We can only speculate about the thoughts that raced through the head of Dr. Alfred Leu in December 1953 as he awaited the verdict of the Cologne state court (Landgericht) presiding over his criminal case. Leu was charged with the murders of hundreds of adults and seventy children in 1941 during his tenure as a physician at the Sachsenberg mental hospital near Schwerin, Germany. The state’s evidence against Leu was impressively incriminating. Numerous eyewitnesses had stepped forward to attest to their observation of murders committed in Leu’s wards through lethal injections of veronal and luminal. Others testified about Leu’s admission during the war that he was a confirmed advocate of euthanizing the mentally ill. His connections with the Berlin office entrusted with the mass killing of handicapped patients were well documented.

Whatever anxiety Leu experienced as the court prepared to announce its verdict could only have been accentuated by the recent history of West German prosecution of physicians for their participation in killing the mentally ill. Leu was assuredly aware of the 1946 case of Dr. Hilde Wernicke, convicted of murder by the Berlin state court for her role in passing on the names of selected patients
to her nurses for extermination. Wernicke was executed for her crimes. Other euthanasia personnel in the late 1940s were, like Wernicke, convicted of murder and sentenced to death or lifelong prison terms. To make matters worse for Leu's equanimity, these earlier physicians were convicted even though they had not directly administered the coup de grace to their patients. By contrast, Leu had not only transmitted patient lists to his nurses for killing but had himself personally participated in the murders. Although the Constitution of the Federal Republic of Germany had abolished capital punishment in 1949, Leu faced the possibility of life in prison if convicted.

Leu's fears proved to be unfounded. The Cologne state court acquitted Leu of all charges on the ground that he had participated in the destruction of patients only to oppose it from within. His choice to follow his conscience rather than the law of homicide justified his actions, even if it did involve him in killing handicapped children who, in the court's words, were "completely below the zero line." With this legal benediction, Dr. Alfred Leu, the proven killer of patients at the Sachsenberg mental hospital, left the Cologne courthouse a free man.

How did German courts travel the light-year from convicting euthanasia doctors of murder to not only acquitting them, but celebrating their conscientious devotion to the healing craft? How can we account for so prodigious a change in judicial interpretations of murderous violence against the mentally handicapped during the war? Were West German courts merely applying the law in a neutral manner to the facts before them, or were they bending the law and finessing evidence in order to achieve a result that served an agenda rather than the ideals of substantive justice? To what degree were the extralegal forces that may have conditioned the outcomes of German euthanasia trials also at work in the U.S. prosecutions of euthanasia criminality? What kinds of general conclusions may be drawn from a comparative juxtaposition of the two groups of national trials immediately after the war? These important questions are the focus of this study.

The central argument is that, despite the sincere desires of many policymakers, jurists, and politicians to punish the crimes of euthanasia criminality, the matrix of power relationships in the immediate postwar era played havoc with the prosecution of euthanasia killers. For both Americans and West Germans,* concerns about preserving or recuperating sovereign power consistently bedeviled the neutral quest for justice. On the U.S. side, the tendency to view Nazi euthanasia (and genocide more generally) as the excrescence of Germany's

* Although the Federal Republic of Germany was not formally established until 1949, I will refer throughout this book to that portion of the country under U.S., British, and French occupation prior to 1949 as "West Germany."
war of aggression, a view originating in U.S. insistence that to prosecute crimes unrelated to waging aggressive war might detract from U.S. sovereignty, skewed the Americans’ construction of euthanasia as early as 1945. Preoccupation with its own sovereignty inclined the United States to relate all forms of National Socialist criminality—including euthanasia—to Hitler’s grand plan to subjugate the peoples of Europe. In the process, individual degrees of participation in the destruction of the mentally ill were dissolved in an overarching conspiracy that equated the smallest participant with the greatest on a theory of joint and several criminal liability. The effect was not only to obscure the origins of Nazi euthanasia by over-identifying it with military conquest but, in some cases, to invert the usual presumption of innocence in U.S. criminal trials.

The West Germans, too, were concerned with national power in the immediate postwar years. For them, however, the issue was not to preserve sovereign power, but to regain it after the unconditional surrender to the Allies in 1945 and the military occupation of their country. Growing disenchantment with denazification, a restive impatience with continued prosecution of accused war criminals, and mounting demands for a general amnesty for the perpetrators of Nazi crimes and for their reintegration into German society sapped the will of the West Germans to prosecute and punish euthanasia personnel. Particularly in the late 1940s, these extralegal forces increasingly affected the kind and quality of justice dispensed in West German euthanasia trials. The effect, as in the case of the Americans, was to reverse conventional burden of proof standards: where German criminal procedure tended to presume guilt with formal indictment, German courts in the waning years of the 1940s assumed the innocence of euthanasia defendants, despite voluminous evidence against them. The impact on the progress and outcome of euthanasia trials of this drive to preserve or recover sovereign power is the focus of this study.

The word *euthanasia*, the Greek roots of which translate as “good death,” may be interpreted on at least two separate levels. On the first, euthanasia is the election by morally autonomous beings to end their lives in the face of 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. Because deference to the choice of the individual underlies it, euthanasia of the first level 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, an international sociopolitical movement between the late nineteenth century and 1945. Coined by its founder, Francis Galton, the term 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. The hardnosed variant of eugenics tended to oppose the role of environment in heredity, stressing instead the brute facticity of genetic fitness. Accordingly, it was pessimistic about improving human potential through social means, and thus tended to be politically conservative. The hardnosed eugenic approach favored a “negative” eugenics that sought to prevent genetic inferiors from reproducing 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 United States, 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.

Clearly, accomplices were needed at all levels of the German mental healthcare 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 Nazi Party. By 1937 (a year when the membership rolls of the Nazi Party were open to all Germans over the age of seventeen), 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, and other civil servants lagged considerably behind doctors. Significant percentages of physicians also belonged to the ideological bastions of Nazism, the SA (26 percent between 1935–1945) and the SS (9 percent between 1933–1939, and possibly more from 1939–1945). 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, 1.3 percent of all SS men were doctors by 1937—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.¹

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 Fifty-first German Doctors’ Day 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,² subsequently revised this estimate, stating that Mielke’s figure represented only the direct perpetrators who committed crimes with their own hands. Standing behind these doctors 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.³

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 United States, Great Britain, France, and the USSR) and trials held by military commissions and military government courts, numerous national trials prosecuted Germans involved in Nazi criminality, including euthanasia killings. In twelve separate trials between 1946–1949, U.S. authorities indicted and tried 184 representatives of Nazi organizations deemed criminal by the IMT. Of these, 142 were convicted; sentences varied from eighteen 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 twenty-three 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 twenty-three defendants were charged with euthanasia killings: Karl Brandt, Viktor Brack, Waldemar Hoven, and Kurt Blome. All save Blome were convicted and executed.

As the IMT and national trials were moving forward, the Germans prosecuted their own Nazi criminals. The lion’s share of investigations and trials of Nazi crimes took place in the five-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, eastern (European) 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. In 1950 West German courts convicted 809 Nazi defendants, but that figure fell to 259 in 1951 and a paltry 21 by 1955.4

How can we account for the dramatic decline in Nazi criminal prosecution? The most immediate (if superficial) explanation for the decline is the web of legal limitations that inhibited prosecution in the postwar years. First, the structure of German criminal investigation in the postwar years impeded efficient location and prosecution of Nazi war criminals. German state prosecutors 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. Because the crimes of the Final Solution had been committed on foreign soil, they had no geographic link to 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 U.S. 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 five years after the war to investigate, arrest, and prosecute the suspected murderers of foreign Jews and others.

* 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), 49; Erwin Schüle, “Die Zentrale der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen in Ludwigsburg,” Juristenzeitung, 1962, 241.
Third, efforts to prosecute Nazi offenders sometimes ran afoul of the statute of limitations, which barred prosecution of certain offenses after a 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 (i.e., 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 ten years. Five years later, offenses punishable with fifteen 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.5

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 accounting of National Socialist crimes by West German courts. They do not, however, fully explain the plunge in indictments after 1950, nor do they address the psychological, political, demographic, and cultural forces afoot in German postwar society that inhibited an open confrontation with Nazi criminality. Scholars have cited several explanations to account for the refusal, characteristic of broad segments of the population in the immediate postwar period, to look Germany’s “brown” past fully in the face. First, reports on the IMT proceedings indiscriminately blended the defendants’ military, political, and genocidal offenses, thereby effacing the differences between political or military 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 were the unfortunate but common byproducts of total war. Political or war crimes were a recognizable species of offense, committed by both the victors and the vanquished in the heat of battle. On this view, the Nazis’ crimes were acts carried out in the course of service to the Fatherland; in no sense could they be identified with the asocial depravity of “real” criminals.6 From this set of dubious premises, some drew the conclusion that Allied trials of “war criminals” were little more than Siegerjustiz (victor’s justice), punishing German defendants for crimes the Allies had also perpetrated.

Furthermore, many Germans regarded the Allied trials as 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 September 1951) was in existence prior to 1945, some argued that the categories of offense spelled out by them were 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.)

No effort to explore the West Germans’ unfavorable attitudes toward Nazi war crimes trials after 1948 should overlook the perceived failures of the U.S. denazification program. Germans living in the U.S. zone were obliged in the immediate postwar years to complete a questionnaire on their prior political and social engagements. These forms were reviewed by denazification courts, which classified the subjects of the questionnaires into one of five categories: exonerated, follower only, lesser offender, offender, and major offender. The denazification bodies could impose penalties based upon this classification, ranging from fines to confinement in a labor camp for no more than ten years. They could also ban an individual from his profession for a period of time. Mere membership in certain Nazi organizations (like 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.

Aiming to scour German society of the Nazi taint, the U.S. denazification program achieved notable successes. Sometimes, however, 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 occasioned draconian punishment. The spectacle of mass murderers receiving “detergent certificates” (Persilscheine), cleansing them of egregious wrongdoing, discredited the process in the eyes of many. The bad odor surrounding the denazification proceedings may have clung by association to Allied and German trials of Nazi defendants, viewed by the public as an extension of denazification under a different name.7

Deep psychological and cultural forces also contributed to the German public’s unwillingness to confront Nazi crimes. In their study The Inability to Mourn,8 psychologists Alexander and Margarete Mitscherlich argued that postwar Germans suffered from an incapacity to “work through” the traumas of the era of the Third Reich, a process Sigmund Freud had called Trauerarbeit, or “the work of mourning.” The vast amplitude of National Socialist criminality precluded the German people from coming to terms with a past that was still cancerously alive. 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.

A more recent account by Aleida Assmann likewise traces the failures of German confrontation with Nazi mass murder in the postwar era to psychocultural factors. Drawing on the anthropological distinction between “shame” and “guilt” cultures, she contends that Germany immediately after the war, like militaristic societies in general, was a shame culture that enforced the conformity of its members by exposing them to “the gaze” of formal and informal social control. A guilt culture, by contrast, expiated individual guilt through public confession, acknowledgment of responsibility, and internal conversion. In such a culture, guilt properly confessed and accepted became a “resource of individuation” for both the individual perpetrator and for society collectively. This process obviously includes criminal trials as a means of uncovering offenses, restoring order to the society discomposed by them, and facilitating the “conversion” of the perpetrator through punishment. Where, however, criminal guilt was repressed because of the shame evoked by it, particularly in a culture transitioning from a shame to a guilt paradigm (like postwar Germany), the willingness to acknowledge past criminality and recognition of the need to punish it with the devices of the criminal law are blocked. Although Germans would eventually shrug off their shame culture and confront the crimes of National Socialism after 1958, its paralyzing effects prior to that time induced a “massive defense against memory” among the German population. One casualty of this repression was continued judicial engagement with the trials of Nazi offenders.9

The cumulative effect of these circumstances was to engender strong opposition to continued prosecution and punishment of Nazi defendants beginning in the late 1940s. Although most Germans supported the trial of the major war criminals by the IMT in 1946 (insofar as it buttressed the mistaken but fervid German belief in the “exclusive guilt” [Exklusivschuld] of Hitler and his top-echelon henchmen for the regime’s crimes), an equal number disapproved of the trials of German elites after the IMT had concluded. Fueled by the movement into western zones of millions of displaced Germans from the east, political opposition quickly arose against a sustained war crimes trial program. Obscure far-right parties formed, demanding an end to denazification and to prosecution of Nazi war crimes defendants. Leaders in both Catholic and Protestant churches like Bishop Wurm and the director of the chancellery of the German Protestant Church Hans Asmussen pressed Allied officials to end war crimes prosecutions. In 1949 a group of German jurists was established, composed of among others the foremost defense attorneys from the Nuremberg trials. Called the Heidelberg Circle, the group set about to achieve a final liquidation of the war crimes trials by influencing politicians and public
The ability of these and other critics to mold and channel the negative attitudes of West Germans toward war crimes trials was considerable: in 1946 70 percent of West German respondents approved of prosecuting the major war criminals, but by the end of the decade a comparable percentage disapproved of continued trials.10

Politicians like Konrad Adenauer were, of course, keenly aware of the topography of West German sentiment regarding further prosecution. As previous scholars have convincingly demonstrated, Adenauer pursued a “policy toward the past” that consisted of amnesty for many Nazi war criminals (the Christmas amnesty law of 1949 and a second amnesty law passed in 1954), their reintegration into German society through the Article 131 law (which required the civil service to allocate a prescribed percentage of jobs for former members of the Nazi government), and a process of what Norbert Frei has termed “normative demarcation,” that is, affirming the democratic, pro-Western character of the Federal Republic by contrasting it with its alleged opposites—unreconstructed Nazis and Communists. The trifecta of amnesty, reintegration, and normative demarcation achieved simultaneous goals: it preempted the appeal of ultra far-right political parties, won adherents to the new German state, and placated the Western allies. The victory of Adenauer and the CDU in the 1953 elections was a sign of popular assent to this policy. Adenauer's accomplishments, however, could only be paid for in the coin of forgetting and repression—an attitude of willed amnesia that retarded the progress of war crimes trials.11

Adenauer's “policy toward the past” was thus cunningly designed to serve both domestic and foreign objectives. At home, it subverted nationalist politicians, stabilized the fledgling democracy, and won votes for the CDU. Abroad, it conveyed the image to the United States and its allies of a rehabilitated Germany, democratic, capitalist, confident, and, most important, securely in the Western camp. The late 1940s witnessed the rise of the Cold War as Europe fissioned into two armed camps. As political tensions between the Eastern bloc and Western allies threatened to turn into a shooting war, the Allies’ need for West Germany as a bulwark against Communism in central Europe became poignant. A remarkable seachange had occurred in the space of a few years: the Soviets had displaced the Nazis as the clear and present danger to Western security interests. Adenauer was acutely aware of Germany's importance in the geopolitical chess match between the two superpowers. Only months after the outbreak of the Korean War—a time when hostility between east and west was at its peak—Adenauer sought to exploit this opportunity to recover German sovereignty from the Allies via the quashing of war crimes trials. He dispatched a memorandum to the Allied High Commission, demanding that the occupation statute be revised to enhance German sover-
If no revision (read: repeal) was made, he warned ominously that Germans might be unwilling to “sacrifice” themselves for freedom, and plans for a European defense community to protect the West from Soviet invasion would be stillborn. Frank Stern summarizes Adenauer’s strategy and the degree to which it encapsulated the feelings of West Germans in 1950:

Sovereignty via integration into the West and rearmament, which included rehabilitation of the Wehrmacht, were essential aspects of the developing national consciousness and key points of official government policy. In concrete terms, this ultimately meant negotiations: on canceling the debt of the German Reich, repealing of the Statute of Occupation and creation of a European defense community.

In short, the price Adenauer demanded for a German contribution to fighting the Soviets was recuperated national power achieved, at least in part, by discontinuing Nazi war crimes trials. A salient component of Adenauer’s policy toward the past was the reintegration of former Nazis into the German civil service, including the judiciary. As denazification petered out, onetime Nazi judges and prosecutors, many of whom had served on the infamous “special courts” (Sondergerichte) and “People’s Court” (Volksgerichtshof), returned to their positions in the German legal system during the Adenauer era. In the British zone of occupation, by the late 1940s between 80 and 90 percent of state court judges were former Nazi Party members. 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. For such individuals, Adenauer’s program of amnesty and integration nourished by an atmosphere of collective forgetting must have been especially attractive.

The present study limns a portrait of U.S. and West German euthanasia trials against this background of a society yearning for an end to constant evocations of Nazi atrocity, particularly as embodied in continued war crimes trials. Rather than reenact what other scholars have already done, in this book I undertake close readings of transcripts and verdicts generated in the trials of euthanasia defendants. Accordingly, with the exception of periodic references to the context of the trials, this study does not focus specifically on the socioeconomic, political, and cultural forces that shaped the prosecution of Nazi defendants. Instead, through close textual readings of actual trial transcripts and verdicts, I seek to chart how social, geopolitical, and cultural forces shaped the actual verdicts of the trials. The focus is on the texts of the trials, in which are registered the skewing influence of extrajuridical forces in West Germany in the crucial eight-year period following the war. The extraordinary
impact of contextual (or non-legal) factors on the trials of the Nazi euthanasia doctors will emerge as a palimpsest underlying the trial documents. Our examination of the court records will reveal that the influence of these non-legal factors was determinative of the verdicts. In locating the judgments squarely within their historical context, the study suggests that considerations of national sovereignty were an intrinsic and predestinating force in the postwar trials of the euthanasia doctors, a force so irresistible and pervasive as to alter the legal burdens of proof in both the U.S. and German cases.

Of course, tracing decisively the arcs of causality between a force and its effect (or, in this book, between an alleged bias and a final verdict) is impossible in historical investigation; too many causes interact in shifting permutations that directly or indirectly impinge on the ultimate result. E. H. Carr’s hypothetical about the length of Cleopatra’s nose and the founding of the principate is a facetious but telling illustration of this point.15 To develop a narrower account of the progress of euthanasia trials after the war, the enormous range of potential causes would have to be ranked lexically: primary status assigned to some, secondary to others. In the final analysis, any such ranking of causes as they pertain to Nazi war crimes trials must by necessity be artificial. Did the structure of German criminal investigative agencies after the war contribute more to the decline of these trials than the unpopularity of the denazification program? Did the pain felt by Germans when reflecting on their collective guilt for the multitudinous criminality of the Nazi government have greater weight than the active lobbying efforts of far-right nationalist parties to draw a Schlußstrich to further trials? Did the checkered pasts of West German judges outweigh Adenauer’s policy toward the past as factors in the movement toward leniency, acquittal, and amnesty, and were these factors more important than the geopolitics of the Cold War?

To ascribe priority to any one of these factors over the others would amount to an arbitrary valuation, because all of them affected the trend toward an abatement of Nazi war crimes trials, yet to none can be assigned a numerical value that would justify its super- or subordination to the others. In this respect, a Foucauldian methodology of looking for contingencies rather than causes in historical change is more appropriate. On this approach, the phenomenon to be explained—the subsidence of euthanasia trials into leniency and acquittal—was a result of a complex set of interrelated causes. The phenomenon, in other words, was contingent on political, institutional, cultural, demographic, and international developments in the postwar era. Subtract any one or more of them—say, the lack of an integrated criminal investigation system or the outbreak of the Cold War—and the result may have been considerably different. It is hard to imagine, for example, that Alfred Leu would have been acquitted if the Allies were less intent on establishing West Ger-
many as a partner in the defense of Western Europe against Soviet attack and more concerned with punishing former executioners of the Nazi regime at large in the Federal Republic. Similarly, the existence of a federal criminal investigation agency might have alerted prosecutors’ offices to the presence within their jurisdiction of Nazi war criminals, thus facilitating their arrest and prosecution. The point is that all of these factors played a role in undermining the spirit of Nuremberg; in their absence, the outcome may not have ensued and, if it did, may not have taken the form in which we currently understand it.

I would suggest that a Foucauldian emphasis on historical contingencies does not preclude generalizations about causality in history. This study seeks to knit together into a general concept many diverse causes underlying the decline of euthanasia prosecution: that is, the desire for national power. Without reference to the quest for sovereign power, neither the U.S. conspiracy approach to Nazi euthanasia nor Adenauer’s quid pro quo of German support for a European Defense Community in exchange for ending war crimes trials is explicable. The Americans’ desire for a democratic, armed, and anti-Soviet Germany opened the door to the German longing for restored sovereignty. If in fact the eclipse of justice in the cases of Nazi murderers is overdetermined in this account, that fact proves the complexity and multi-causality of postwar efforts to prosecute the offenders. A tidier explanation may convey an appearance of greater mastery, but it would do so at the price of imposing an artificial simplicity on a densely tangled historical situation.16

The first trial group we will analyze relates to the prosecution of euthanasia personnel by the United States between 1945 and 1947. The U.S. euthanasia trials are composed of 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 decisions of international and domestic courts and 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.17

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 a 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 by West German courts 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 time frame of this study is the critical eight-year period following the end of the war, when all of the U.S. and most of the German trials were conducted. Chapter 1 provides the reader with the historical prelude to the trials. It sketches the history of the idea of “life unworthy of life” with reference to what we might justly call the crucible of eugenic euthanasia—the German experience of World War I and the traumas of the early 1920s. In this chapter I suggest that the fusion of eugenics with racial hygiene in Germany became a potent cocktail for many Germans in the Weimar years. I recount

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* German courts in the west could charge defendants with crimes against humanity under Control Council Law #10 only in the British and French zones of occupation. The United States never formally authorized the German courts in its zone to try cases under the auspices of Law #10. See Brief an die Herren Dienstvorstände der Gerichte und Staatsanwaltschaften betr. Strafverfahren nach Kontrollrargesetz Nr. 10, Bad. Ministerium der Justiz, 6 December 1951, Staatsarchiv Freiburg, Bestand F 178/1, Nr. 1112.
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 1930s. Further, Chapter 1 explores the evolution of euthanasia killing from 1933 to 1941 as a prelude to the expanded killing projects of the Third Reich by late 1941 and early 1942. Finally, the chapter 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 remaining chapters excavate from the U.S. and West German trial records interpretations of the motives behind the mass killing of the disabled. Chapter 2 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 U.S. conspiracy theory was driven by a predisposition to interpret Nazi crimes in terms of the regime’s ambitions to conquer by military force the peoples of Europe. Without this link to the conduct of the war, U.S. 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, U.S. authorities portrayed the killing of the mentally ill as a war measure to strengthen the German army by enriching it with booty (chiefly medical supplies and hospital space) plundered from “useless eaters.” Because all the euthanasia defendants belonged to the same “conspiracy” to attack other European countries, it mattered little how large or small a function they discharged; they were equally liable for all acts carried out on behalf of the conspiracy.

Chapters 3, 4, and 5 contrast the U.S. 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, German courts virtually assured lenient treatment of their defendants. The trend toward leniency and acquittal began in the late 1940s 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 extralegal factors) increasingly affected the adjudication process.

A subsidiary but intriguing theme is taken up in Chapter 3: U.S. and West German conceptions of their jurisdiction over these crimes. The U.S. authorities premised their jurisdiction over euthanasia defendants on the traditional laws of armed conflict, including the Geneva and Hague conventions. Because Nazi euthanasia, on the U.S. 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 Nazis’ internal state affairs but prosecuting matters recognized as breaches of international law by the world community. For U.S. 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 another 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. 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? In both U.S. and West German trial records, the issue is repeatedly raised of the defendants’ awareness of illegality at the time they participated in euthanasia crimes. The U.S. authorities 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 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 1950s, however, natural law as a liability-producing device was on the wane as courts began to express doubts about their defendants’ awareness of wrongdoing.

Now that I have acquainted the reader with my argument and method, I would like to say what this book is not about. It is not a polemic against human rights trials nor a critique of those who advocate an enlarged international jurisdiction over notorious war criminals. Despite the case presented here that considerations of national power often beset the process of adjudication, it is my firm belief that the effort to hold international criminals liable for their atrocious assaults on humanity should and must be pursued. If the present study proves anything of value to the war crimes question in contemporary debate, it is that the wisest course yet devised for dealing with war criminals is the International Criminal Court (ICC), created by the Rome Statute in 1998. Arguably, a permanent body representing a broad cross section of the world’s nations will be less susceptible to forces of politics, power, and international contingency that have plagued ad hoc tribunals since 1945. Insofar as we aspire to do justice at the international level, the ICC is our best hope. This book is merely a caveat for the champions of prosecuting war crimes offenders; like the retainer who whispered in the ear of the Roman conqueror that all glory is fleeting, it reminds us that all human justice is limited. The striving is still worth the endeavor.
INTRODUCTION

LAW vs. HISTORY

It might be objected that the purpose of a criminal trial is not to present a historically truthful account of the episode at its center; hence, it is pointless to find fault with the historical inaccuracies and distortions of a criminal proceeding like the U.S. Doctors’ Trial. Whatever the merits of this criticism as it pertains to conventional criminal trials, it fails to understand one of the primary motives behind the Nuremberg proceedings: to preserve the history of Nazi criminality for the education of future generations. In his Report to the President of June 6, 1945, Robert Jackson affirmed that the “groundwork” of the Allied case against the major war criminals had to be

factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the barbarities which have shocked the world. . . . Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.18

The Nuremberg trials, including the subsequent proceedings, were different from conventional criminal trials: in the minds of leading policymakers like Jackson, they were to serve an educative purpose for future generations by memorializing a history that might in palmier days seem beyond belief. Jackson and his colleagues were not oblivious to the historical significance of their work; on the contrary, in Jackson’s own words, their aim was to use the trials as a stylus to write a “factually authentic . . . well-documented history” for the benefit of posterity.

Given the extraordinary nature of Nazi criminality, and in view of the trial planners’ own conception of their purpose in holding the trials, it is hardly amiss to hold the U.S. judiciary’s conception of Nazi crimes up to critical scrutiny. Much of the analysis in Chapter 2 will subject U.S. constructions of Nazi euthanasia to historical cross-examination—particularly the overarching theory that euthanasia was driven by the voracious resource demands of aggressive warfare.

A NOTE ON SOURCES

Like all works of history, 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 34-volume series, Justiz und NS-Verbrechen (The Judiciary and Nazi Crimes).19 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 written by German jurists in the immediate postwar period, published in diverse German legal periodicals. Some of the primary source documents cited in this study are taken from two compendia, Ernst Klee’s *Dokumente zur “Euthanasie”* and Michael Marrus’s *The Nuremberg War Crimes Trial, 1945–46*. Finally, my study makes liberal use of secondary sources by European and U.S. scholars. The reader will note my debt to Henry Friedlander and Ernst Klee in Chapter 1. The structure of Chapters 3–5 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.

The time period that brackets this study is roughly 1945–1953. (Reference is made to some euthanasia trials after 1953, but only to illuminate issues raised during the eight-year period after the war.) My reasons for focusing on this period are twofold. First, it was a formative time in the crystallization of West German judicial attitudes toward euthanasia criminality. Many of the primary legal theories and historical perceptions of Nazi euthanasia coalesced during this period. Second, a narrower focus enabled more sustained analysis of the leading cases in the euthanasia trials. A third reason could also be cited: the post-1953 cases did not affect my conclusions about the German euthanasia trials in the immediate postwar period. On these grounds, I felt justified in restricting my study to its current time frame.

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). U.S. 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, and in part because the role of the judge in a criminal case is restricted to that of umpire because it is the jury that typically determines guilt or innocence. Appeals of guilty verdicts are reviewed by a 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 as a result of 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, viability of defenses, verdict, factors in extenuation or aggravation, and sentence. Although the verdict of the U.S. tribunal in the Doctors’ Case contains some explanatory material, it is remarkably brief in comparison with the German decisions. Thus my discussion of the U.S. Medical Case in Chapter 2 is based on the transcript of the proceeding (nearly 11,000 pages), while my treatment of the German euthanasia trials in Chapters 3, 4, and 5 relate to the courts’ sometimes elaborate written opinions.