Confronting the "Good Death"

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In 1948 Brigadier General Telford Taylor, 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 U.S. 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, and 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.¹

The impact of Cold War politics on the trials of Nazi war criminals cannot be overstated. With increasing stridency in the immediate postwar era, West German politicians and policymakers connected the liquidation of war crimes trials with the restoration of national
power. To a great extent, continued prosecution of Nazi criminals was framed by the larger issue of German rearmament, particularly after the outbreak of the Korean War in June 1950. Interpreted in the West as a gambit to export communism by force of arms, North Korea’s invasion of South Korea dramatized the need to incorporate the Federal Republic into a western defense system in central Europe. In the ensuing year after the invasion, the West Germans prepared the draft of a security treaty with the allies, clearly intended to recover some measure of national power for West Germany. Discussions between representatives of the West German government and the Allied High Commission, held in the spring and summer of 1951, had raised the issue of overhauling the current system of pardoning as an element of a general security treaty. Monitoring the progress of the negotiations, the members of the Heidelberg Circle demanded a radical change to the pardon system: the right to pardon and to carry out sentences in the cases of convicted war criminals imprisoned in Germany should be transferred from the Allies to the German government. Adenauer’s justice minister, Thomas Dehler, shared the aspirations of the Heidelberg Circle as they pertained to solving the war criminal problem. He signed a fifteen-point catalog prepared by the central bureau in fall 1951, setting forth demands that no death penalties be meted out in war crimes cases, sentences less than twenty years be commuted, new investigations be discontinued, and ongoing trials be terminated if the prosecution did not expect a sentence greater than twenty years.2

The extreme nature of such demands was in part fueled by the public’s tendency to conflate atrocities unrelated to the war with “war crimes.” Although many Nazi defendants were charged with murder and crimes against humanity rather than war crimes (only 88 of the 603 prisoners held by the Allies in spring 1952 were German soldiers), energetic campaigns to amnesty Germans in Allied custody leveled the distinction between war crimes (resented as victor’s justice) and the racially inspired mass murder of the Nazi government. Even Konrad Adenauer was not immune to this fallacy. Rejecting calls for a general amnesty, Adenauer pointed out that a more limited amnesty was appropriate, because “among the convicted there was a certain percentage to whom the word ‘war criminal’ perfectly applies, and whose punishment must be maintained.” For Adenauer, the “real” criminals—the lower-class sadists within the concentration and death camp system—should be prosecuted, and the rest left in peace.3

The pressures exerted by the West Germans to end the era of war crimes trials achieved two notable successes. First, they induced the Allies to release nearly 75 percent of their German war criminals between 1950 and 1952. No amnesty would be necessary: most of the remaining prisoners were released in the years after 1952. The British and French closed their prisons for war crimi-
nals in 1957, and the United States released the last of the “Landsbersers” in 1958. Second, pressures to liquidate continued trials of Nazi defendants found their mark in West German court rooms, where convictions of war crimes suspects plummeted by 68 percent between 1950 and 1951, and by 98 percent between 1950 and 1955. The euthanasia trials of the late 1940s and early 1950s, steeped in this spirit of leniency for Nazi killers, reflect in miniature this historic moment.

A series of cases beginning in 1948 inaugurated the new Cold War era of leniency in euthanasia-related prosecutions. A distinguishing feature of these cases was the legal doctrine of “collision of duties,” by means of which euthanasia doctors not only evaded the charge of murder, but left German court rooms as moral heroes dedicated to undermining euthanasia by participating in it. In this chapter, we explore how this transformation of medical killers into heroes served the purposes of German yearnings for rejuvenated national power—a power believed to be inconsistent with an ongoing judicial confrontation with the Nazi past.

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 (Nachstand) 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 twentieth 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 Nachstand), 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 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.⁴

A variant of the extra-statutory necessity doctrine was the “collision of duties” defense. According to this form of the defense, 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 1940s as the first successful defense in German courts against charges of murder for euthanasia crimes, beginning with the case of Drs. Karl Todt and Adolf Thiel of the Scheuern mental institution.

The “Merciless Quandary” and the Limits of the Law: The Scheuern Case

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. The president of the new board was State Councillor Fritz Bernotat, a ubiquitous presence in the ambitious killing project launched in Hessen-Nassau. 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 characterized him as a lukewarm supporter of Nazism. In summer 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 to 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 provincial authorities decided to convert Scheuern into a transit center (Zwischenanstalt) at the service of T-4.
Scheuern henceforth received shipments of patients from other institutions designated for ultimate transfer to Hadamar. The purpose of the transit centers was twofold: to create an additional screen to obscure 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, for example, 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 Scheuern, the provincial transit centers included Weilmünster, Herborn, Kalmenhof, and Eichberg—all favorably close to the killing center of Hadamar, which they supplied with victims.6

Between March 1941 and September 1944, Scheuern 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 in the murders of around 1,000 of them. By aiding the transport of patients from Scheuern to Hadamar and continuing to fill out the KdF’s registration forms after discovering their purpose, the pair had fulfilled the elements of the offense of aiding and abetting murder. Further, their actions were “objectively” illegal in the sense that no traditional justifying grounds like self-defense or emergency existed to legitimate their conduct. The novelty of the Scheuern case, however, occurred when the court refused to find the defendants personally culpable for their involvement in euthanasia killings. The court premised its acquittal of the accused on a defense that had been unsuccessfully raised by other defendants in earlier cases: the “collision of duties” defense.

According to the Koblenz court, Todt and Thiel were ensnared 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 whoever they could.7 The court accepted Todt and Thiel’s claim that they had chosen 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.8

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, the patent conflict of duties they faced excused their actions. In other words, their collaboration in euthanasia was objectively illegal, but they bore no criminal guilt for it. For this reason the defendants had to be acquitted. In arriving at this determination, the Koblenz court exhibited a degree of hesitancy and circumspection—we 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 he 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, recalling Martin 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 the defendants. 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.” 9

The argument that one has participated in criminal behavior in order to curb its worst excesses did not surface 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’s and Thiel’s acquittals, albeit with more cocksureness than the Koblenz court had evinced. The latter had recognized that the Scheuern trial was, in the vernacular of U.S. 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 newly reconstituted West Germany seeking to cast off even the minimal reservations the Koblenz court had entertained.
The Rhine Province Case

The Scheuern case, as we have seen, was the first West 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 section 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 councilor 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 Waldniel 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 Hermann Wesse), thus perpetuating the trend toward acquittals of euthanasia defendants.

When the war started in 1939, Dr. Walter Creutz was serving as a medical officer in the German army until given indispensability status and reassigned as departmental chief 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 ordered by 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.\(^\text{10}\)

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, 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 implementing euthanasia in the Rhineland. Haake even stiffened his resolve when Berlin announced that 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 KdF arrived on February 12, it was composed of some of the euthanasia program’s leading figures. To this august group of killers Creutz made his pitch. When he had finished, Werner Heyde, a member of the delegation, responded with a single gesture: he removed a copy of Hitler’s euthanasia order of September 1, 1939, and presented it to Haake.11

The Hitler decree had the desired effect. Haake immediately backpedaled, exclaiming that, in view of the expressed will of the Führer, he withdrew all his objections to adopting the euthanasia program in the Rhineland. The Berlin Commission then demanded that transit centers 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 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 numerous Rhineland patients, because a zealous advocate of euthanasia no doubt would have succeeded him. Intent on curbing the effects of the euthanasia planned for the Rhine province, Creutz attended a meeting sponsored by the KdF in Berlin, where, in the presence of 50 to 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 firm legal standing. At this meeting, Werner Heyde outlined the categories of patients exempt from the program. These categories included patients capable of work, patients whose mental illness was war- or age-related, foreigners, and patients incapable of transportation.12

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 audience 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, particularly in the home institutions 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 identifying patients injured in accidents as 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 whoever they could than to resign and leave their patients vulnerable to a potentially less sympathetic replacement.\textsuperscript{13}

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 transferred patients were gassed after arrival at Hadamar. A similar procedure took shape at the new transit center Galkhausen, where three of the five doctors from the Nitsche commission prepared lists of patients (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.\textsuperscript{14}

Typically, Creutz received the transport lists from Berlin, and he forwarded them 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 a Dr. We., the women in one headed by a 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 cross-purposes 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.15

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 thirty-four cases and R. in forty cases. Both had regularly approached the relatives of 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 over the phone to implement the measures more rapidly and with greater efficiency. In March 1941, Gekrat proposed to Governor Haake the immediate removal of patients from four Nassau institutions as a way to erase the backlog caused by the retarded pace of transfer from 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, approximately 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 mentally ill children in specially created “children’s wards.” Rhineland facilities were to play a part in this expansion of the killing project. Creutz was ordered to establish in Galkhausen and in another institution yet to be determined two such wards. He expressed his misgivings about this operation, but the committee representatives were unmoved. Thereafter, Creutz remonstrated with the Berlin offices until in July 1941 he received a letter from Viktor Brack accusing him of intentionally obstructing 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 gave Brack’s letter to Haake, who resented the charges of misfeasance against one of his officials. Haake contacted Reichsleiter Philipp Bouhler 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 its 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 at 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 at Waldniel, he suffered a hemorrhage that rendered him unable to fulfill his responsibilities. Renno proposed Dr. Hermann Wesse as his replacement. During Wesse’s prior visits to see his wife, who was a staff doctor in Waldniel’s adult section, 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 the 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 expert.

Wesse remained at Görden until February 1942, at which time, primarily at the instance of Creutz, he was sent for further psychiatric training at the Rhine State Clinic for Juvenile Psychiatry in Bonn, where he lingered another seven months. In the meantime, Creutz contacted the Waldniel hospital and demanded that its chief medical advisor, a 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, Wesse was active as the director of Waldniel’s children’s ward, filling out reports on the patients that noted the severity of mental disability (e.g., “idiocy,” “feeble-mindedness,” “mild, medium, or severe degree”) and his evaluation of the child’s educational capability. These reports were forwarded to the Reich Committee in Berlin. Weeks later he received a decision from the committee: educable children were to be discharged and children considered incapable of education were to be “put to sleep.” 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” thirty children with lethal overdoses of luminal.18

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 to 1945. The immediate cause of this second wave of transports was the increasingly urgent demand for hospital space because of 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 with 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 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 transferred patients were being killed in the collection centers. In April 1943 Creutz submitted a petition to Josef Goebbels, State Secretary Stuckart of the Reich Interior Ministry, and Karl Brandt, requesting an investigation of why so many patients were dying after transfer. His concerns were dismissed with the reply that the high mortality rates resulted from food rationing required by the war emergency and from transporting 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 representative 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.\footnote{19}

This period of deportations between 1942 and the end of the war coincided with the wild euthanasia characteristic of phase two of the killing program. For the Rhineland as for much of the German Reich, the selection of patients in this phase was made not on the basis of forms but by the home institutions themselves. 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.

The Düsseldorf state court found that Creutz fulfilled all of the elements of aiding and abetting murder as well as crimes against humanity under Law #10. Creutz was not, however, a perpetrator but an accomplice, because he “by no means desired the result as his own.” The court next turned to consider whether Creutz’s acts were objectively illegal. We will recall that the court in the Scheuern case deemed Todt’s and Thiel’s actions illegal but acquitted them based on a “collision of duties” (that is, the 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” (Übergreiflicher Notstand) justified Creutz’s involvement in the transportation of patients to their deaths. The lay assessors on the court found that Creutz was an unswerving opponent of the operation, sparing no pains to restrict 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, Creutz worked at cross-purposes with Berlin: his orchestration of a program of sabotage, his consistent resistance to a children’s ward at Waldniel, his opposition to 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 impede 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 ninety-seven patients to the transit centers of Galkhausen and Andernach for ultimate transfer to Hadamar for killing. Of these patients, sixty-seven were withheld or discharged—a significant accomplishment ascribed to Creutz’s rescue plan.\footnote{20}

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 resigning 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 Vienna's health-care system, 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 dwarfed the mortality rate of 7.5 percent in the Rhine province. Had Creutz followed Gu.'s example and resigned his post, the Rhineland likely would have experienced a death rate similar to Vienna's.21

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. 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 to 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.22

Regarding the transportations of patients between 1942 and 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.23

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 whoever they could. The court held that this “collision of duties” operated as a “justifying ground” to acquit both We. and R. of all charges.24

The last group of defendants in the Rhine province case to be acquitted on the basis of a collision of duties was two University of Bonn professors, Kurt Pohlisch and Friedrich Panse. Pohlisch enjoyed a triple appointment as a professor of psychiatry and neurology at the University of Bonn, 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 commitment to pure science, the professors’ research on eugenics during the 1930s suggests 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 to record the racial-hygienic background of the German population. Pohlisch 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.25

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 condition for a period of five years, as well as all “feeble-minded” patients not regarded as essential workers, were to be killed after inspection of their registration forms by government experts. In the aftermath of the meeting, both men served for a time as T-4 medical experts
reviewing these registration forms until summer 1940. The court determined that in 10 of the 300 to 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 at the April meeting. They had 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 the result of the professors’ lobbying efforts. Summing up their role at the April conference, the court concluded: “It must be said that in the conference considerable restrictions were achieved and both defendants contributed to it through their suggestions.”

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 selected for transport only patients 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 to July 1941. 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.
The Düsseldorf court had no difficulty in justifying the Bonn professors’ actions on the ground of a “collision of duties.” On the basis of “proven innocence,” Pohlisch and Panse were, like Walter Creutz, acquitted of all charges.

The court’s tribute to the Bonn professors is oddly discordant with what we know of their research in racial-hygiene during the 1930s. 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 an expert” 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.

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 resumed their psychiatric careers after their acquittal. In this way, the three defendants acquitted in the Rhine province case were beneficiaries of West Germany’s peculiar “policy toward the past” that emerged in the later years of the 1940s—a policy that included the reintegration into professional life of former Nazi officials. Before Creutz, Pohlisch, and Panse 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, 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 was based on a misinterpretation of extrastatutory necessity. According to the higher court, this doctrine was inapplicable in cases where two groups of people were involved—that is, 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
“hopeless” patients in the interests of saving other patients. This was a grave legal error, the Supreme Court held, because you could not compare the two groups and proclaim one worthier of being saved than the 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” than the lives of healthier patients.28

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” because he had acted blamelessly. For the Düsseldorf court, even this lenient outcome insufficiently recognized Creutz’s valor. By the time of Creutz’s second acquittal, the Supreme Court for the British Zone was no longer available to chasten the state court: in 1950 it had been replaced by West Germany’s Federal Supreme Court, which exhibited a less critical attitude toward the findings of the lower courts in these cases.29

The Rhine province was not the first case to acquit euthanasia accomplices of criminal wrongdoing; that distinction belongs to the Scheuern trial. The cases of Creutz, Pohlisch, and Panse, however, were the first euthanasia trials 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 Scheuern 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 German critic of postwar German justice Jörg Friedrich the Rhine province case was a judicial and moral outrage. “Only this judiciary, itself well-schooled in murder, could extol to his patients a nine-

* The Supreme Court for the British Zone (OGBHZ) was frequently at odds with regional courts in West Germany in the postwar years. The antagonism may have resulted from the OGBHZ’s role in ensuring that Allied Control Council Law #10 was properly observed in trials conducted by regional courts. As Dick De Mildt has observed, the perception by some German jurists that Law #10 violated the ban on ex post facto laws within German jurisprudence may have sparked their resentment of it. See De Mildt, In the Name of the People, 358n39.
hundred-fold murder accomplice as an idol of morality,” Friedrich corrosively remarked. The Düsseldorf court’s example did not fall on flinty soil. It flourished in the verdicts of subsequent courts, transforming men into virtuous paragons who, in a different era, would have earned the label of murderers.

The Württemberg Case

One of the more bizarre of the “collision of duties” euthanasia cases involved four doctors in the Württemberg mental health administration. Their twelve-day 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 for the mental health system in Württemberg’s Ministry of the Interior. Mauthe was commissioned to implement the euthanasia program in the state of Württemberg. Acting on this commission, he ensured that registration forms were distributed and properly completed in the forty-eight 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 transports were to provide notice to the patients’ relatives. After this decree was disseminated, lists with names of patients to be transported were sent to the home institutions, 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 discharge 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, on orders from Berlin, a former castle belonging to the Samaritan Foundation Association was converted into a euthanasia center for mentally handicapped patients. The rooms within the Grafeneck facility were used as office space for the T-4 staff. The actual extermination room was located in a shack formerly used for farming. This inauspicious structure was converted into a gas chamber. Adjacent to it, three crematoria were installed to dispose of the murdered patients’ bodies. A large wooden barracks and doctor’s office stood nearby. When the mentally disabled arrived at Grafeneck, usually in busloads of approximately seventy-five people, they were brought into the receiving bar-
racks, disrobed by nursing personnel, and led to the examining doctor. A minute-long physical exam ensued. 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 mock water faucets. Once all 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 cremated. 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 an 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 for patients 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 fourteen-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, at least 93 children were transported to children’s wards outside Württemberg, chiefly Eichberg, where they were murdered.

Otto Mauthe typified a new species of criminal that appears for the first time in history during the era of Nazi genocide, the “desk murderer” (Schrifttischtäter). Although never harming anyone directly, 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 incriminating decrees authored by Mauthe, each of which promoted euthanasia in some material respect. The decree of June 10, 1940, for example, required mental health officials in Stuttgart to prepare lists of patients for transport to Grafeneck. Another one (August 9, 1940) prohibited the Liebenau institution from informing relatives of transportees of their removal. He issued the decree of June 5, 1941, 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 codefendants, 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 (Article 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 did not anticipate participation in mass murder, “but rather a multiple participation in a single murder”; and because the code had no category for mass murder, mass killings under the code that numbered 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.31

Mauthe (or his attorney) must have taken note of the Scheuern and Rhine province cases, for he raised the collision of duties as a defense at 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. 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. Further, he did not exploit all opportunities for saving patients, using his freedom of discretion; rather, he expressly avoided saving patients because of his “exaggerated anxiety and bureaucratic indifference.” (In one example, he refused to support an exemption lest the SS investigate or his superior 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.32

Similarly, Mauthe neglected opportunities to extricate children from transport to the children’s ward at Eichberg, despite his awareness that patients 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 out of 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 even serve this mild punishment; not long after the trial, his sentence was suspended and Mauthe was released from prison.

A second physician convicted by the Tübingen court was the acting director of the Zwiefalten mental institution, Dr. Alfons Stegmann, charged with delivering his patients for transportation and killing. Stegmann claimed he had known nothing about the purpose of the transports until after the transports’ departure—an assertion refuted by witness testimony that Dr. Stähle had enlightened him on the reason for the transports in February 1940. Moreover, his behavior during the period of his directorship at Zwiefalten contradicted his “sabotage” argument. He not only maintained regular contact with 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!” The court described such detachment from the plight of these doomed human beings 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, because 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 design 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 (such as 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 the defendant would qualify for extenuated punishment.
The third and final physician convicted by the court, Stegmann’s successor as director of the Zwiefalten institution, a 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 cases 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 lives. Because she had not caused their deaths “cruelly,” “maliciously,” or out of “base motives” but “solely out of pity,” and because these three 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 section 212 of the German Penal Code. 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, a Dr. S., and Dr. F., one defendant in the Württemberg trial did successfully invoke it to secure his acquittal. This defendant was a medical specialist in psychiatry, a 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, they had actually restricted it. Finding Dr. E.’s defense unrefuted by the evidentiary record, the Tübingen court acquitted him on the basis of a collision of duties.

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 disturbing 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 approximately ten hours of jail time per killing. Willfully or not, such a sentence conveys a
message to the rest of society that this type of killing is of a different order of wrongdoing than conventional homicide—an order of wrongdoing that society may condone, because it lacks the reprehensibility of conventional murder.

In the 1960s, polls of West German citizens indicated that many wished for the prosecution of National Socialist crimes to come to an end, in part because many Germans regarded the crimes committed during the era of National Socialism as something other than true criminality. A German expert on the prosecution of Nazi crimes, Herbert Jäger, once commented 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 Exzessäter (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 “small wheels” within the machinery of destruction often escaped condign punishment. For Jäger, one of the foremost goals of prosecuting Nazi crimes 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.37

The Baden Case

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 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 State Councillor Fritz Bernotat of Hessen-Nassau comes readily to mind; without his sedulous 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 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 retry 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 retrial in May 1950.

Dr. Ludwig Sprauer was the director of the Health Department (Department IIIb) of the Baden Interior Ministry. As director he controlled twelve mental hospitals in Baden, including state, district, and religiously affiliated institutions. In 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. Until its formal legalization, the program was backed by a September 1939 authorization by Hitler. Sprauer’s role was to facilitate registration and transportation of incurable patients in Baden institutions.38

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 codefendant 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 thirty of the ninety patients designated were finally transported. These and other incidents of resistance, however, did not spur Sprauer into opposing the euthanasia program; on the contrary, he scotched resistance wherever it appeared. His tactics of quashing opposition ran the gamut from threats of imprisonment to “collegial” invitations to take extended vacations. On another 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 doctor-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 work. Opportunities arose during this sabotage initiative for Sprauer to cooperate with it. The director of the Emmendingen facility, a Dr. Ma., asked Sprauer to authorize exemption of twelve 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 program. Fears that a critical attitude toward it would prejudice his career haunted him, causing an almost knee-jerk submission to 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, “where after a few years he hoped to rise to the position of a ministerial councillor.” 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.

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”—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, inasmuch as any refusal to collaborate would have meant dismissal from his job and
certain “professional disadvantages” harmful to 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 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. On May 2, 1950, after a two-day trial, the Freiburg court found him guilty of aiding and abetting numerous murders and of crimes against humanity.

Because the death penalty had been abolished in Germany in 1949, the court meted out to Sprauer an eleven-year jail term. Within months after he was sentenced for his role in helping to murder 3,000 persons, 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 1950s. Sprauer was one, but by no means the only, example of this 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.” Not until the work of Binding and Hoche was published in 1920 did he embrace euthanasia as a “humane” method for ending the lives of severely mentally handicapped patients. He believed euthanasia should be restricted to two groups of patients: “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 himself would 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 expert. He served at various times as director of three Baden mental hospitals, as well as the temporary director of the children’s ward in another institution. As director at the Rastatt
hospital, 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 and 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 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 console a distraught nurse by referring to the exigencies of the war, assuring her that it was a “completely humane” proceeding.41

At one of the Baden institutions under his direction, 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 the 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 eighteen 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 brief stint 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 there, 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, because 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 expert. After Sprauer had recommended Schreck as ideologically reliable, he was ordered to report to Herbert Linden in Berlin in February 1940. In
Berlin he and fifteen other doctors attended a meeting chaired by Viktor Brack, who related that because of 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.” 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 were then exhibited to the participants, along with an explanation of how the medical experts were to evaluate them. At the end, all 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, because the program coincided with his own philosophy on euthanasia. He added, however, that he fully believed in the legality of the program when he agreed to collaborate with it.42

From March until December 1940, Schreck assessed some 15,000 registration forms sent him by the T-4 front office, the Reich Cooperative for State Hospitals and Nursing Homes. The first shipment contained 350 to 400 forms from three Baden institutions, 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 modest information contained on the registration forms—least of all an adequate basis for determining whether 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, 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 wartime 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. Because 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.” 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” (which would have acquitted Schreck on the basis of a mistake of law), but was less morally reprehensible than a conscious 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 rise to the level of a mistake of law 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 no longer for him a precise procedure. These failures cannot be regarded as accidental, but are the symptoms for the destruction of the professional ethic, which every doctor had to suffer who involved himself in the extermination program.43

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 an expert evaluator and to his actions as director of the three Baden hospitals under his direction. He was acquitted of the homicide charge for his personal involvement in killing the three children in the Wiesloch children’s ward, because 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. Because these killings were not prompted by any of the motives required by the German law of murder, they were instances of manslaughter under section 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 eleven years. Like Sprauer, he was soon released from jail, serving only a year of his sentence.

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 1950s, 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. To a significant degree, this yearning was impelled by a desire for restored national power after the catastrophe of Germany’s defeat in 1945. We turn to this new series of verdicts and the rationale invoked to support them in the next chapter.