was “right” to spare their feelings.43

Wesse, like her predecessor Wenzel, was acquitted of wrongdoing in connection with these killings in the Uchtspringe children’s ward. The rationale for acquittal of the charge was the same in both cases: like Wenzel, Wesse could not have exerted her conscience any further to understand the wrongfulness of her actions. She reasonably assumed the procedure was “well-organized and reliable from an ethical-medical standpoint.” The cautious attitudes exhibited by the experts in the Reich Committee reassured her that the program was being administered conscientiously and with scientific
precision. She had, in short, no good reason to doubt the ethical or legal timbre of the killing procedure. According to the court’s interpretation, it was ethically and legally defensible for a lower level functionary to accept a “conscientious” and “scientifically precise” procedure ordered by the top of the institutional chain.

If Wesse’s activities had been restricted to the children’s ward, she would have walked out of the Göttingen courtroom a free woman. However, her murderous work at Waldniel also involved 30 disabled women, and for these killings the court refused to recognize a mistake of law. At the end of 1944, Wesse was informed of Berlin’s decision to order the killing of mentally ill adults in the Waldniel men’s and women’s departments. By contrast with the procedure in the children’s ward, no antecedent observation and expert review would be observed with these killings, since this would unduly delay the process. Wesse was assigned responsibility for euthanizing incurable patients in the women’s department. She accepted the assignment, reasoning to herself that the pressures of the war had forced Berlin to deviate from the cautious procedures that governed euthanasia in the children’s ward. Another doctor segregated the severest cases among the female patients and removed them to Wesse’s children’s ward. She reviewed the patient records of these handicapped women and decided to “put to sleep” 30 of them. Wesse carried out the killings of these women herself with morphine injections. At her trial, she raised the defense that she was motivated by pity to destroy these patients, and that she never doubted their killing was in harmony with the wishes of the Berlin authorities.
Apparently, the Göttingen court's magnanimity toward the killers of disabled patients was not unlimited, since it rejected Wesse's argument and held her criminally liable for the deaths of the 30 women. The critical factor in distinguishing these killings from the euthanasia of the children was their unregulated character. The killings were done on a summary basis, without procedural safeguards in place to convey the appearance of ethical and legal legitimacy. Had Wesse roused her conscience sufficiently—as was her legal duty—she would have recognized the glaring illegality of these makeshift orders. "If she had [exerted her conscience]," the court held, "then, with her exceptional intelligence, she would have seen that something was not in order—that entrusting a young assistant doctor [like herself] with deciding alone about the euthanasia of mental patients is simply indefensible." In other words, she would have understood that any "law" that permitted such a haphazard procedure "must have exceeded the limits of what is legally permissible." Wesse could have acted differently than she did; she could have expressed to the Reich Committee, with whom she was on good terms, her refusal to participate in the anarchic destruction of patients. Since she failed to "exert her conscience according to the measure of her intellectual powers to recognize what is right and wrong," she was criminally liable for the deaths of the 30 female patients.\footnote{44}

Despite this finding, the court refused to characterize her killings of these women as murder under German law, inasmuch as the killings, in the estimate of the court, lacked the characteristics of reprehensibility (e.g., base motives, maliciousness, etc.). For this reason, she was convicted of manslaughter in these killings. In the sentencing phase of the trial, the court considered mitigation appropriate because Wesse had been medically trained in an era when "utilitarian considerations" undermined the doctor-
patient relationship. She was given a remarkably lenient jail term of 6 months per patient
killed, a sentence the court deemed “appropriate and sufficient.” Even this absurdly
disproportionate punishment was never carried out, because on December 27, 1954 the
Göttingen court decreed the sentence null and void.*

The Uchtspringe case forms with the verdict in Leu a low point in the coddling of
euthanasia defendants by West German courts. Leu, Wenzel, and Wesse had all killed
scores of patients, often with their own hands. If, as Ulrich Herbert argues,45 the
Christmas Amnesty of 1949 had sent a message to the German population that the era of
prosecuting Nazi crimes had ended, then the wave of acquittals in the early 1950’s
culminating in the preposterous exoneration of the child-murders Leu, Wenzel, and
Wesse must have been seen for what it was—a sign of the refusal of German courts to
convict the murderers in their midst.

C. The Beat Goes On: The Warstein Case (December 1953)

T.S. Eliot may have thought April was the “cruelest month,” but from the
perspective of postwar justice that title may go to the month of December 1953. In this
month, three separate courts in three separate trials acquitted euthanasia defendants. We
have already discussed two of these cases. The third and final case in this trifecta
involved two doctors, P. and S., employed during the war in the largest of the
Westphalian mental hospitals, Warstein. Dr. P. became director of Warstein in July
1934; Dr. S. served as assistant doctor there beginning in January 1931, rising to chief
doctor in March of that year. In 1937, S. also assumed the directorship of a ward created

* Nullification of the sentence was carried out pursuant to the “Law for Exemption from Punishment
(Straffreiheitsgesetz) of 1954, which exempted from punishment cases of manslaughter punishable with a
at Warstein by P. to accommodate mentally ill patients with tuberculosis. During the war, both men split their professional lives between military service and work at Warstein.

Warstein was swept up into the killing operation in the summer of 1941, along with the other Westphalian mental hospitals (Aplerbeck, Münster-Marienthal, Gütersloh, Lengerich, Eickelborn, and Nieder-Marsberg). From June 1941 to August 1941, 2,720 patients from these institutions were transferred to the Hessian transit centers at Eichberg, Scheuem, Idstein, Herborn and Weilmünster. Of this number, the Dortmund state court found, 1,227 patients were subsequently sent to killing centers and gassed. 125 of the 2,720 transferees survived the transfer. The fate of the remaining 1,368 patients, however, was unknown. A total of ten transports with 902 patients were transferred from Warstein to the transit centers. It was proven that, from 1941 to 1944, 401 of these patients died and 36 survived. What became of the other 465 could not be ascertained at the time of the trial.

The transports from Warstein followed the same pattern that prevailed in other "home" institutions (Ursprungsanstalten) throughout Germany. Registration forms were sent to Dr. P. for distribution to his staff doctors, who filled them out on their patients and returned them to Berlin. Months later, transport lists arrived in P.'s office from Berlin. The court was satisfied that both defendants were aware of the purpose of the transports when they assembled their patients for transfer. The indictment charged them with aiding and abetting murder and crimes against humanity for their knowing participation in furthering these transports of patients designated for killing.46
The defendants’ odyssey through the German judicial system was one of the most tortuous among the euthanasia cases. The trial in December 1953 was the end of a long road of indictment, acquittal, appeal, and re-trial, involving not fewer than three separate trials (the first in October 1948) and two appellate reviews and reversals. The plenitude of conflicting verdicts and counter-verdicts offers a splendid example of the “flipability” of post-1947 euthanasia trials. The will to acquit the defendants was clearly present already in the 1948 trial, when the Schwurgericht of Münster acquitted P. and S. on the ground of an “extrastatutory necessity.” By December 1953, thanks to the German Supreme Court’s verdict of March 18, 1952, a new rationale had emerged to support the defendants’ acquittal, the “exertion of conscience” doctrine. Although the Dortmund state court found that both men had knowingly promoted the crime of murder, it also found that neither was aware that his actions were illegal. The court’s holding was grounded in an acceptance of the defendants’ argument that they had participated in euthanasia only to save as many of their patients as possible. By remaining in their posts and sabotaging the program where they could, the defendants had rescued as many as 30 percent of their patients by striking their names from the transport lists, discharging them from the hospital, or arranging their transfer to Catholic hospitals not yet imperiled by the killing operation. Both defendants were moreover devout Catholics without ideological ties to the Nazi Party. Clearly, they had fully “exerted” their consciences and decided to “remotely collaborate” with the euthanasia program in order to undermine it. As a result

31, 1945. See de Mildt, In the Name of the People, n. 151, p. 354.
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of their conscientious reflection, they had no awareness that their minimal promotion of
the killing program was illegal—quite to the contrary, they believed that outward
compliance with the program in order to save patients was legally required.

The Dortmund court, unlike the earlier state courts that had acquitted P. and S.,
did not hold that it was legal to sacrifice some patients in order to save others. Rather, it
held that the defendants were justified in believing their contributions to the sacrifice of
some patients (considered at any event by the court as minimal) were permitted. This
was due to the "moral turbulence" of German society under the Third Reich, a time
"when normal values had been overturned." Eminent legal authorities had disagreed on
the legality of sacrificing some in order to save others; thus, a defendant could not be
held accountable for conscientiously "arriving at an erroneous decision" about which
distinguished jurists could not even agree. This applied a fortiori to P. and S., who were
"insufficiently prepared and armed for the decision of such an extraordinarily difficult
question of law and conscience." The court went on:

The measure of the required exertion of conscience depends on. . . the life and
professional background of the individual. The entire educational and professional
training of the defendants—in their specializations one-sidedly medical—were not
oriented to communicate to a young person sufficiently clear and unambiguous
guidelines for his personal decision of conscience in such an extremely difficult situation.
The educators of the era in which the defendants had first formed their ideas of the legal
order could not foresee such a situation in any shape or form. The defendants were
therefore, through no fault of their own, intellectually and spiritually unequipped for an
extraordinarily complicated situation. They lacked the casuistic, ethical, and legal
education for the correct solution. Insofar they cannot be held criminally responsible for
their erroneous decision. 48

P. and S., in brief, had "exerted their conscience" to the maximum degree. Nothing
further could have been required of them.
The Sachsenberg, Uchtspringe, and Warstein cases—all decided in December 1953—inaugurate a subtle shift in the acquittal of euthanasia doctors. The prior tendency to acquit them with recourse to a collision of duties or extrastatutory necessity gave way by 1953 to acquittals based on “exertion of conscience” (a form of mistake of law). The new emphasis on a defendant’s capacity for moral reflection held sway in West German courts for the next two decades.

D. Flipability Run Amok: The Case of Dr. Sch. (July 1959)

One defendant who did not appear in the Warstein case of December 1953 was the doctor of law and Westphalian civil servant, Dr. Sch. He had been indicted along with P. and S. in 1948 for aiding and abetting murder and crimes against humanity, based on his participation with them in organizing the Nazis’ euthanasia program in Westphalia. At the first trial in October 1948, he had claimed he had no knowledge of the killing ordered by the authorities, and had therefore only unwittingly promoted the euthanasia program by forwarding Berlin’s registration forms and transport lists to Westphalian mental institutions. The Schwurgericht in Münster agreed that no evidence existed to prove his knowledge of the goals of the transports. At this same trial, Sch.’s co-defendants P. and S. had admitted to knowing of the lethal purpose behind the transports, but argued they had collaborated only to avoid greater harm to their patients. Both were acquitted on the basis of an extrastatutory necessity. In March 1949, the Supreme Court for the British Zone reversed the verdict of the Münster Schwurgericht and remanded the case for retrial, noting the contradictions in the findings of fact regarding Dr. Sch. On remand, the Münster court convicted Dr. Sch. in August 1949 of
aiding and abetting murder. The German Supreme Court rejected his appeal of this verdict in November 1952. He thereafter filed a petition for amnesty, which effectively stayed execution of the sentence against him.

In November 1954 he applied for a new trial, now arguing that, contrary to his claims in the earlier trials, he had really known all along about the euthanasia program, but decided quietly to join the sabotage operation of other provincial doctors. No doubt emboldened by the exertion of conscience cases, he added that he had searched his conscience at the time and decided it was not wrongful to sacrifice some patients in order to save others. His applications were rejected in May 1955. He appealed this determination to the Appellate Court in Hamm, which overturned the lower court's rejection in May 1956, thereby permitting a new trial. The case went forward on January 28, 1959.49

Ample evidence was available to rebut Dr. Sch.'s defense that he had acted only in the best of faith to minimize the damage of the killing program. Unlike his earlier co-defendants, Dr. Sch. had failed to raise this defense until six years after his first trial in 1948. Second, his political affiliations suggested that Nazi functionaries had considered him a reliable Party member, to whom sensitive Party offices could be entrusted. Two witnesses testified during his trial that he had always impressed them as a devout National Socialist. Despite the shadow this evidence cast on Sch.'s defense, the Münster state court acquitted him of aiding and abetting murder. (Crimes against humanity ceased to be chargeable against defendants tried in West German courts for Nazi crimes after August 31, 1951.) The court clearly felt that he had "exerted his conscience" to the best
of his ability, qualifying his actions as the product of a mistake of law. Complicating Sch.'s ability to discern the wrongfulness of his conduct was the novelty of the situation he found himself in—a situation for which his legal studies could not have prepared him. “The situation here was completely new,” the court held. “Never before in history had a state ordered the mass killings of innocent patients . . . . Accordingly, the defendant could find no solution to the problem in his studies of legal literature.” The court found it meaningful in this context that Sch. was “only of mediocre talent as a jurist.” Evidently, extraordinary juridical prowess was needed to grasp the wrongfulness of collaborating in the mass murder of scores of patients.50

With his acquittal in 1959, Dr. Sch. could join the ranks of other Nazi war crimes defendants scrubbed clean of moral and legal blemish for their willing participation in the Third Reich’s assault on humanity. The renewed interest in these crimes in the late 1950’s-early 1960’s, most dramatically represented in the Ulm Einsatzgruppen trial (1958) and the heavily publicized Eichmann trial (1961) in Jerusalem, left scarcely a ripple on the surface of euthanasia prosecutions.

III. Conclusion

German physicians and civil servants were not the only beneficiaries of the judiciary’s indulgent attitude toward euthanasia crimes. Since the late 1940’s, German courts had also declared nursing staff indicted for their roles in killing patients innocent of criminal wrongdoing. Even before the “exertion of conscience” cases, German courts had acquitted nurses with reference to the mistake of law (Verbotsirrtum) doctrine, on the grounds that their lack of education rendered them incapable of recognizing the illegality

* These offices included, inter alia, District Legal Office Director and Chief Office Director in the Gau
of their actions, or that the Führer order backing it up had no legal effect. The same rationale was employed to acquit the nursing staff of the Meseritz-Obrawalde institution, prosecuted in the Munich state court in 1965. Again, the court parroted the familiar language about the defendants’ intellectual and moral incapacity to understand that killing patients was illegal. By virtue of this defect, they could not “exert their conscience” sufficiently to adjudge the euthanasia program wrongful, especially since their supervisor-doctors ordered it, a law was alleged to support it, and neither the police nor the local prosecutors had intervened to stop it. The “fog of doubt” enveloping their actions prevented any morally autonomous action.

The trend toward acquitting euthanasia defendants based on an “exertion of conscience”/mistake of law rationale would continue after 1965. In 1967, T-4 gassing technicians Heinrich Bunke, Aquilin Ulrich, and Klaus Endruweit were acquitted due to an “unavoidable mistake of law” that clouded their “awareness of the illegality of their actions.” Although the German Supreme Court reversed their acquittal in 1970, the case on remand eventuated in yet another miscarriage of justice: Endruweit, Bunke, and Ulrich were declared “unfit for trial” on medical grounds, while a fourth T-4 doctor prosecuted with them, Kurt Borm, was acquitted in 1972 by the Munich state court on a mistake of law theory—a verdict upheld by the Supreme Court on appeal in 1974. As Willi Dressen has observed, the decision in the Borm case contradicted the holdings of earlier courts that no defendant could invoke his or her reliance on a law repugnant to the
Dressen’s statement is partially correct: the Munich court’s verdict was in poignant conflict with the holdings of earlier courts. However, that turn had occurred much earlier than 1972, as the exertion of conscience cases of the early 1950’s prove.

All of the German euthanasia trials we have examined also prove that the law can be a fragile refuge for justice. A defining feature of criminal law is its role in reducing interpersonal violence between the members of a social order. Rather than entrust justice to private individuals and personal blood feuds, society vests the determination of guilt or innocence in a court system charged with applying the law with fairness and impartiality. Legal “science,” not extrajuridical forces, is supposed to govern a court’s deliberations.

During the Third Reich, the homicide laws had failed to arrest Germany’s descent into genocide and mass murder. In the postwar era, law revealed itself again to be at the mercy of geopolitical, ideological, and psychological forces. Whether using the language of extrastatutory necessity, collision of duties, or exertion of conscience, western German courtrooms after 1947 became a force field in which these vectors were given free play. The upshot, as we have seen, was the acquittal or lenient treatment of hundred- and thousandfold murderers.

Even the American euthanasia trials were not immune to such forces. From the beginning of their plans to try Nazi war criminals, the U.S. had committed itself to the position that the crimes of the euthanasia doctors (like those of Nazi perpetrators generally) were bound up with the Nazis’ plot to wage aggressive war. By killing patients, resources could be freed up to supply the army in its campaign to Germanize the European continent. The U.S. hewed to this interpretation (which I have called the “economistic” theory of Nazi genocide) for political reasons: if the euthanasia program
were disconnected from Nazi military aggression, a precedent would be set for intervening in the domestic affairs of sovereign nations. The principle of sovereignty, as emphasized in chapter 4, was at the center of the Americans' concern. Commitment to an economistic theory of genocide led the Americans to construe the Nazis' assault on the mentally handicapped as an outgrowth of their boundless imperialism—a conception that relegated the ideology of destroying "life unworthy of life" to a secondary role. By the late 1940's, as Telford Taylor related, the horizon of the Cold War was lowering over Europe, resulting in a growing number of acquittals in both U.S. and German courts. Although the law demanded the prosecution and punishment of war criminals, the will of the American and German decisionmakers to acquit won out. Once more, as it had during the war, the law had proven to be an inadequate bulwark against criminality.

The U.S. and West German euthanasia trials open a window on the role of nonlegal factors in criminal adjudication. They show us how easily the law becomes the servant of power, and that power, rather than exerting its influence from a position external to legal process, is in reality deeply interfused with it. What legal positivists have for decades ascribed to a realm extrinsic to law is, on the contrary, intrinsic to it—in fact, constitutes law's beating heart. In the U.S. and German cases, the ability of power to affect legal adjudication was so pronounced that it worked an inversion of burdens of proof. For the Americans, the principle of assuming innocence until guilt is proven was overturned during the Hadamar and medical trials. The need to punish the enormities of the Nazi regime induced American jurists to assume the guilt of their defendants. For the Germans, their practice of presuming guilt with the formal indictment was similarly inverted: they tended to assume the innocence of the euthanasia defendants (especially
after 1947), and sought ways to vindicate this presumption. Both national trial groups, the U.S. and the West German, reveal the susceptibility of the law to power as an indwelling, inevitable constituent of legal process.

NOTES

1 JuNSV, Lfd. Nr. 381.
5 The trend may be due to several factors: the publication of Anne Frank’s wartime diary, the creation of an archive in Ludwigsburg devoted to gathering documentary evidence on war crimes that was then forwarded to prosecutor’s offices throughout West Germany, and the rise of a younger generation of Germans uncompromised by the events of the war, who saw old Nazis in power and prospering in the new Republic. On this subject, see J. Friedrich, *Die kalte Amnestie*, pp. 343-347. An exception to my statement about the minimal effects of this trend on euthanasia trials is the indictment of Werner Heyde, Hans Hefelmaim, and Gerhard Bohne on May 22, 1962. Heyde escaped trial by committing suicide on February 13, 1964; his co­defendants eluded justice through flight (Bohne) and a declaration of medical unfitness for trial (Hefelmaim). Their indictment, however, was not representative of German attitudes toward euthanasia crimes. Rather, it was largely driven by the maverick State Prosecutor of Hesse, Fritz Bauer, who had once described himself as “living in exile in the [German] judicial system.” Quoted in Fritz Bauer, *Die Humanität der Rechtsordnung: Ausgewählte Schriften* (Frankfurt: Campus Verlag, 1998), p. 14.
6 JuNSV, Lfd. Nr. 226, pp. 94-95.
7 JuNSV, Lfd. Nr. 226, p. 95.
8 JuNSV, Lfd. Nr. 226, p. 98.
14 The quote is from Schmidt, *Süddeutsche Juristische Zeitung*, p. 569.
16 De Mildt, *In the Name of the People*, p. 168.
17 See supra, chapter 7, pp. 410-32.
19 For the details of this meeting, see supra, p. 351.
The neologism "flipability" was coined by Critical Legal Studies theoretician Duncan Kennedy, but its roots go back to Wesley Hohfeld's idea that legal propositions can be "flipped," that is, interpreted in more than one way (and often in contradictory ways). See Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 Yale L.J. 16 (1913). Hohfeld's theory of interpretation was adopted by the Legal Realists, through whom the Critical Legal jurisprudential appropriated it. Critical Legal scholar David Kairys describes the hermeneutic underlying this view of legal reasoning: "Stare decisis [the practice of following precedents] neither leads to nor requires any particular results or rationales in specific cases. A wide variety of precedents and a still wider variety of interpretations and distinctions are available from which to pick and choose. Social and political judgments about the substance, parties, and context of the case guide such choices, even when they are not the explicit or conscious basis of decision." Kairys, "Legal Reasoning," in The Politics of Law: A Progressive Critique, ed. David Kairys (New York: Pantheon Books, 1980), p. 14.


Faltlhauser's sponsorship of the Sonderkost was reported by the director of the Regensburg mental hospital, Dr. Paul Reiss, who was present at the conference of directors in the Bavarian Interior Ministry in November 1942. Reiss offered his testimony before the same Munich court in 1948 that later presided over the Pfannmuller case. The court's institutional memory must have been, at best, a dim one. See 1 KLS 154/48 StaA München, excerpted in Klee, Dokumente, p. 286. Faltlhauser was himself indicted for murder in July 1949 for his contributions to the killing of well over a thousand patients at Kaufbeuren. The Augsburg Landgericht acquitted him of the murder charge, but found him guilty of manslaughter for the deaths of ca. 300 patients. He was sentenced to a paltry 3 years by a court that praised him for his "compassion," "one of the noblest motives in human conduct." See JuNSV, Lfd. Nr. 162, p. 180.
The Dortmund court’s assertion that “normal values had been overturned” during the Third Reich is not entirely accurate. As we will see in the Conclusion to this study, Nazi perpetrators often recognized the wrongfulness and illegality of their participation in the regime’s criminal designs, but nonetheless chose to follow the will of their superiors. To preview my argument in the Conclusion, Nazi perpetrators were split between the domains of conventional morality and the illegal but visionary demands of the Party. Although, like Faust, they sacrificed traditional moral and legal norms to the Mephistophelian will of the Nazi state, the perpetrators remained in most cases aware that their actions were repugnant to those norms.

My point is not that the U.S. failed to provide the Nazi doctors with a fair trial, but that they tended to assume the guilt of the defendants prior to trial. Authentic horror at the scope of Nazi genocide largely accounts for the inversion of the traditional burden of proof standard.
Conclusion

Why the Nazis Still Matter: The Lessons and Legacy of the Euthanasia Trials

In the end it is the mystery that lasts and not the explanation.

- Sacheverell Sitwell

Where does the self begin and end? You see: Not wonder at the immeasurable infinity of the soul; rather, wonder at the uncertain nature of the self and of its identity.

- Milan Kundera

I. The Presence of the Past: Some Conclusions about the U.S. and West German Euthanasia Trials

In November 1954 Dietrich Allers, a German jurist who had served as the manager of T-4's Central Office (Zentraldienststelle), sent a letter to his former colleague and fellow jurist Reinhold Vorberg, the one-time director of Office IIc of the Führer's Chancellery. Sanguine about the changed fortunes of T-4 perpetrators in the years since the end of the war, Allers wrote:

Take a look around and think back to the time around 1947. At that time, all of us envisioned a miserable personal future for ourselves. Today most of us have again become something, and it is my opinion that we should not demand too much. Certainly quite a few people who held totally different positions [before] have landed well on their feet . . . .

Allers may have spoken too soon: in December 1968, he and Vorberg were convicted of complicity in the deaths of 70,273 mentally ill patients during the war. Vorberg was sentenced to a ten-year jail term, Allers to eight years. (They
were credited with time already served during preventive detention and freed without spending a single day in jail.) Their subsequent conviction notwithstanding, Allers' rosy assessment of the improved situation of euthanasia killers after 1947 was an accurate one. Our study of the verdicts from the U.S. and West German euthanasia trials confirms his perspective on postwar justice in the Federal Republic. It suggests the following periodization: a brief two-year interval between 1945 and 1947 characterized by convictions of euthanasia defendants as perpetrators of murder or crimes against humanity; and an extended period from 1948 until at least the late 1960's, characterized by the lenient treatment of these defendants, including their portrayal as accomplices rather than perpetrators, mild sentences, and acquittals.

The present study is not the first to observe the change in the quality of justice meted out to Nazi defendants by postwar courts. Telford Taylor had noted as long ago as 1949 the growing tendency toward leniency in the American National Trials. Ernst Klee, Jörg Friedrich, Ulrich Herbert, and Norbert Frei have written about the trend toward leniency that arose in the West German cases in the late 1940's, as has Dick de Mildt. This study has drawn upon their excellent works on the altered climate of German public opinion in the late '40's. However, the present study has taken a step in a different direction by focusing on a single genre of the postwar trials, those relating to euthanasia crimes. We have examined the texts of these trials to see how U.S. and West German courts constructed their interpretations of Nazi euthanasia, how their interpretations changed over time, and why they changed as they did. We found that the
Americans in both the Hadamar trial and the Doctors' case were wedded to a view of Nazi euthanasia criminality as the result of German imperialism. This interpretation structured the Americans' portrayal of medical killing in the Third Reich, casting it as a method for freeing up resources like hospitals, supplies, and personnel for use by the German army. In the German trials, the precedent of the Bathtub Case was applied with greater frequency after 1947 to reduce the defendants' wrongdoing from perpetration to complicity. Furthermore, we discovered that relatively new defenses, such as extrastatutory necessity and collision of duties, were adopted to acquit participants in the euthanasia program. By the early 1950's, in the wake of a German Supreme Court decision on the mistake of law doctrine (Verbotsirrtum), German courts employed a different theory to exculpate euthanasia defendants—the "exertion of conscience" defense. We saw in Chapters 5, 7, and 8 that none of the facts in the cases we examined absolutely compelled West German courts to accept any one of these defenses. Just as easily, the courts in the later cases could have shrugged off the proffered defenses as insufficient to justify participation in a program to kill the mentally disabled. That they did not do so indicates that factors other than the individual merits of the cases determined the outcomes. Not value-free legal science but irrational political, social, and cultural forces were at work in these trials, shaping, forming, and often distorting the courts' verdicts.

Among the external forces that affected the German trials were the travesty of the de-Nazification proceedings, the flood of millions of displaced eastern Germans into the western part of the country between 1945 and 1950, and
the gathering storm clouds of the Cold War, which required a democratic West Germany securely moored to the U.S. as a counterweight in central Europe to the Soviet bloc. With the proclamation of the Truman doctrine in 1947, the U.S. made clear its intention to oppose with “counterforce” the USSR throughout the world—an intention that meant American commitment to rehabilitating and restoring West Germany as a member in good standing within the Atlantic alliance. By 1950, as we have seen, the Americans sought to win support in Europe for a European Defense Community. Under the American proposal, a rearmed West Germany would contribute troops to a transnational European army charged with defending the Continent against Soviet attack. A West Germany absorbed in prosecuting its own citizens for heinous crimes ordered by an authoritarian regime might have vitiated the Americans’ plan for a pro-Western German buffer against the Soviet Union. The McCloy amnesty of January 1, 1951 should be seen in the light of this perceived need for a democratically oriented Federal Republic, as should the growing tendency toward leniency within the American successor trials that Telford Taylor had noticed in 1948.

The Americans’ wishes for a democratic, capitalist, and confident West Germany resonated with broad segments of the German population. Among the Federal Republic’s politicians and jurists, many of whom were saddled with their own National Socialist past, the invitation to forget Germany’s recent history and get on with restoring the country’s sovereignty and prosperity must have been an easy sale. The desire to repress varied from person to person: some were motivated to forget out of fear their own contributions to the Nazis’ crimes would
be uncovered, others out of the harrowing pain that an ongoing confrontation with the Third Reich's enormities would cause. In sum, however, the urge to forget cut across all classes and group affiliations within West Germany. Rather than read this phenomenon primarily from the political, social, and cultural events of the turbulent postwar era, we have focused on the texts of the verdicts themselves, wherein are recorded, like the passage of years inscribed in the concentric circles of tree rings, the fears, insecurities, and yearnings of a nation standing in the shadow of genocide.

In the preceding chapters we have also seen that the United States' approach to euthanasia crimes differed from that of the Germans. Even before the end of the war, the Americans were discussing the possibility of making the Anglo-American theory of conspiracy the centerpiece of a postwar trial of Nazi war criminals. In remarkable fidelity to the originators of the conspiracy theory (e.g., Murray Bernays, Henry Stimson, Edward Stettinius, and Francis Biddle), the American drafters of the London Charter identified all the crimes leveled against the major war criminals—crimes against peace, war crimes, and crimes against humanity—as outgrowths of the Nazis' conspiracy to wage aggressive war against the countries of Europe. On this theory, as we have seen, Nazi criminality was a byproduct of the plan to bring Europe under the heel of German dominion. Euthanasia thus emerged as a scheme to transfer resources from "useless eaters" to German soldiers in order to fortify them in their conquests. The conspiracy theory enabled American prosecutors to charge their defendants as perpetrators rather than accomplices. Although West German courts tended to
agree with the Americans' economistic interpretation, they did not regard euthanasia as driven forward by the engine of a conspiracy to wage aggressive war. Instead, they focused on their defendants' actual contributions to the euthanasia program, guided by the principle of individual culpability. At no time did German triers of fact impute criminal liability vicariously to an accused. This was a considerable advantage for the defendants, an advantage that, when reinforced with the society-wide inclination to relieve Germany of the dead hand of the Nazi past pressing upon it, tended toward mild punishments and acquittals.

Differences in approach to euthanasia criminality—the Americans guided by conspiracy, the Germans by individual culpability—did not stop here. The United States' view of its jurisdictional rights over Nazi defendants also differed from the German conception. For the Americans, the Third Reich's violation of the traditional Laws of War created the jurisdictional basis of both the IMT and the U.S. NMT. I have repeatedly emphasized that the Anglo-American jurists were not particularly concerned with the *ex post facto* question. In response to objections about the retroactive effect of prosecuting Nazi war criminals, the Anglo-Americans replied either that no *ex post facto* problem existed, since the defendants were charged with violating internationally recognized principles of law; or, in the alternative, that the need to punish these terrible crimes outweighed the principles of legality. By contrast, German courts were more heedful of the principles of legality, chiefly because they formed the backbone of the Continental tradition of law. From the end of the war until the early 1950's, German courts neutralized the *ex post facto* problem by insisting on their
defendants' ability to grasp the wrongfulness of euthanasia based on an intuitive perception of the natural law. The principle of abstaining from the murder of innocents might have been suspended by the criminal orders of the Nazi state, but it was still codified in the universal law of nature, to which all rational beings had access. By 1953, this revival of natural law was tacitly overruled as German courts began to express doubts about the ability of euthanasia defendants to comprehend the wrongfulness of their actions. Henceforth, all that would matter was whether defendants had in good faith roused their consciences in an effort to understand the moral quality of their contemplated acts.

The changes in the administration of justice described above were far from a mechanical application of neutral legal principles. They were instead caused by the warping effect of non-legal factors. The study has shown that the influence exerted by such factors was not external to the process of law, but internal to it. The relationship between power and law, in other words, was intimate and organic, much as a particular chromosomal arrangement constrains a somatic trait. The forcefulness of "non-legal" factors (which are, in fact, ingredient to legal process) was such that it worked an inversion of burden of proof standards. The geopolitical need to punish the offenders led the Americans to presume the euthanasia defendants guilty; the West Germans' need to recover their sovereignty and forget the traumatic past led them to presume their defendants innocent. This remarkable reversal of burdens of proof in both the U.S. and West German trials attests to the superordinate power of irrational forces to affect legal adjudication.
Did the euthanasia defendants understand that the willful destruction of human beings labeled “unworthy of life” was wrongful? This is one of the persistent undercurrents in the present study, a theme we will shortly turn to in our discussion of the legacies of the euthanasia trials. Herbert Jäger held that, while some of the smallest wheels may have genuinely believed in the program’s legality, many were aware of its patent wrongfulness. Jäger based his opinion on the labyrinthine system of concealment devised around all of the Nazis’ essays in mass murder, from the violence of the Reich Night of Broken Glass and the destruction of the Polish intelligentsia to the euthanasia program and the Final Solution. He contended that

\[ \ldots \text{the crimes were often committed under conditions suited to make the perpetrators aware of the illegality of their actions. Whether or not this consciousness in the individual case actually existed or not is a question that eludes scientific discussion; it has also frequently proven to be extraordinarily difficult for courts to determine. Many of these cases are, however, “circumstantially evidential” [indizenhaltig].}^1 \]

For Jäger, one of the leading “conditions” that advertised the program’s illegality was “concealment directed both inwardly and toward outsiders.”

Inward concealment took the form of an officialese, or coded language, that referred to the murder of patients as “removal” (beseitigen), “selection” (Auslese), or “special treatment” (Sonderbehandlung). By using antiseptic language to denote the killing of patients, the euthanasia killers could attenuate their sense that their actions were illegal. Concealment toward outsiders, on the other hand, was sustained through vows of silence enforced with threats of draconian punishment, dummy organizations created to hide the role of Hitler’s personal Chancellery in the killing, and pseudonyms adopted by many of the leading T-4 doctors. These
types of deception functioned both to withhold information about a criminal
program from the public and to numb the euthanasia participants’ own awareness
of its illicit nature. Other signs that they understood the wrongfulness of the
program included the insistent clamor among the T-4 medical community for a
euthanasia law signed by Hitler (never enacted, as we saw) and psychosomatic
disorders among some of the T-4 doctors (e.g., Sprauer and Weber), caused,
inssofar as we can tell, by their inability to reconcile Nazi euthanasia with their
perception of its criminality.

At the end of the day, after the historical autopsy on Hitler’s grim regime
has been performed, what remains of this terrible event for us? How may the
occurrences in a time and place so different in many ways from our contemporary
world be appropriated? What, if anything, do the postwar euthanasia trials tell us
about our own post-modern age? In the final two sections of this study, we will
address these questions by exploring the lessons and legacy of the trials.

II. The Lessons

Analysis of the U.S. and West German euthanasia trials may be governed
by two broad approaches to historical investigation. We can approach these
materials for the lessons they teach our own era about questions relevant to us
here and now. Alternatively, we might adopt the historicist view that every age,
in Ranke’s words, is “immediate to God” and therefore beyond our modern
attempts at judgment or appropriation. The first approach studies history for clues
to problems we confront today; the second studies history out of antiquarian
fascination with the past. The present study has been guided by the first of the
two approaches to the historical record. While acknowledging the difficulties inherent in any comparison across cultures and time periods, it affirms the relevance of the trial documents to questions that are important to compassionate human beings living in a new century, a century in which stunning breakthroughs in biotechnology and genetic engineering will enhance even further the value of the euthanasia trial records. Our capacity for doing both immeasurable good and evil has never been greater. The potential for evil in this razor's-edge balancing act is depicted in the tens of thousands of documents from the Nazi euthanasia trials.

What then are some of the lessons to be learned? I believe there are at least nine important conclusions we may glean from the postwar trials.

A. Questions about drawing lines between "valuable" and "less valuable" life are persistent within human history, and show no sign of fading away.

The Nazis did not invent the idea that human beings should be ranked hierarchically in terms of their greater or lesser value to society, nor did they invent the idea that "valueless" life should be purged. As we saw in chapter 1, notions of biological fitness date back to antiquity. In many ancient cultures, the practice of destroying the physically or mentally disabled (usually in infancy) was motivated by utilitarian considerations: a handicapped child would be insupportably burdensome to its family and to society. In the 19th century, notions of biological value were grafted onto racist imperialism, which urged the subjugation of "lesser" races by the racially "valuable" Nordic Europeans. The novelty of National Socialism was to make racial value the cornerstone of a
modern political movement. Over time, as Nazism became increasingly violent in the 1930's and 1940's, this ideological commitment to racial value was itself "violentized:" beginning with efforts to segregate mainstream German society from disparaged minorities like the mentally ill (via sterilization) and Jews (via the Nuremberg laws), Nazi racialism ended in expansive projects of the ultimate form of segregation, mass murder. The story of this descent of German civilization into criminality is told in the findings of fact in the euthanasia trials.

We may be tempted to regard this episode in Western history as an anomaly growing out of a unique economic and socio-political milieu. Such a conclusion, however, overlooks the persistent quality of the Nazis' central concern: valuing the lives of some at the expense of others. In their program of positive and negative eugenics, the Nazis sought to draw boundaries between life they believed should be cultivated and life that should be rooted out. More than a half-century after the fall of the Nazi empire, we are still faced with boundary-drawing. Biotechnology is delivering into our hands the power to engineer life in accordance with our preferences. We will soon have the power to alter the genetic code of a fetus to forestall some types of birth defect prenatally. Parents with sufficient will and resources may someday design the genetic code of their own children to suit their notions of human value. Although these choices do not amount to the mass murder inflicted on hundreds of thousands of people by the Nazis, they are nonetheless steered by judgments about what "valuable" life consists of, and how it may be fostered. An overwrought imagination is hardly needed to envision a future in which a genetically-engineered aristocracy lays
claim to the levers of privilege and dominion, while “unworthy” lives, sterilized to prevent them from reproducing their kind, are relegated to menial jobs serving the new master race. This is, of course, precisely the society the Nazis wanted to establish.

B. Political, social, and racial factors always impinge on our line-drawing between “valuable” and “valueless” life.

If the euthanasia trials prove anything, they show that a pure “science” of ranking human beings in terms of their value is impossible, since decidedly unscientific factors like social, political, and racial prejudice will always influence such ranking. Binding and Hoche’s treatise on destroying “life unworthy of life,” widely cited in the euthanasia trials by both the defendants and the judges, is illustrative. The authors believed they had developed a scientific procedure for disposing of “ballast existence” more or less immune to abuse. (Binding conceded that errors might occur, but held this should not restrain us from implementing euthanasia, since all measures, even the most salutary, had a margin for error.) In the post-war trials, euthanasia defendants often justified their involvement in mass killing with reference to Binding and Hoche. Defendants like Hermann Pfannmüller and Gerhard Wenzel invoked the Binding-Hoche thesis as the inspiration for their roles in the T-4 program, and at least one German court acknowledged the scientific seriousness of their work. The sordid realization of a program loosely modeled on that proposed by Binding and Hoche—a program that quickly degenerated into the murder of functional mental
patients, Jews, so-called “asocials,” and sick foreign workers—reveals the degree to which racial and ideological factors can infiltrate supposedly “scientific” procedures.

In our own era, boundaries drawn between valuable and less valuable lives continue to reflect social prejudices. Section 97 of the Austrian Penal Code, for example, forbids the deliberate abortion of a fetus unless it occurs during the first trimester or “a serious danger exists that the child will suffer from severe mental or physical injuries.” This paragraph essentially permits the otherwise illegal abortion of a fetus (explicitly called a “child” in sec. 97) if a strong probability exists that it will be severely disabled. Section 97 does not define exactly what “severe” means; presumably, the word is open to definition by the attending physician. Defenders of this law would likely muster humanitarian arguments in its support. The counterargument that sec. 97 codifies prevailing social attitudes about the sort of life worth preserving and the kind fit for destruction, however, is equally tenable. A similar interpretation might be applied to the “wrongful life” tort in U.S. (and now in Dutch) civil law, which can in some circumstances render physicians liable for failing to counsel parents to terminate a pregnancy when the fetus might be severely handicapped.

C. *Ideas of biological worth, once they have won broad acceptance in a population, take on an internal momentum that is rarely predictable (the “moral slide”).*

The Nazis placed human beings on a ladder of biological value, in which those on the higher rungs were to benefit and flourish at the expense of those on the lower. From this premise, Hitler and his followers drew the conclusion that
less valuable people should be removed from society, then prevented altogether from reproducing. In the late 1930's, the decision was made to accelerate the removal of unwanted groups by mass killing (the “T-4 program”); originally restricted to “incurable” mental patients, the killing eventually spread to numerous other undesired minorities. By the end of the war, at least 270,000 mental patients, six million Jews, and an undetermined number of “asocials” (juvenile delinquents, petty criminals, the homeless) had been liquidated. The murders in every case had at least some connection with the T-4 authorities in Berlin (the employees of which, as we have seen, were responsible for setting up the first death camps in Poland). It is a stretch to suppose that Binding and Hoche, writing in 1920, could have anticipated the obscene directions in which their ideas would be developed.

The British medical ethicist Jonathan Glover calls this phenomenon the “moral slide.” In illustration, he cites the practice of area bombing during World War II, justified by its advocates with resort to the British blockade of Germany during the Great War. Their argument was that, since the deaths of hundreds of thousands of German civilians due to the blockade were ethically acceptable, the destruction of civilians through area bombing was likewise unobjectionable. As Glover notes, the World War I blockade facilitated the horrific bombing raids on Hamburg, Darmstadt, and Dresden, which then became precedents for the Americans’ fire-bombing of Tokyo. The latter subsequently paved the way to the nuclear incineration of Hiroshima and Nagasaki.
chain of destruction, earlier episodes of violence are used to justify later ones, even where the subsequent acts of violence surpass in cruelty and scope of devastation the precedents cited in their support. 

The chain of escalating violence constructed on destructive precedents has yet to be broken in the modern age. From blockades to area bombing to the nuclear immolation of cities, we have moved toward the potential annihilation of countries, continents, and now the earth itself. In a perverse, if unintended, elaboration of Nazi genocide, writers like the philosopher Berel Lang have suggested that we have cut a swath from the destruction of civilians, to the mass destruction of entire peoples, to the terrible possibility of omnicide—the annihilation of all or most life forms on the planet. We are, of course, not aware of behaving criminally, nor is it my argument or my belief that modern governments and the populations that elect them should be equated with the Nazi killers. We do, however, share with many of the killers a muted awareness of the moral consequences of our actions. Labyrinthine bureaucracies and modern technologies buffer us from the horrors of actual or potential mass death, much as they muffled the perceptions of many of the T-4 defendants. In his closing address to the Frankfurt Schwurgericht in May 1970, Hans-Joachim Becker, a euthanasia functionary who had helped make T-4 a going financial concern by overcharging insurance carriers for murdered patients, declared that he had been “ensnared in the operation without knowledge or understanding of it,” and that he found it “unbearable” to be punished for something he “had not done.” Becker’s protests of innocent involvement in wrongdoing evoke comparison with
the euthanasia defendants we have examined, as well as other Germans embroiled in the killing projects of National Socialism. While we can doubt the total veracity of such claims, it does seem that large organizational structures and technologies blunt our insight into the nature of the actions we participate in. One of the sobering lessons of the euthanasia trials is that the "moral slide" happens with or without our unimpaired awareness of its occurrence.

D. There will always be plenty of accomplices to assist a criminal regime carry out its crimes.

With several notable exceptions (among them Brandt, Brack, Mennecke and Pfannmüller), few of the German medical professionals in the euthanasia trials were driven to commit their crimes by ideology. The majority was impelled by other factors, among them careerism. Almost every physician we have discussed, for example, joined the Nazi party only after 1933, when it became professionally expedient to swim with the political current. Many of them—particularly the directors of state institutions and civil servants within the provincial health services—owed their advancement, at least in substantial part, to their membership in the Nazi party. Some ideological killers like Friedrich Mennecke were motivated by careerist aspirations: Mennecke reveled in his self-important contact with the "famous Berlin organization" (the Führer's Chancellery), boasting to his wife of the praise showered on him by Werner

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* Eichmann and Rudolf Höss come to mind in this regard. They maintained throughout their interrogations and trials that they had not participated in the killings. Although both men had contributed to the murders of millions, neither felt responsibility because he had not himself directly caused the death of a camp prisoner. See Eichmanns Vernehmungsprotokolle II, 673; Rudolf Höss, Kommandant in Auschwitz: Autobiographische Aufzeichnungen des Rudolf Höss, hrsg. M. Broszat (München: Deutscher Taschenbuch Verlag, 1996), p. 153.
Heyde for his contributions to T-4's work. Other defendants collaborated in the killing program out of fear for losing their positions (e.g., Mauthe, Sprauer, the three Hannover province defendants, Hermann Wesse, and Mathilde Weber).

The emphasis placed on career and status, especially among the bourgeois professional classes, renders these individuals peculiarly susceptible to corruption when a criminal faction has come to power. This is so because middle-class professionals typically depend for their career advancement on their position within an organization. Where organizational life is dominated by a criminal regime, opportunities for wrongdoing multiply. We saw a graphic example of the vulnerability of middle-class professionals to a criminal government in our discussion of Ludwig Sprauer, director of the Baden Interior Ministry's Health Department. At his trial for complicity in the transportation of Baden mental patients to their deaths at Grafeneck, Sprauer justified his actions on the grounds that he would have faced "professional disadvantages" had he declined his cooperation with the program. Little or no evidence emerged at trial that Sprauer was an ideological Nazi. Rather, he apparently weighed the competing interests (career advancement versus the lives of the patients) and deemed his career more important than the patients' welfare. We may deplore the crassness of Sprauer's calculation, but it is hard to avoid the suspicion that many other ambitious officials in a similar position would arrive at the same conclusion.

E. Societies tend to be reluctant about confronting atrocities their own citizens have committed, especially where the atrocities are related to nationalist projects like warmaking or territorial expansion and involve large numbers of perpetrators.

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The German people for the most part supported (or quietly tolerated) the trial of the major war criminals at Nuremberg. When the trial was over, the belief spread in Germany that the real war criminals had been dealt with. Further indictments and prosecutions came to be regarded as “Victors’ Justice” (Siegerjustiz), a perception that plagued the 12 U.S. trials subsequent to the IMT proceeding. The popular backlash against the Allied successor proceedings without question affected the German trials of euthanasia defendants in the late 1940’s and early 1950’s, edging them toward the leniency and acquittal described in chapters 5, 7, and 8. Where 70 percent of western Germans favored the trials in 1946, by 1950 an equal percentage opposed them. Ulrich Herbert ascribes this remarkable inversion to the fact that the subsequent trials presided over the guilt not of a tiny minority of the population (as the IMT had), but of the crème-de-la-crème of German society: jurists, diplomats, doctors, scientists, and generals. With the IMT, the public could accept the trial of a criminal nucleus that had seduced Germany into catastrophic wars of conquest and extermination; in the subsequent trials, by contrast, German social elites and—symbolically—the German nation itself were in the dock.11

That the prosecution of German social elites in the subsequent trials provoked resistance and denial should not be a surprise to us. In the United States today, we have yet to confront fully the war crimes and crimes against humanity committed by U.S. forces in Vietnam. The My Lai massacre, in which hundreds of Vietnamese civilians were murdered by members of the U.S. Army’s Charlie Company, would not have been brought to light without the courageous intervention of a whistle-blower, who foiled a
two-and-a-half year Army cover-up of the slaughter. Even so, one of the main perpetrators of the massacre, Lieutenant William Calley, would later address Veterans’ groups as a war hero.¹²

F. In shocking crimes tried before international courts, the facts will drive the law.

In examining the historical prologue to the IMT and American National Trials (NMT), we saw that legal niceties like the ban on *ex post facto* prosecutions evaporated in the face of Nazi crimes. Questions of jurisdiction and retroactivity were subordinated to the need to punish these enormities. Although the “Martens Clause” had opened the door to criminalizing acts not specifically condemned by the 1907 Hague Convention (“until a more complete code . . . has been issued. . . . belligerents remain under the . . . law of nations”), no international instrument had proscribed crimes against humanity until the London Charter in 1945. In the years since the Nuremberg trials, international law has condemned with exquisite particularity the kinds of crimes perpetrated by the Nazis: the U.N. Convention for the Prevention and Punishment of the Crime of Genocide (1948), the four Geneva Conventions for the Protection of War Victims (1949), the Helsinki Accords (1975), and the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (1977) all seek to criminalize Nazi-style assaults on civilian populations. Enhanced linguistic specificity, however, does not mean that current international statutes will cover all future acts of global violence, given the human imagination’s endless fecundity in inventing new methods of torture and mass death. If we someday
face a situation similar to that confronting the Allies in 1945, the will to punish can be expected to outweigh formalistic concerns about retroactivity and due process.

**G. In shocking crimes tried before national courts, the law will drive the facts.**

As our examination of the U.S. and West German national trials revealed, crimes prosecuted before national courts are subject to the influence of nonlegal factors (politics, international events, psychological needs). The very susceptibility of legal process to these forces proves that the legal apparatus in national courts will determine how the "facts" of the case are interpreted, forging conceptions of the evidence structured less by dispassionate legal science than by other, extrajuridical factors.

**H. A crime against humanity may have little or nothing to do with war crimes.**

It is convenient to categorize crimes against humanity and war crimes together, but eliding the conceptual difference between them risks skewing our understanding of both. The T-4 killings, like the Final Solution, were not triggered by the war in the way SS shootings of American G.I.s at Malmedy were. The latter were the direct result of the brutalizing tendencies of war. The former, by contrast, were conducted under cover of the war, and may well have occurred had World War II never broken out. (In the case of the Jews, the Final Solution would have been considerably more modest, since European Jewry would not have fallen into Hitler's hands without German occupation of Europe.) The recent "ethnic cleansing" (a euphemism for genocide) prosecuted before the
International Tribunal for Yugoslavia in the Hague suggest that the mass murder of a civilian population may occur even in the absence of formal armed conflict.

A brief excursus on German etymology demonstrates the point. Our word “war” is a Germanic word, cognately related to verwirren, meaning “to confuse” or “perplex.” Viewing Nazi genocide as arising from a situation of wartime extremity suggests that its perpetrators acted in a state of “confusion” or “perplexity”—in other words, in the fog that envelops all combat. The logical implication is that Nazi criminality was caused by the crises, confusions, and duress of war.

The truth is other. The physical assault on the disabled began shortly after Hitler came to power, when the Nazis passed a mandatory sterilization law (Law for the Prevention of Hereditarily Diseased Progeny). The full story of the prewar mistreatment of the mentally handicapped cannot be read solely from National Socialist legislation, however. We will recall the testimony at the Eichberg trial of its former director, Wilhelm Hinsen, that a “growing deterioration of care for the mentally ill” was already apparent in 1938, visible in reduced meat rations and a smaller ratio of patients to doctors. Similarly, the Nazis’ persecution of the Jews began long before the official beginning of the Final Solution in the summer and fall of 1941. Jäger describes lynching-style murders of Jewish prisoners at Dachau by SS men in 1937. In November of that year, SS guards forced a Jewish prisoner to climb into the iron drum of a cement-mixing machine, which they hoisted to a height of three meters and released. The drum fell to the floor with a crash. The procedure was repeated for a half-hour.
during which one of the guards cursed the victim, "You pig-Jew, I'll show you!"

He and his comrades revived the unconscious victim with cold water and renewed the torture until the victim, covered with blood, appeared to be dead. He died later on the same day. In the concentration camp Sachsenhausen, two prisoners (among them a professor from Lodz) were murdered by forcing a water hose into their mouths and turning on the faucet full-blast. Their deaths ensued amid laughter from the assembled camp personnel. This gallery of prewar horrors could be replicated ad infinitum.\(^{14}\)

The purpose in reciting these grisly episodes is to demonstrate that violence against the mentally ill and European Jews had started before the war had commenced. Although such violence had not yet assumed a programmatic character, it was sufficiently widespread to provoke the well-known "Declaration of War" by Chaim Weizmann at the 1939 Zionist Congress, in which he identified the Jewish people with the cause of the Allies against Hitler at a time when the death camps in Poland and mass shootings in Russia were two years in the future. Weizmann was responding to the murderous violence visited on Jews in the first six years of the Nazi government's existence. During this time (1933-39), it has been estimated that the Nazis killed some 140,000 concentration camp prisoners, many of them Jewish. When war came, it merely furnished the opportunity to push these inchoate genocidal tendencies forward into the massive killing projects of the 1940's.\(^{15}\)
I. A crucial factor in a criminal regime's ability to transvalue the morality of a civil population is time laden with experience.

Most of the perpetrators retained their awareness that killing innocent people was wrongful at some level, be it legal or moral. In some cases (regrettably few in number), doctors approached about collaborating in the euthanasia program refused to participate. When Ludwig Sprauer informed the director of the Illenau institution, Dr. R., about the program in December 1939, R. flatly rejected Sprauer's invitation to collaborate with it. Dr. R. thereafter vainly tried to organize a resistance among other Baden directors against Sprauer before taking a three month "vacation." On his return, he continued to joust with Sprauer over exempting Illenau from the euthanasia program. Sprauer not only refused to grant this exemption, but demanded that R. prepare a list of 60 patients for transport to the transit center of Reichenau. His efforts to oppose the program thwarted, R. retired a few months later. Mention was made in our discussion of Sprauer's trial that other directors of Baden institutions opposed attempts to transport patients from their facilities to the killing center at Grafeneck. The examples of Wilhelm Hinsen, Dr. R., and the Baden directors prove that not all German physicians had abandoned devotion to the welfare of their patients.

Why was this so? The Nazi Party was only in power 12 years—long enough to affect the moral landscape in Germany, but not long enough to effect a complete "transvaluation" of German mores. Yet, the Nazis were remarkably efficient in investing this comparatively brief opportunity for indoctrination with maximum propaganda effect. The time available to them, in other words, was
laden with the experience of the National Socialist thought world. Despite the
brevity of the regime’s existence, evidence of an incipient transvaluation does
exist, particularly within the indoctrinated Party cells (primarily the SS, Gestapo,
and Security Services). Hans-Heinrich Jescheck, during the war a Wehrmacht
officer serving in eastern Europe, had occasion to observe the combat units of the
SS (the so-called “Waffen SS”). He was struck by the fact that these SS soldiers
neglected the recovery and care of their wounded comrades, an attitude that
contradicted the duty to care for the war-wounded within the German army.
Clearly, the elite stormtroopers had internalized the Nazi Party’s ethic of the total
expendibility of the individual—a transvaluation of values the Nazis had
produced in less than a decade. In the field of Nazi medicine, German bioethicist
Eckhard Herych relates the story of his now deceased godmother, who was
trained at the chief medical training center for SS doctors, the Würzburg College
of Medicine. Throughout most of her postwar career, she was able to conceal her
attitudes toward the mentally disabled. Toward the end of her life, however, the
onset of senile dementia made it increasingly difficult for her to maintain the
decades-long pretense. On one occasion, as she was walking with Herych
through the crowded streets of a German city, she saw a handicapped person in a
wheelchair, about whom she quipped: “We would know what to do with him back
then.” The menace in this remark is unmistakable: she was obviously referring
to the Nazi euthanasia program. If the Nazis could reconfigure the moral
consciousness of the ideological vanguards of the Party within 12 years, it is
disquieting to reflect on what they might have been able to achieve with more time.

II. The Legacy

Black's Law Dictionary defines the word "legacy" as "a gift or bequest by will of personal property." When we speak about the "legacy" of the euthanasia trials, we use the term metaphorically to describe the meaning of the destruction of the mentally ill as we interpret the event today. As the historical "legatees" of both the T-4 program and the trials of its implementers, we are called upon to understand the nature of the event in order to appropriate its meaning for ourselves, our children, and for posterity. How, then, are we to interpret the fundamental character of the T-4 program? Why did it happen? What were the motives of its originators? And could it happen again?

In order to address these questions, it is essential to reflect on whether the killing projects of the Third Reich were primarily "modern" or "anti-modern" phenomena—that is, whether the destruction of the mentally ill and others was developed as a "solution" to modern problems like food and resource allocation, or instead was driven by irrational factors like racial hatred and the ideology of "life unworthy of life."

The U.S. and West German euthanasia trials forged their own answer to this question long before scholars turned it into a contentious issue of academic debate. The Americans were consistent in their view of National Socialist euthanasia from the IMT to the Doctors' Trial: the program was conceived and implemented to destroy "useless eaters" unable to contribute to "the German war.
machine.” As early as the U.S. Hadamar trial in October 1945, Adolf Wahlmann, Hadamar’s chief doctor, had confessed that conserving resources was the true purpose behind the killings at the institution. Likewise, in their pre-trial interrogations both Brandt and Pfannmüller had admitted to the pivotal role of economics in the murder of the mentally handicapped (although insisting on their own “humane” motives). These and kindred statements gave the U.S. prosecutors a ready-made case founded on an “economistic” theory of Nazi genocide. The U.S. theory of Nazi euthanasia was not unalloyed: it also portrayed the killing of the mentally ill as ideologically inspired, originating from “a perverted moral outlook in which cruelty to subjugated races and peoples was praiseworthy,” as Taylor put it in his opening statement. However, the economistic theory tended to have the upper hand throughout the trial, receiving the endorsement of the American Tribunal in its verdict.18

The West German trials uniformly depicted the program as underpinned by “crass utilitarian considerations and pure material emphases.”19 Virtually every case we explored in chapters 5, 7, and 8 subscribed to the economistic theory of the T-4 program, holding that patients were killed in order to transfer medical resources from “valueless” to “valuable” members of the Volksgemeinschaft. The courts typically referred to this process as guided by Zweckmässigkeitserwägungen, literally “considerations in accordance with goals,” a locution that has in both German and in English a distintively modern ring. On this theory, the goal of making available scarce resources, especially hospital space, for use by “productive” Volksgenossen was achieved through the
destruction of the "unproductive." As we assess the legacy of the euthanasia trials, it is instructive to examine whether the courts' economistic interpretation is an accurate portrayal of the T-4 program. In the final analysis, the degree to which Nazi genocide incorporates modern and post-modern elements will affect the ways in which we understand, appropriate, and apply that event today.

A. How modern was National Socialist mass murder? The Academic Debates

One of the more forceful statements of the economistic theory of Nazi genocide in the last two decades appears in the work of Götz Aly and Susanne Heim. In a series of books and articles beginning in the 1980's, they argued that not ideological forces like racism but modern concerns with overpopulation and resource allocation drove the Nazis' descent into mass extermination. For Aly and Heim, the key to understanding the motives behind the Holocaust (as well as the Nazis' extermination of other despised minorities) is the middle-level Nazi officialdom in the civil occupation administration of the General Government (i.e., occupied Poland). These officials were less Party ideologues than technocratic pragmatists, whose plans to modernize Poland, and possibly other parts of eastern Europe, involved the "rationally calculated" assumption that millions of superfluous people would have to disappear. In this "rational" calculus, the poor among eastern European populations would have to be killed in order to make way for the introduction of modern agricultural and industrial enterprises. The deaths of millions of redundant human beings would also solve the problem of inadequate food supplies in Poland. The brunt of these genocidal
plans fell on Polish Jews: as a largely urban and impoverished group dominating the pre-modern economy and occupying housing that could be made available for an ethnic German industrial workforce, they were especially conspicuous targets for the Nazi modernizers. The Holocaust emerges in Aly and Heim’s account as a solution to the “modernization” problem, rather than the “final solution” to the “Jewish problem,” devised by rationally-minded German bureaucrats.

In a recent essay, Aly applies this thesis to the murders of the mentally ill in the east. He attributes the destruction of mental patients by the Lange Sonderkommando in the East Prussian sanatorium Soldau to German resettlement policy. (The facility was later used as a transit camp for ethnic German settlers from Lithuania.) Aly cites killings of the disabled in the Warthegau and elsewhere, executed without “concrete” orders to create space for ethnic German settlers. The experiences of the German officials in charge of these killings persuaded them that mass extermination was a practicable method of dealing with population policy, especially since the German public and participating bureaucrats did not object to it. Conditioned by this success, these officials were primed to extend the logic of mass murder in late 1941 to the annihilation of the Jews.21

Although Aly and Heim’s thesis pertains chiefly to the unfolding of Nazi extermination policy in eastern Europe, the implication for the domestic T-4 program is clear: T-4, like all the bureaucracies imbricated in National Socialist...
mass killing, was concerned less with destroying "life unworthy of life" than with solving modern problems related to resource allocation (housing, hospital space, medical supplies and staff, food, etc.). For the German historian Norbert Frei, this emphasis on "economic rationality and scientific modernity" enabled Aly and Heim to interpret the persecution of the mentally handicapped—beginning with their sterilization in the mid-1930's and culminating in the T-4 killing program—as "rational" and "modern" responses to the problem of material constraints. By extension, he notes, the same held for "the stigmatization, looting, and murder of Jews all over the Continent." A similar conception, left systematically undeveloped, is present in the U.S. and German judicial conceptions of the "crass utilitarianism" of Nazi euthanasia.

On a certain level, evidence does exist to support the Aly-Heim thesis. Nazi authorities routinely clothed their evacuation and killing of mental patients in economistic language. The commissioner for the Bremen health department, Erich Vagts, drafted a transcript of an April 1940 meeting presided over by Viktor Brack, during which ominous reference was made to the evacuation of 30-40 percent of patients in German mental hospitals deemed "asocial or life unworthy of life elements." These "elements" were to be transported from their current hospitals, which would then be converted into "urgently needed" hospitals (Reservelazarett), to "primitive facilities." "In these primitive accommodations," Vagts recorded, "mortality will of course be considerably greater, especially in times of war." In fact, the so-called "primitive facilities" were the T-4 killing
centers. Vagts’ transcript shows that, even before the invasion of the Soviet Union or the razing of German cities by Allied saturation bombing, Nazi officials were justifying the deaths of the mentally ill on war-related grounds.\textsuperscript{23}

The question, however, is not so much whether such evidence exists: it indisputably does. Rather, we should ask whether we have good reason to accept on their face these economistic representations by government functionaries. The trial courts \textit{did} accept them, but such acceptance did not affect the outcome of their verdicts. For historians the stakes loom larger, because the answer to this question will determine whether we conceive of Nazi criminality as guided by recognizably modern concerns (overpopulation, housing, food) or by a virulent will to destroy “valueless” groups. The Aly-Heim thesis has invited telling criticism from several directions.\textsuperscript{24} One of its foremost antagonists is Ulrich Herbert, who critiques Aly and Heim for falling under the spell of Nazi language. For Herbert, the technocrats’ claims of resource scarcity were “strategies of legitimation” that provided a pseudo-scientific warrant for their “racist aims.” Herbert’s point here is quite subtle: he does not contend that the utilitarian justifications “masked” Nazi racism. Instead, they furnished “‘empirical’ proof for the correctness, superiority, and scientific character of National Socialist racism.” Arguments about population policy and resource allocation proved to the Nazis the truth of their own “race-based approach” to all social questions. Aly and Heim, Herbert maintains, mistake a legitimating strategy for the actual cause of National Socialist criminality.\textsuperscript{25}

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The Nazis, in other words, sought post hoc rationalizations for an irrational and increasingly violent racial hatred. Herbert's criticism is supported by a wealth of evidence, some of which we have discussed in earlier chapters. A patina of pretentious pseudo-science always clung to National Socialism, as the establishment of prestigious university chairs in racial hygiene during the 1930's demonstrates. That ostensibly "reasonable" men could turn serious attention to pseudo-scientific questions suggests an antecedent desire to find some empirical basis for irrational prejudice. (The biometric manias of the 19th century, professing to find a material proof of racial inequality in alleged differences in cranial capacity, might be ascribed to a similar motivation.) Allegations during the war that the regime's killing projects were required by the demands of humanity (the "humanitarian" justification for euthanasia) or of economy seem to fall into step with these earlier efforts to legitimize attacks on disfavored groups. Such strategies of legitimation are related to Herbert Jäger's notion of "internal concealment:" the pose of humanitarianism or war-economy offers a corroboration (be it moral or "scientific") of racially-inspired murder, concealing from the perpetrators themselves its true ideological purposes.26 With respect to Nazi euthanasia, internal concealment is manifested in the Hitler order of 1939, the language of which ("a mercy death is to be permitted after humane assessment") conveyed the impression to its narrow circle of readers that the killings were an act of compassion for suffering people. The Nazis' tendency to blur the contours between euthanasia as the freely elected choice of a terminally ill, autonomous subject and the murder of "worthless" people by government fiat
is another instance of the attempt to legitimate killing on acceptable grounds.
Whether deriving from traditional morality or from “science,” these examples of rationalization bolster Ulrich Herbert’s contention that the utilitarian language used by Nazi technocrats was a strategy to legitimate million-fold murder committed for racial-ideological motives.

I find Herbert’s critique of Aly-Heim compelling. The case of Aly and Heim reveals how even seasoned researchers in the field of Nazi genocide can be led astray by the mendacious quality of National Socialist language. Without a doubt, Hitler’s invasion of eastern Europe evoked continuity with the historic Drang nach Osten (drive toward the east) that had animated the territorial fantasies of German nationalists for centuries. It is equally certain that Hitler and the SS intended to colonize the east with ethnic German settlers and surplus Germans from the overpopulated Reich; this was the central tenet of his theory of Lehmensraum, expressed in his speeches as early as the 1920’s. Where Hitler’s geopolitical schemes departed from earlier precedents was in its fanatical preoccupation with purity, defined in terms of race, and in the capacity of this idee fixe to become increasingly violentized as the regime attained its territorial aims. The pure “community of the people” (Volksgemeinschaft, also an obsessive theme in Hitler’s speeches dating back to the 1920’s), whether in Germany or in eastern Europe, required the exclusion of inassimilable “elements:” Gypsies, the mentally disabled, and the “poisoner” of the human race, the Jews. In the 1930’s the Nazis endeavored to exclude such groups through sterilization (the mentally ill) and disemancipation (the Jews). By 1938, the
salvos of the regime’s increasingly violent attitude toward the Jews erupted in the Night of Broken Glass; by late 1939, an official program had been conceived to destroy “incurable” mental patients. Emboldened by the successes of institutionalized killing during phase I of the euthanasia program, awash in euphoria over their stunning victories on the eastern front, the Nazis embraced the method of extermination to “solve” the “problem” of the Jews in their midst. At every turn of this snaking path, Nazi policymakers framed justifications for their violent actions. Sterilization and killing of “unworthy life” were legitimated on humanitarian and economistic grounds. The Night of Broken Glass attacks were “spontaneous” uprisings of Germans aggrieved over vom Rath’s assassination, while the mass murders of Jews in the east were summary executions of suspected “saboteurs” and “partisans.” Given this penchant for (self)deceit and misrepresentation, it is hardly surprising that the crown jewel of Nazi criminality, the destruction of millions of European Jews in the death camps of occupied Poland, should be tricked out in the misleading language of population policy.

This does not of course mean that pragmatic or situational factors did not sometimes intrude into the decisions to unleash violence against the Nazis’ devalued victims, as Aly and Heim maintain. There was a perceived need for more army and civilian hospitals in Germany, particularly after the Allied destruction of German cities in 1942-1943. Hospitals could be produced by emptying mental institutions and converting them to military and civilian use. However, I would argue that the need for hospital space did not cause the destruction of the mentally ill (which, in any case, had already begun years
before), so much as strengthen decisions previously made on ideological grounds. Freeing up medical resources became another strategy to legitimate in the Nazis' own minds the annihilation of the unfit. The prior devaluation of disabled patients as "life unworthy of life" simplified the decision to kill them for "economic" reasons. By the early 1940's, the violent potentiality within Nazism was becoming fully actualized: all social problems could be solved through mass murder. Without the Nazi taxonomy of biological value, however, this radicalization would never have occurred.27

If, as I have argued, the destruction of the mentally disabled and other groups by the Nazis was actuated by ideological motives, what is the nature of its legacy for us today? Was Nazism anti-modern? If so, why should post-modern people interest themselves in studying a vanished and obsolete civilization as remote from their concerns as the Hittites (who as a culture survived much longer than the Nazis)? To deny the Aly-Heim thesis that Nazi genocide was motivated primarily by "modem," amoral rationality rather than racism is not to deny its modern aspects. Zygmunt Bauman has developed a more persuasive account of the modern features of Nazi killing projects. He perceives the Holocaust as an episode of "social engineering" that used the resources of state authority to achieve the goal of a "better" society—one purged of "contaminants" like the Jews. The Nazis deployed ends-means rationality in pursuit of this objective, consisting of layers of intermediate bureaucracy and planning agencies responsive to the expressed will of the Führer. In typically modern fashion, these organizations received their orders and dispassionately contrived the most
efficient means of producing the desired effect—namely, mass extermination.

Bauman sees in both the amoral social engineering and the ends-means rationality of Nazi officials the symptoms of a modern style of thought. For Bauman, modernity is not only heedless of the suffering, devastation, and mass death left in the wake of its goal-oriented actions, but may in certain circumstances employ them if they are the most expedient means to targeted ends. Rational action divorced from moral awareness breeds holocausts.²⁸

Bauman’s provocative thesis makes important observations about the modern features of Nazi genocide. In his account, National Socialist killing is imbued with chimerical racist ideology; however, the ideological goals of the regime are pursued with all the cognitive and administrative resources of the modern state, including instrumental rationality and sophisticated bureaucracies. Bauman’s analysis (like Aly’s), as the historian of Nazi science, Alan Beyerchen, has noted, is best tailored to the middle-level officials and policymakers (such as T-4) bent on “managerial, impersonal efficiency;” it has less application to the field-level executioners at the bottom or the “visionary” leadership cadre at the top.²⁹

Bauman’s theory, moreover, does not address the contemporary relevance of Nazi genocide even if it does contain modern elements. We live, after all, in a post-modern world—shaped, to be sure, by modernity, but distinct from it. For those interested in the contemporary relevance of Nazi genocide, the issue pivots not only on the relationship of genocide to modernity but also to post-modernity. Writing in the early 1970’s, the German psychoanalyst Erich Fromm elaborated
his theory of "necrophilism," a behavioral phenomenon that may enable us to maintain the relevance of Nazi genocide to our post-modern world. According to Fromm, Hitler and his top echelon followers were driven to their criminality by a desire to produce death as an act of projecting onto the world their own internal emptiness. "Necrophiles," or lovers of death, "want to destroy everything and everybody, often even themselves, their enemy is life itself." The necrophile realizes his identity by using his resources, his techné, to produce corpses. Fromm sees no strategic dimensions in Hitler's killing projects—only the "passion of a deeply necrophilous man."

Fromm's denial of a strategic goal served by Hitler's atrocities raises the question of what impelled his multitudinous crimes. The historical record suggests that anti-Semitism, anti-Slavism, and a crude Social Darwinism were essential to his motivation. If we understand the sparking malice directed toward Hitler's victims as the "passion of a deeply necrophilous man," we approach a conception that has great explanatory power for all of Hitler's convoluted criminality. His desire to preside over a kingdom of corpses may have been the infernal engine that drove the Nazi regime's habit after the war had started of problematizing social issues (usually couched in the form of a question: the "Jewish question," "the Eastern Worker question," "the Free Mason question," etc.) and demanding ever more radical "solutions" to them. Hitler the megalomaniac, Hitler the providential renewer of the human race, sought to create
himself, as he had alleged in *Mein Kampf*, through an act of superhuman will. Between 1939 and his death in April 1945, that will was increasingly the will to annihilation.

In short, the same process of modernity that once called into question traditional forms of identity has made possible individuals like Adolf Hitler, internally empty people in search of the "absolutely real" through the production of death and destruction. In its anxiety about the problematic nature of the self, the postmodern age has turned to identity politics for a secure anchor. The psychopathological form of that quest may be the mass destruction of human life in a lunatic effort to broker a self-created identity. Necrophiles like Adolf Hitler, referred to by the postwar German courts as the "main perpetrator" of Nazi genocide, may be the shadows cast by identity politics, the extreme possibilities of the modern and post-modern landscape we all inhabit.

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The necrophiles at the apex of the Nazi pyramid were not, however, the focus of the German euthanasia trials. As we have seen, middle level bureaucrats and health care personnel were the defendants in these trials. In many of the prosecutions, the defendants alleged a lack of awareness of criminal wrongdoing as an absolute defense to charges of homicide. For a time, German courts dismissed their claims with reference to natural law. As adherence to natural law theory waned in the early 1950's, however, mistake of law defenses gained more
acceptance within German courtrooms. For the student of Nazi genocide, an important question is thus raised by the trial records: to what extent did the euthanasia killers comprehend the illegality of their actions?

The problem of an actor's awareness of wrongdoing within governmental structures bedevils most inquiries into state-sponsored criminality. The issue of knowledge is complicated even further in the case of Nazi genocide, inasmuch as an extremely broad swath of German society—the Nazi Party, German industry, the civil service, federal and state ministries, the military, the police, the judiciary—were complicitous in it. Where so many “respectable” citizens were involved, to what degree can it be said of Nazi criminals that they recognized their own contributions to genocide as illegal? One solution to this question, as we have seen, was to posit the existence of a natural law that reveals principles of justice and injustice to all rational people. Another solution was suggested by the late German historian Hans Buchheim in the 1964 Auschwitz trial. In his expert testimony before the Frankfurt state court, Buchheim rejected natural law as a means of holding Nazi killers criminally liable for their actions. Instead, he proffered an “analysis of the psychological situation of the era governed by National Socialism,” in order to arrive at an understanding of cognitive-ethical possibilities available to Germans during the Third Reich. Buchheim’s method takes us into the innermost caverns of the genocidal mentality under Nazism, allowing us to chart the fractured moral consciousness of the Nazi killer.
B. Haunted by Morality: the Double State, the Divided Self, and Phantom Communities in Nazi Criminality

On July 2, 1964 Hans Buchheim, a German historian from the Institute for Contemporary History in Munich, offered testimony at the trial of former guards at the Auschwitz death camp. He testified as an expert witness on "the problem of the superior orders defense [Befehlsnotstand] from a historical perspective, as it pertained to the crimes commanded by the Nazi regime." In his expert testimony, Buchheim declared that Adolf Hitler's authority within the National Socialist state was divided into two discrete and non-overlapping spheres, one "normative," the other "extra-normative." The normative sphere embraced military matters, especially orders given in the field that targeted purely military purposes. The extra-normative sphere consisted of the political domain, in which Nazi Party ideology was the "highest law"—a "law" transcending the conventional legal order and superior to it, because it served the "historical mission" of National Socialism. "The unconditional duty of obedience to Hitler was not in harmony with the state order," Buchheim testified. "Legal and moral principles had relatively little validity in the face of 'the law of history;' where they stood in the way of the 'historical mission,' they were suspended, and the command of the Führer was released from every normative principle. The killing of political opponents was no longer murder, but only a political necessity."
In illustration of this fissioning of Hitler’s authority into a normative and an extranormative domain, Buchheim cited an excerpt from the *Einsatzbefehl* Nr. 8 of the Chief of Security Police Security Service, dated 7/17/41, regarding “Guidelines for the Selection of Civilians and Suspected Prisoners of War of the Eastern Campaign in the P.O.W. Camps.” The original text of the order read:

> The Wehrmacht must immediately free itself of all those elements among the prisoners of war that are regarded as Bolshevik agitators. The special condition of the eastern campaign therefore requires special measures, *which must be implemented free of bureaucratic and administrative influences*. While thus far exclusively military considerations have been the basis of the prescriptions and commands of the P.O.W. system, the political goal must now be achieved of protecting the German people from Bolshevik persecution and to seize firm control of the occupied territory. (emphasis added)

According to Buchheim, this excerpt demonstrated the duality of the *Führer*’s authority within the Nazi state, clearly distinguishing between military goals (subject to “bureaucratic and administrative influences,” presumably the Laws of War) and political goals (determined by Nazi ideology and thus exempt from the normative sphere). In pursuing the political goals of National Socialism, “special [i.e., extra-normative] measures” were both justified and required. The commanders of the *Einsatzgruppen* and SS units who received orders to shoot Jews, Gypsies, Soviet P.O.W.s, and the mentally ill in the eastern territories were aware that such orders were “illegal,” as measured by conventional norms like the Laws of Armed Conflict or the German Penal Code. They nonetheless overcame their inhibitions by following the requirements of the “higher” extra-normative “law” expressed in the *Führer*’s will—a will that ultimately steered the German people toward fulfillment of its historical mission. Buchheim continued:

> An appropriate assessment of obedience to criminal orders is only possible if we free ourselves of the false conception that all *Führer* commands had to be...
consistent with a unified legal order, and every Führer command had to have legal effect. Of course, there was the unity of the Führer's authority. It was not, however, of a normative nature, but rather consisted in an alleged extra-normative historical authority. Only through it were the extra-normative Führer commands binding; by contrast, they were not legally binding. [emphasis in original] The duty of obedience toward them was as a result not a legal duty (and it was not understood as such at the time), but a duty of loyalty, which the recipient of the command affirmed through his voluntary consent. The content of the extra-normative commands did not become legally valid through the Führer's command according to conceptions at the time, but remained uncovered by valid law, and had therefore an unmistakable character of illegality. Precisely this, however, belonged to the duties of the convinced follower of the Führer, that he did what was historically necessary from ideological conviction in conscious violation of the law, and bore the stress resulting from this situation. At any rate, he could have the certainty that he would not be held accountable in the name of the law. On the other hand, he could not claim he was ensnared in a superior orders situation of duress comparable with the superior orders situation of a civil servant or soldier, which only operated on the basis of general civil duty.35

The important point Buchheim makes is that Hitler and his followers were aware their actions in eastern Europe were illegal. They had the "consciousness of illegality" (Unrechtswusstsein) prerequisite in German law to convicting a defendant of a crime. Yet, the historical task embodied in Hitler's will set them above the restrictions of the moral and legal order as they endeavored to implement their utopian world order.

The evidence supports Buchheim's theory of the Nazi government as a double state producing followers with a divided psychology of right and wrong. Historically, the notion of a "law of Nature" within National Socialist thought (not to be confused with the natural law tradition in Western jurisprudence) is at least as old as Mein Kampf, published in 1925. In his ponderous autobiography, Hitler set forth his idea that human thought and action must correspond to the

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* The status of "consciousness of illegality" in determining criminal fault was a controversial one in postwar German jurisprudence. Some jurists, among them Gustav Radbruch, held that German law did not require it as an element of criminal intent; all that mattered was that a defendant fulfil the elements of the offense (Tatbestandsmässigkeit). See Radbruch, Anmerkung, SJZ (1947), 633.
cruel laws of nature, which demanded above all that the strong dominate the weak. Drawing on a vein of racialist thought traceable to the 19th century works of Count Arthur de Gobineau, Hitler argued that the decline of all great civilizations occurred when this "iron logic of nature" was violated, as it was in modern parliamentary democracy. Even after 1933, Hitler stayed remarkably faithful to this primitive Social Darwinism, often referring in his Table Talks to his own self-conception as a messianic "tool" by means of which the "eternal" laws of nature could be realized. In a secret speech delivered on May 30, 1942 before the children of German officers, he descanted on the "battle all around us" that would lead "to the selection of the better and tougher." In this struggle Hitler perceived "the world order of the powerful and strong," the "law governing in the world." With the Nazi state crumbling all around him in 1944, he returned to these ideas in a speech to officer candidates:

Nature teaches us with every inspection of its rule that the principle of selection governs it, that the stronger victor remains and the weaker goes to the wall. It teaches us that what often appears as cruelty to us, because we are ourselves affected or because our upbringing has estranged us from the laws of nature, is often necessary in order to achieve a higher development of the living organism... [Nature] does not know the concept of humanity, which says that the weaker is to be nurtured and preserved under all circumstances, even at the cost of the existence of the stronger... Nature recognizes in weakness no ground for mitigation... on the contrary, weakness is to be condemned...

For Hitler, the war represented "the unchangeable law of all life, the presupposition for the natural selection of the stronger," as well as the "prelude to the eradication of the weaker." Morality might deplore this carnage, but from the "standpoint of nature" it was justified, and all means for its realization—war, brutality, terror—were permissible.

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All of this entailed a conception of law within the Third Reich identical with that sketched by Buchheim at the Auschwitz trial in 1964. Hitler felt himself obliged to obey the law only when it conformed to the "laws of nature." When however an act required by Nature violated a statute, Hitler simply disregarded it. For Hitler law, like everything else, was to be used and tossed aside when it became an impediment to the ideological goals of Nazism. We should bear in mind, as Buchheim emphasized, that Hitler was not oblivious to the law, nor did he regard himself as a legislator or source of law, whatever National Socialist propaganda in the 1930's trumpeted about his nomothetic powers.* Instead, he felt himself authorized to ignore the law when it clashed with his historical mission of reprimising the human race—a task achieved by destroying or subjugating biological and racial inferiors.

This contemptuous attitude toward the legal order also characterized Hitler's liegemen. In 1933 Hermann Göring declared, "My measures will not be enfeebled by any kind of legal considerations . . . . I am not here to promote justice, but only to destroy and eradicate, and nothing else!" In a 1936 speech before the Academy of German Law, Heinrich Himmler defended the use of

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* Thus Carl Schmitt’s effusive celebration of Hitler as “a source of law” for his role in the Night of the Long Knives in 1934 contributed to an aura of legitimacy around Hitler’s person (or “Hitler Myth,” to quote Ian Kershaw), assiduously cultivated by the Nazis since the 1920’s. Schmitt’s paean does not, however, reflect Hitler’s own conception of his position vis-à-vis positive law nor the views of many of his followers during the war, for whom Hitler was a source not of law but of extra-legal obligation (Treudeflicht). See Walther Hofer, ed., Der Nationalsozialismus: Dokumente 1933-1945 (Frankfurt am Main: Fischer Bücherei, 1960), p. 105; I. Kershaw, “Hitler and the Germans,” Life in the Third Reich, ed. R. Bessel (New York: Oxford University Press, 1987), p. 41, pp. 42-43.

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police terror in the years after the seizure of power, claiming that these
"pioneering acts" had laid "the foundation for a new law, the right to life of the
German people." Himmler continued:

From the very beginning I have held to the standpoint: whether a [legal]
paragraph opposes our actions matters not one whit to me; in fulfillment of my
tasks I do that which I can answer to according to my conscience in my work for
the Führer and the people, and to sound human understanding. Whether other
people chatter about "breaking the laws" made absolutely no difference in those
months and years in which the life or death of the German people was
concerned."

Himmler's remark sums up tout court the Nazi leadership's conception of legal
obligation: the mission of the Nazis might offend a mere "paragraph" in a statute,
but it was urgently necessary in order to defend the lives of "the German people."
The breathless invocation of national survival seems exaggerated to us today, but
it is consistent with many other examples of the ambience of crisis that the Nazis
exploited, created, and batted on. For Himmler as for Hitler and Göring, talk
about violating laws was "chatter" that elevated empty form above the rights of
the German people to national survival. In furtherance of these "rights," resort
would be made to measures standing outside the official legal realm. It is little
wonder the Nazis took such a dim view of positivism.

Ultimately, the source of obligation for a Nazi functionary was not the
law, but the National Socialist worldview. This principle of obligation did not
apply to average apolitical Germans, for whom the conventional norms of
codified law and custom sufficed to guide their actions. Rather, it extended to the
shock troops charged with implementing Nazi ideology—chiefly the SS and the
Party security services (Gestapo, SD, and security police).
indoctrinated enclaves, Herbert Jäger has noted, members acted not as German citizens but "as National Socialists" pursuing the political objectives of the movement. Both Adolf Eichmann and Rudolf Hoess, for example, described the end of Nazism in 1945 as not just the collapse of a political system, but of a style of thinking that was radically self-referential and discontinuous with mundane legal culture. For loyal Party man Hoess, the fulfillment of one's duties in the SS was "dedication of the self to the ideals [of the Party]." This self-enclosed "world" of devotion to ideological Nazism, in Hoess' words, "disappeared" with the destruction of the Nazi state in May 1945. Eichmann expressed a similar, faintly nostalgic view during his interrogations in Jerusalem, where he told his interrogators that the "psychological attitude toward all of these things" before 1945 was "completely different than today." Eichmann confessed that his own attitude toward "ideological things" had undergone a significant change since May 8, 1945 (the date of Germany's surrender). The tone of Hoess and Eichmann's postwar statements is consonant with Himmler's infamous Posen speech in 1943, in which Himmler, almost facetiously, alluded in an imaginary dialogue to the SS man's subordination to internal party norms:

"The Jewish people are to be exterminated," says a Party comrade. "Of course, it's in our program—exclusion of the Jews, extermination, we'll do it." And then they all arrive, the 80 million good Germans, and every one of them has his own decent Jew.

As Jäger comments, the invented reply of the loyal SS man—"of course, we'll do it"—relates to a consciousness of obligation linked to the goals of the Party, not to a conventional sense of legal duty.  

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These examples strongly support Hans Buchheim's claim that the Nazi state was bifurcated into two distinct spheres: a prosaic socio-legal order governed by law and a political subculture dominated by Nazi ideology. Jäger captures the essence of this schizoid feature of Nazi Germany through a series of binary opposites: "state and movement, legal order and political doctrine, totality and group, compliance with the law and loyalty to the ideological Party line."

Significantly, certain acts deemed "necessary" and "correct" according to Party ideology violated the criminal laws of the state. Nonetheless, such acts were not punishable as crimes during the Third Reich's existence. The Governor-General of Poland, Hans Frank, was exemplary in his awareness of the need to implement Party ideology despite legal niceties, as reflected in the following statement about the destruction of the Polish intelligentsia:

If I didn't have the old National Socialist fighting team of the police and SS here in the country, with whom could we conduct this policy? I couldn't do it with the Wehrmacht, in general with noone; it is such a serious matter, and we stand here as National Socialists before such an enormously difficult and responsible work that we can talk about these things only in the narrowest circles.41

If the Nazi leadership and its upper-echelon myrmidons believed that service to Party and Führer superceded the demands of the law, in what sense can we say that they acted with a consciousness of illegality? The answer is that the Nazis never lost their understanding that the genocidal violence unleashed in the name of Party ideology was illegal under then existing German criminal law.

The Nazis' fractious relationship with the German Penal Code is visible at the earliest stages of the regime's existence. Already in June 1934, in the wake of the first organized spasm of violence by the government, the so-called Night of the
Long Knives, Hitler had felt the need to legalize post hoc the murders of Ernst Röhm and other SA members on the grounds of “state emergency” (Staatsnotwehr). Nazi jurists like Carl Schmitt celebrated the law (published on July 3, 1934), which, although admittedly retroactive and thus a breach of conventional legal procedure, was notwithstanding “itself the highest justice.”

The brittle uneasiness demonstrated in this episode is also discernible in the savage, pogrom-like violence of the Reich Night of Broken Glass of November 1938, when marauding bands of Nazi thugs assaulted German Jews and their property and set fire to synagogues. The violence was both incited and directed by the Nazi Party leadership, but this same leadership disclaimed any involvement in the attacks, ascribing them to the “spontaneous explosion of popular rage” over the assassination of the German diplomat, vom Rath. We can ponder why the Party leaders felt the need to conceal their role in egging on the vandals, but one thing is clear: their behavior in the Night of Broken Glass attacks was illustrative of their modus operandi during the euthanasia murders and the genocide of the war years.

This modus operandi consisted of two distinct facets. First, it labored to conceal both the crimes of the Nazis and the central government’s involvement in them. The euthanasia program, as we have seen, was a top-secret Reich matter, the operatives of which were sworn to secrecy on pain of capital punishment. A bewildering panoply of dummy organizations and coded language was elaborated to hide the directorial role of Hitler’s personal chancellery in the killings. The central figures in the program—men like Werner Heyde, Paul Nitsche, Viktor
Brack, et al.—often signed official documents with pseudonyms. It is my own belief that the relative success of the euthanasia program explains why its personnel were reassigned in 1941 to initiate the mass extermination of the European Jews in eastern Europe: they were by then experienced killers, and, perhaps most importantly, they knew how to keep a secret. Second, the Nazis' modus operandi revealed during the Night of Broken Glass established—or, at the very least, forcefully confirmed—the fateful pattern ingrained in the psychologies of the lower-level perpetrators: namely, that they could act with impunity on the orders of the Nazi government, whether implicitly or explicitly given, even when these orders were illegal. The phenomenon of "politically desired illegality" would characterize the atmosphere surrounding the enormities of the Nazi regime during the war. It would enable the field-level enactors of mass murder to overcome their scruples and plunge themselves into National Socialist genocide.

Unlike the perpetrators of mass liquidations in the east, the euthanasia perpetrators clamored for an official law to place their killings on a secure legal footing. In September 1939 Hans Lammers had pressed Hitler for such a law. Although a draft was prepared for Hitler's signature, it was never signed into law, allegedly because of fears for the "sensation" it would cause. The Hitler order of 1939 was merely an authorization of Bouhler and Brandt to designate hand-picked doctors for the euthanasia program; it never amounted to a formal law, nor was it understood by the Nazi elite as such. (The Reich Minister of Justice, Franz Gürtner, never doubted the complete illegality of the euthanasia program.) For this reason, requests continued for a real law that would guarantee immunity of
the euthanasia practitioners to criminal prosecution. In April 1941, at a meeting of the Higher Regional Court presidents and prosecutors, including the presidents of the Supreme Court, People’s court, and the Reich patent office. Gürtner’s successor as Minister of Justice, Franz Schlegelberger, addressed the representatives of the German judiciary, informing them they were to quash any judicial proceedings against T-4 employees for their participation in euthanasia killings. On its face, the program might seem to be illegal, Schlegelberger told his listeners, but in fact it was backed by the “will of the Führer.” At this same meeting, Viktor Brack sketched the course of the euthanasia program to date, describing the system of camouflage developed to conceal it from the public. He also alluded to a future “law regarding end-stage medical assistance.” This law, as we have seen, never came into being.

Clearly, the organizers and implementers of Nazi euthanasia knew that their actions on behalf of T-4 were illegal: the deadly secrecy of the program, the institutionalized deception designed to mislead outsiders, pleas for a formal law legalizing the destruction of the disabled, and initiatives to suppress legal proceedings against euthanasia personnel are prima facie evidence of this knowledge. To what extent, however, does Buchheim’s theory of extranormativity apply to the euthanasia killers prosecuted in German courts after the war? His testimony at the 1964 Auschwitz trial focused primarily on the SS, SD, and police, from whose ranks men were detailed to the Einsatzkommandos and the staffs of the concentration and death camps. Buchheim’s subjects had been released from the restrictions of the laws in their dealings with the
“subhumans” of eastern Europe. Can we extend his idea of a double state, giving rise to a double moral consciousness, to the euthanasia participants? I believe we can. Like Buchheim’s killers, the euthanasia perpetrators were effectively released from criminal liability, especially after the April 1941 meeting with Schlegelberger and Brack. They knew—and their claims at trial may be accepted as veracious on this issue—that they would not face indictment by the legal authorities of the Third Reich. Yet, despite their belief that their actions were beyond the pale of criminal wrongdoing as measured by the Nazi state, the euthanasia killers often perceived their actions as wrongful. This is poignantly shown in the case of Dr. Mathilde Weber, the chief doctor of the Kalmenhof children’s ward. At trial, she testified that the “poor condition” of the children transferred to her ward for killing so affected her that she fell into a depression that lingered until her departure from the facility. The Schwurgericht accepted Weber’s allegation of depression as truthful, but rejected her explanation of its etiology. Instead, the court found that her “revulsion against her activities in Kalmenhof was owing much more to the feeling of being involved in an operation she believed was wrong.” For the Schwurgericht, Weber’s depression attested to her recognition of the wrongfulness of euthanasia—a recognition that nevertheless failed to arrest her participation in it. The same may be said of Dr. Ludwig Sprauer, the director of the Baden Interior Ministry Health Department charged with registering and transporting patients from Baden institutions to the killing centers. The court accepted his claim that he had suffered terribly under the reproaches of his conscience. According to one witness, an Evangelical
minister whom Sprauer had met during this time, he had made “such a constricted, insecure, even anxious impression that [the minister] could not resist the thought: ‘I would not want to be in his shoes.”’

Weber and Sprauer both felt the lash of conscience, resulting in psychosomatic complaints. They nonetheless overcame their scruples and collaborated in Nazi mass murder. Insofar they bear comparison with many of the SS and Einsatzgruppen killers, who often justified their atrocities as unpleasant but “necessary” in order to achieve the ideological goals of Nazism. One of the cardinal problems with the so-called “Goldhagen thesis” is its tendency to overlook precisely this aspect of the Nazi genocidal mentality: many of the killers, even those who were anti-Semites, were not ulcerating with a pent-up desire to kill Jews, but strove to “overcome” their feelings of moral compunction about the repulsive task given them by the Führer. The language of “self-overcoming” (Selbstüberwindung) runs like a fault-line through the discourse of the National Socialist murderers. In his infamous Posen address, Himmler referred to the brutality of the early years of the regime, which had caused

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everyone to "shudder," but hastened to add that everyone was prepared to "do it
again the next time, if it is commanded and if it is necessary." For Himmler, the
destruction of the Jews fell into this category of "necessary" evils ordered by the
will of the Führer. The great achievement of the SS man—so Himmler in 1942—
was to perform this horrific act and maintain his "decency:"

Most of you know what it means if 100 corpses are lying together, if 500 or 1000 are lying there. To have stayed the course and—apart from exceptions of
human weakness—to have remained decent has made us tough [hart]. This is a
page of glory of our history that has never been nor ever will be written.50

Regarding this extraordinary passage from Himmler's Posen speech, Herbert
Jäger commented:

The form of "decency" cultivated in the SS is also clear here, requiring of the
individual a completely impersonal obedience to orders cleansed of private
impulses, but seeking to eliminate as much as possible from the event all
individual motives—sadism, personal enrichment—condemned by bourgeois
morality.51

us to grasp an important feature of Nazi genocide, including euthanasia killing:
the conflicted nature of the perpetrators' moral consciousness. Jäger argues that
the killers were often divided inwardly between an aggressive, murderous
ideology and a "petit bourgeois value system" that reprobated as rank criminality
the acts commanded by the Nazi government.52 The two-fold Nazi state,
dispersed between normative and extra-normative domains of action, thus had a
boon companion in the two-fold Nazi perpetrator—an individual nourished on a
volatile diet of traditional morality and violent racialism.
The need to steel oneself in order to commit a hyperviolent act suggests that many of the killers heard a farrago of competing voices within their "moral ear." Some voices urged them to kill in obedience to the expressed will of the sovereign authority, others condemned such actions as plain murder under traditional moral and legal standards. The voices of National Socialist ideology enjoined perpetrators to subdue their misgivings in pursuit of Germany's "historical" mission under Hitler. In the documentation from the euthanasia trials, we cannot but be struck by the efforts of the defendants to portray euthanasia killing as a "humane" measure to relieve human suffering. Arguably, these efforts betray their authors' strategy to make palatable to one moral community (i.e., the postwar American and German judges trying these cases) the singular acts and beliefs of an entirely different moral system (that of National Socialism). When Hermann Pfannmüller, Karl Brandt, or Viktor Brack emphasizes the humanity of euthanasia, he is offering an interpretation of it that he knows corresponds with traditional moral and legal principles. Moreover, the very vigor with which these killers represent such ideas at their trials indicates that they are not—nor were they ever—entirely strangers to them. A critic might object that the shadow of the gallows hanging over these men spurred them on to a cynical and manipulative invocation of compassion to justify their slaughter of "valueless life." I would propose, however, that on a certain level these perpetrators, like so many of the killers we have examined in the previous chapters, understood the patent illegality and immorality of their actions as adjudged by traditional Western ethics. It was this deeply-ingrained revulsion
against the wholesale destruction of innocent human life that the Nazi state tried to neutralize through its cult of hardness and self-overcoming. In the final analysis, the “self” that was to be “overcome” was the conventional moral self as constructed in German moral history, predicated upon the 5th commandment’s prohibition of shedding innocent blood.\footnote{53}

The American criminologist Lonnie Athens provides a helpful heuristic for thinking about this clash between the National Socialist thought world and conventional moral principles. Athens holds that human beings develop their sense of right and wrong by incorporating into themselves the multitudinous voices of morality in their community—voices that impart to them the rules and expectations of a particular social order. A properly socialized person internalizes these expectations and applies them in assessing how to respond to concrete situations confronted in daily life. To this extent, Athens’ theory is a facsimile of George Herbert Meade’s “generalized other,” a fund of “attitudes” within society we absorb into ourselves that furnish us with guidelines for our own actions. According to Athens, however, Meade’s generalized other only explained conformity; it had little to say about individualism. In short, Meade accounted for why and how most of us conform our behavior to the expectations of society, but he did not address why some persons deviated from society’s norms into anti-social and criminal conduct. Athens’ proposed solution for this weakness in Meade’s theory is his notion of the “phantom community,” the myriad voices from a person’s primary social group (family, friends, associations of whatever
kind) that can actually interpose themselves between the person and the broader ethos of the community. The individual voices of significant figures in our primary group are internalized no less than the rules and expectations of the larger community. They are “phantom others” residing as ghostly but influential voices in our heads, and together they form a phantom community.  

Athens’ phantom community is far from a seamless whole. Rather, it is a booming, buzzing din of often contradictory voices, with which we “converse” when responding to situations calling for moral judgment in our lives. If the “phantom voices” from our primary social group coincide more or less with the demands of society at large, our behavior will meet the legal and ethical expectations of the community. If, however, the most influential of those voices counsel us to act in a manner different from that enjoined by the community, the self may react to situations—or even create its own situations—in a way drastically at odds with society’s values. Athens found that the violent offenders he studied justified their crimes not with reference to broad social mores, but to their private phantom communities. Part of the difficulty we have in comprehending extreme forms of criminality consists in the fact that the perpetrators’ phantom communities, those insistent voices ringing in their heads with whom they converse, are different from our own.

The demonic genius of National Socialism reposed on its ability to mobilize tens of thousands of ordinary citizens to engage in acts of almost inconceivable violence. Its success was partly due to its ability to insinuate new phantom voices into the moral resources of these people. By exploiting and
enlarging on depreciatory attitudes toward minority groups like the mentally
disabled, Jews, and others, the Nazis "miked" the internal auditoria of their
accomplices, making them receptive to the criminal messages of Party ideology.

The voices of conventional morality, however, were never entirely overwhelmed;
many of the perpetrators retained, as we have seen, a clear understanding that
Nazi violence was both illegal and immoral. That so many otherwise rational
men and women could disregard the humane counsels of their conscience in favor
of voices goading them toward complicity in mass murder is an indictment of the
past—and a warning to the future.

NOTES

1 Letter from Allers to Vorberg, 20 November 1954, excerpted in Klee, Was sie taten, p. 65.
2 See, e.g., E. Klee, Was sie taten, pp. 195-208; J. Friedrich, Die kalte Amnestie, pp. 185-196; U.
Herbert, Best, pp. 434-444; N. Frei, Vergangenheitspolitik: Die Anfänge der Bundesrepublik und
die NS-Vergangenheit (München: C.H. Beck’sche Verlagsbuchhandlung, 1999); de Mildt, pp. 81-
226.
3 H. Jäger, Verbrechen unter totalitärer Herrschaft, p. 249.
4 This is the grim scenario portrayed in the 1997 feature film GATTACA, in which a young "wild
birth" (played by Ethan Hawke) masquerades as one of the genetically designed elite.
5 See the 1953 judgment of the Göttingen state court, JuNSt, Lfd. Nr. 381.
6 Österreichisches Strafgesetzbuch, Art. 97.2. Andreas Feiertag, a journalist for the Austrian
newspaper Der Standard and a former medical student at the University of Vienna Medical
School, informed me in January 2000 that a script customarily assigned to Austrian medical
students recommended that doctors abort a fetus if was believed to suffer from Downes’
syndrome. Interview with Andreas Feiertag at the Café Central (Herrengasse), Vienna, Austria,
January 19, 2000, recorded in the author’s private notes.
7 J.M. Spaight, Bombing Vindicated (London, 1944), pp. 119-120; Sir Arthur Harris, Bomber
Offensive (London 1947), p. 176. See also Jonathan Glover, Humanity: A Moral History of the
8 Glover, Humanity, pp. 87-88.
9 For an intriguing reflection on the link between genocide and omnicide, see Berel Lang.
"Genocide and Omnicide: Technology at the Limits of Ethics," in The Future of the Holocaust
10 Excerpted in Klee, Was Sie Taten—Was Sie Wurden: Ärzte, Juristen, und andere Beteiligte am

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See supra, chapter 5, p. 346.

These case studies are discussed in Jäger, pp. 29-30.


*JüNSV*, Lfd. Nr. 211.

Interview with Hans-Heinrich Jescheck, March 7, 2000; interview with Eckhard Herych, February 3, 2000; both from the author's private notes.

See supra, chapter 4, pgs. 243 (Wahlmann), 260 (Brandt), 261-62 (Pfannmüller). See also the excerpt from Taylor's opening statement on the economic motives for the killings, p. 260. The curious duality within the Americans' interpretation—which, I should add, captures an important feature of National Socialist genocide—is reflected in Leo Alexander's pre-trial interrogation of Viktor Brack, in which Alexander confronted Brack with both an economic and an ideological interpretation of euthanasia. On the latter theory, the euthanasia program was an "experiment in toughness" (*Härteexperiment*) designed to callous the moral sensibilities of the men who would later carry out the regime's expanded campaign against "unworthy life," particularly in the east. See supra, chapter 4, pp. 265-66.

The quote is from the German Hadamar trial, Lfd. Nr. 017, but the phrase recurs in other verdicts: see, e.g., Lfd. Nrs. 102 (the Rhine province case), 117 (the Kalmenhof case on remand), 211 (the Baden case), 226 (the Hannover province case), 383 (the Sachsenberg case), 480 (the case of Dr. Sch.), and 587 (the Meseritz-Obrawalde nurses case).


Norbert Frei, "Wie modern war der Nationalsozialismus?", in *Geschichte und Gesellschaft*, Heft 3, Juli/September 1993, pp. 372-73.

Excerpted in Klee, *Was sie taten*, p. 89. Justification of the euthanasia program on economic grounds occurred even earlier than the Vagts' quotation: already in July-August 1939, Philip Bouhler had informed the euthanasia planning committee that the T-4 program was necessary to create hospital space for the impending war. See supra, chapter 2, pp. 114-15.


H. Jäger, *Verbrechen*, pp. 235-36. For Jäger, internal concealment is an index to a perpetrator's consciousness of illegality.

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Klee quotes from a letter of a Dr. Steinmeyer (head of the “Eastern Worker Central” for Saxony, Thuringia, and Anhalt) to Friedrich Mennecice, dated 11/4/44, regarding visits by several T-4 functionaries to discuss with him the “eastern worker question” (Ostarbeiterfrage). This “question” involved the extension of “special treatment” (Sonderbehandlung) to the forced eastern workers in the Reich. (Eastern workers, as we have seen, were in fact liquidated by the hundreds at the Hadamar killing center.) The Nazis’ propensity to problematize social issues as “questions” and to find genocidal “solutions” was characteristic of the regime in the 1940’s. See Klee. Was sie taten, p. 102.


The phrase is taken from Michael Geyer, “The Stigma of Violence, Nationalism, and War in Twentieth-Century Germany.” German Studies Review (Winter 1992): 93. 101. According to Geyer, the “real” in Nazi discourse was an “elaborate fiction” holding that people are not what they do “but what they are said and made to be.” The “real” is a fraud, yet Nazi ideology “insists absolutely on its realism, backing up its claims with pseudosciences.” For Geyer, the “search for the truly real self” is the force behind National Socialist violence. Hannah Arendt’s notion of “the banality of evil” does not sufficiently address this deluslive quest for the “really real.” Jean Amery, a victim of Nazi torture during the war, disputed Arendt’s banality thesis with reference to his own experiences: “Evil exceeds and overlays banality…[Arendt] knew Eichmann only from hearsay, saw him only through the glass cage . . . If one insists on it [my torturers] were only bureaucrats. Yet they were much more. I saw it in their serious, tense faces, which were not swelling let us say, with sexual sadistic delight, but concentrated in murderous self-realization. With heart and soul they went about their business and the name of it was power, domain over spirit and flesh, orgy of unchecked expansion.” Quoted in Edith Wyschogrod, Spirit in Ashes: Hegel, Heidegger, and Man-Made Mass Death (New Haven: Yale University Press, 1985), p. 75.


Lewald, “Das Dritte Reich—Rechtsstaat oder Unrechtsstaat?”, p. 1660. Lewald comments on this passage: “The psychological situation at the time [the order to commit a crime is received] is totally misunderstood if we assume that Hitler thought of himself as a ‘legislator’ when he gave criminal orders to his followers. Much more, he sunk his teeth fanatically into the illusory idea of the “Final Solution,” which he viewed as a historical mission . . . Party ideology raised Hitler to the highest, absolute ‘legislator’ (a view parroted also by Hitler), in order to lend his acts legality.”


Quoted in Jäger, Verbrechen, p. 189.

Jäger, Verbrechen, p. 208.


RGBl. I. 529.

Cited in Jäger, Verbrechen, p. 212.

See supra, chapter 2, p. 129.

Protokoll der Arbeitstagung der Oberlandesgerichtspräsidenten und Generalstaatsanwälte, am 23. und 24 April 1941 in Berlin: Notizen des Kölner Oberlandesgerichtspräsidenten Dr. Alexander Bergmann über die Referate vom Brack und Heyde auf der Juristentagung April 1941, both excerpted in Klee, Dokumente, pp. 216-19.
Himmler's favorite general, Erich von dem Bach-Zelewski, the Higher SS and Police Leader of Central Russia involved in mass shootings of Jews, was hospitalized for severe gastro-intestinal pain that required surgery. During his post-operative recovery, he was treated by the Reich Physician Grawitz, who reported to Himmler that von dem Bach was tormented by psychic reenactments of the shootings he had performed in the east. See Raul Hilberg, The Destruction of the European Jews, p. 328. Christopher Browning relates a similar account about Captain Wolfgang Hoffmann of Reserve Battalion 101, involved in shooting Jewish women, children, and the elderly in the Konskowola ghetto in Poland. Like von dem Bach, Hoffmann developed a severe intestinal ailment diagnosed as vegetative colitis, a condition that Browning calls "the symptoms of psychologically induced 'irritable colon' or 'adaptive colitis.'" C. Browning, Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland (New York: HarperCollinsPublishers, 1992), pp. 114-120. Weber's condition may have likewise been adaptive in nature, brought on by her awareness that her actions were wrongful, whatever the Party demanded.

Although the Nazis took this "cult of hardness" to an unprecedentedly virulent level, it was by no means without precursors in German history. The upper and middle classes in 19th century Germany subscribed to a truculent warrior ethic grounded in what Norbert Elias calls "a pitiless human habitus" that stressed physical and emotional toughness. For Elias, the centerpiece of this ethic was the duel, a ritualized act of violence that reflected a carefree attitude about inflicting pain and a sociopathic indifference toward those who suffered it. According to Elias, the culture of violence gradually seeped into the German middle class during the Wilhelmine period before its radicalization in the 1920's and '30's. He sees this violent middle-class ethos reflected in the novels of Ernst Jünger, who glorified war as the highest achievement of human beings. See Norbert Elias, The Germans: Power Struggles and the Development of Habitus in the Nineteenth and Twentieth Centuries, ed. Michael Schröter, trans. Eric Dunning and Stephen Mennell (Cambridge: Polity Press, 1996), pp. 109-112, 206-211. See also Jonathan Fletcher, Violence & Civilization: An Introduction to the Work of Norbert Elias (Cambridge: Cambridge Polity Press, 1999), pp. 129-137. For an intriguing "thought piece" arguing that a "national cult of violence" arose in post-World War I Germany, dedicated to forming identities in the crucible of war, see Michael Geyer, "The Stigma of Violence, Nationalism, and War in Twentieth-Century Germany," pp. 75-110. The high premium placed on aggression and violence does not, however, mean that traditional standards of conduct did not persist into the era of National Socialism.

Lonnie Athens, "The Self as Soliloquy," Sociological Quarterly 35 (3): 521-32. See also Richard Rhodes, Why They Kill: The Discoveries of a Maverick Criminologist (New York: Alfred A. Knopf, 1999), pp. 79-95. The interested reader is referred to both these texts for references to Meade's work on the "generalized other."
APPENDIX A. PARTY AND MINISTERIAL BUREAUCRACIES WITHIN THE NATIONAL SOCIALIST STATE.

Adolf Hitler
Reichschancellor. Leader of the NSDAP, and Commander-in-Chief of the Wehrmacht

Deputy to the Führer
Party Chancellery
(Hess)

Führer’s Chancellery
(Bouhler)
Chief, Section II: Brack

Reich Chancellery
(Lammers)

Interior
(Frick)
Dep’t IV:
Conti
Linden

Propaganda
(Goebbels)

Economics
(Schacht)

Foreign Office
(von Neurath)

Himmler

SS

Police

Heydrich

SS

SS Police

Heydrich

SS

SS Police

Heydrich

Heydrich

Gestapo

Kripo

APPENDIX B. THE PARTY AGENCIES OF THE NSDAP.

Hitler

Führer's Chancellery

Party Chancellery

Party Formations

Bouhler

Bormann

State Secretary Klopfer

SA

Chief: Hitler

Chief of Staff: (Lutze)

Himmler

(merged with Interior Ministry's Police)

Bormann

State Secretary Klopfer

Propaganda

Finance

Law

Foreign Policy

Foreign Policy

Party Court

Party Court

Health (Wagner)

Political Office

Race Conti

Office Gross

Family Research Office

Reichsleiter

Main Offices

Offices

Source: Raul Hilberg, The Destruction of the European Jews, Vol. I, p. 60. The broken lines represent the Party Chancellery's role as a two-way conduit for reports to and orders from Hitler. All party agencies were responsible to Hitler. Some have been omitted in the above chart.
APPENDIX C. ORGANIZATION OF THE FÜHRER’S CHANCELLERY (*KANZLEI DES FÜHRERS*).

<table>
<thead>
<tr>
<th>Office</th>
<th>Jurisdiction</th>
<th>Chief</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chancellery of the Führer</td>
<td></td>
<td>Reichsleiter</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Philipp Bouhler</td>
</tr>
<tr>
<td>Main Office I</td>
<td>Personal Affairs</td>
<td>Oberdiensleiter Albert Bormann</td>
</tr>
<tr>
<td>(Hauptamt I)</td>
<td>(Privatkanzlei)</td>
<td></td>
</tr>
<tr>
<td>Main Office II</td>
<td>State and Party Affairs</td>
<td>Oberdiensleiter Viktor Brack</td>
</tr>
<tr>
<td>(Hauptamt II)</td>
<td>(Angelegenheiten betr. Staat und Partei)</td>
<td></td>
</tr>
<tr>
<td>Main Office III</td>
<td>Pardon Office for Party Affairs</td>
<td>Oberdiensleiter Hubert Berkenkamp</td>
</tr>
<tr>
<td>(Hauptamt III)</td>
<td>(Gnadenamt für Parteiangelegenheiten)</td>
<td>After 1941: Kurt Giese</td>
</tr>
<tr>
<td>Main Office IV</td>
<td>Social and Economic Affairs</td>
<td>Hauptamtsleiter Heinrich Cnyrim</td>
</tr>
<tr>
<td>(Hauptamt IV)</td>
<td>(Social- und Wirtschaftsangelegenheiten)</td>
<td></td>
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<tr>
<td>Main Office V</td>
<td>Internal Affairs and Personnel Matters</td>
<td>Oberdiensleiter Herbert Jaensch</td>
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<tr>
<td>(Hauptamt IV)</td>
<td>(Internes und Personal)</td>
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### APPENDIX D. ORGANIZATION OF THE FÜHRER, MAIN OFFICE II.

<table>
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<td>State and Party Affairs</td>
<td>Oberdienstleiter Viktor Brack</td>
</tr>
<tr>
<td>Office II a</td>
<td>Deputy of chief of Main Office II</td>
<td>Oberrechtsleiter Werner Blankenburg</td>
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<tr>
<td>Office II b</td>
<td>Matters concerning the Reich Ministries; also clemency petitions (Gnadengesuche)</td>
<td>Amtsleiter Dr. Hans Hefelmann Deputy: Richard von Hegener</td>
</tr>
<tr>
<td>Office II c</td>
<td>Matters concerning the armed forces. the police. the SS security service, and the churches</td>
<td>Amtsleiter Reinhold Vorberg</td>
</tr>
<tr>
<td>Office II d</td>
<td>Matters concerning the Nazi party</td>
<td>Amtsleiter Buchholz After 1942: Dr. Brümmel</td>
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<table>
<thead>
<tr>
<th>Office</th>
<th>Chief</th>
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</thead>
<tbody>
<tr>
<td>Minister</td>
<td>Dr. Wilhelm Frick (till 1943)</td>
</tr>
<tr>
<td></td>
<td>Reichsführer Heinrich Himmler (1943-45)</td>
</tr>
<tr>
<td>Reichsführer</td>
<td></td>
</tr>
<tr>
<td>State Secretary</td>
<td>Hans Pfundner</td>
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<td>National Health</td>
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<td>(till 1935)</td>
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<td>Ministerialrat Dr. Herbert Linden</td>
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