Confronting the "Good Death"
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The West German euthanasia trials between 1948 and the mid-1950s occurred during a tumultuous era in German and international history. The U.S. goal of integrating into the Western alliance a democratic and pro-U.S. Germany became a pillar of European foreign policy in both the Truman and Eisenhower administrations. As early as 1949, the Pentagon and State Department realized the military inadequacy of NATO troop strength as compared with the Soviets: its undersupplied twelve divisions were dwarfed by the USSR’s twenty-seven. A solution to this mismatch, in the minds of Secretary of State Dean Acheson and Pentagon policymakers, was to rearm West Germany and shore up NATO’s ground forces with German soldiers. Opinion about German rearmament was divided within the State Department; some officials feared French and Soviet responses to any plan to revive the German military. The reservations of these critics, however, were dealt a severe blow with the outbreak of the Korean War. Acheson saw Soviet fingerprints all over the North Korean invasion and inferred that the USSR might also be willing
to launch a surprise invasion in Europe. In September 1950 Acheson proposed at a meeting of French and British foreign ministers the establishment of a transnational European army that would include German troops. Although the U.S. plan for a European Defense Community would ultimately founder in 1954 when the French rejected it, the aim of German rearmament was achieved with the incorporation of a new West German military into NATO in May 1955.¹

The idea that West Germany must have sound democratic credentials if it were to enjoy the most visible badge of sovereignty, rearmament, influenced the German state's policy on war crimes trials. Obviously, contemporary Germans burdened with allegations of committing Nazi war crimes could not shore up the Free World's bulwark against Soviet Communism. As scholars of post-war Germany have demonstrated, the Federal Republic of Germany employed various strategies to advertise its reinvention as a democracy protective of human rights and freedoms. Philosemitism was one such strategy: through public avowals of exaggeratedly positive attitudes toward Jews, the Germans served notice on the world community of their readiness to regain the status of a sovereign country. Another bona fide display of Germany's rebirth as a democratic state was anti-Communism. Given the penchant after the war to classify both National Socialism and Communism under a common “totalitarianism,” the Cold War rhetoric and policies of the fledgling state were outward symbols of West Germany's transformation from authoritarianism to a militant democracy—broadminded, tolerant of diversity, yet prepared to defend the West from a Communist despotism likened in postwar years to Nazi tyranny. As a whole, philosemitism and anti-Communism confirmed West German claims to moral, political, and social legitimacy, and buttressed German assertions of national power at a time when the Federal Republic was in its infancy.²

The prosecution of Nazi criminals was enmeshed in this complex skein of geopolitics and the quest for revived national power. Like philosemitism and anti-Communism, the abolition of trials of Nazi-era perpetrators became part of a strategy to regain German sovereignty. One gambit in this strategy was the Bundestag's Christmas Amnesty of 1949, which freed Nazi defendants sentenced to jail terms of six months or less—a decree that affected nearly 700,000 West Germans. On January 1, 1951, it was the Americans' turn: the U.S. occupation authorities amnestied Nazi defendants convicted at Nuremberg with sentences of less than fifteen years. This decree released convicted industrialists like Alfried Krupp and Fritz ter Meer, co-founder of the I. G. Farben slave labor concern at Auschwitz. By February 1951 every industrialist war criminal had been released.

In that same year, the Bundestag promulgated the “131 Law,” deriving its name from Article 131 of the 1949 German Constitution. Article 131 had
assumed responsibility for regulating the “legal condition” of former Nazi bureaucrats, many of whom had fled eastern Germany with the collapse of the Third Reich and were now unemployed in the western part. Others had been expelled from the civil service by denazification procedures for their proven Nazi past; at least one-third (100,000) of the bureaucrats covered by Article 131 had been classified as “compromised” by denazification courts. The 1951 law based on Article 131 was a coup for this group of erstwhile Nazi functionaries. It required federal, state, and local governments to allocate at least 20 percent of revenue paid for salaries to employ the 131 beneficiaries. Although the law excluded former officials classified as “major offenders,” in reality few of the “131’ers” (only 1,227) were affected by the restriction. In this fashion, former Gauleiters and Security Service commanders who had successfully concealed their past and received mild classifications were able to reenter the West German civil service.3

These developments in the early 1950s were both symptoms and causes of a nationwide amnesia that crept over West Germany about its recent genocidal past. In the years that followed, ex-Nazi officials were reabsorbed into German society, many of them into state and local government. At the same time, in those trials of Nazi criminals that did take place, German courts acquitted euthanasia defendants with reference to extrastatutory necessity and a new theory to justify acquittal: the defendant’s inability to “exert his conscience” sufficiently to recognize the illegality of his actions. This new defense became another implement in the West German judiciary’s toolbox to exonerate euthanasia killers and liquidate the era of Nazi war crimes trials.

**Theologians for Acquittal: The Hannover Province Case**

The doctrine of extrastatutory necessity, used as a means of acquitting euthanasia doctors, was in temporary eclipse in the Württemberg and Baden cases. In July 1950 the eclipse came to a dramatic end in a series of cases that acquitted entire slates of defendants, many of them deeply involved in murdering disabled patients during the war. In retrospect, it is clear that these trials signify the high-water mark in the history of euthanasia acquittals by German courts.

The verdict in the first of these trials was published in late July 1950 by the state court of Hannover. The defendants were three officials in the provincial government of Hannover: Dr. Ludwig Gessner, former governor of the Hannover province, and two of his departmental chiefs within the public health department, Dr. Georg Andreae and Dr. F. This trio distributed decrees of the Reich government for the province of Hannover, by means of which patients were transported to transit centers before being transferred to killing institutions.
For their roles in this apparatus of destruction, the defendants were charged with aiding and abetting murder and crimes against humanity.

Euthanasia came somewhat late to the former Hannover province. When the Berlin authorities decided during summer 1940 to include the province in the killing program, it had already been implemented for some time in Pomerania, Vienna, Freiburg, Tübingen, Württemberg, Hessen, Saxony, and the Rhine province. Responsibility for inaugurating the program that summer in the Hannover province fell to the three defendants. At the time the provincial government administered the mental institutions at Göttingen (700 patients), Lüneburg (1,100 patients), Osnabrück (700 patients), Wunstorf (500 patients), and Hildesheim (1,200 patients). In addition to these public hospitals, the Hannover province contained religiously affiliated institutions, including one on whose board of directors Dr. Andreae served. In some of these hospitals the provincial government accommodated disabled patients from the Hannover province. Hannover patients were also to be found in institutions outside the borders of the province: forty patients were lodged in the Wittenkindshof institution near Oeynhausen, seventy at Tillbeck, fifty at Dorsten, and a handful at Sandhorst near Aurich. The grand total of patients entrusted to the provincial government for care amounted to 7,000; of this number, approximately 4,000 were within the province’s own institutions, while 3,000 were housed in contracted institutions. All of these hospitals, provincial, religious, and contracted, would be swept up in the T-4 euthanasia plan.4

In July 1940 the first registration forms poured into the Hannover province from Berlin. An accompanying instruction sheet ordered the provincial administrators to have the forms completed and returned to Berlin by August 1, 1940. In February 1941 the first transport lists arrived for the institutions of Göttingen, Lüneburg, and Hildesheim, containing the names of 200 patients. Each of the three institutions had to select 120 patients from the lists of 200 and prepare them for transfer. Transports based upon these lists occurred on March 7 (Lüneburg and Hildesheim) and March 11 (Göttingen). The first transports of 121 patients from Göttingen on March 11, 1941, went to the killing centers of Sonnenstein and Hadamar. The patients dispatched to Sonnenstein were gassed in April 1941, those to Hadamar in June 1941. Other institutions were obliged to transport their hand-chosen patients on April 22 and 24 (Osnabrück) and April 23 and 24 (Wunstorf). A third wave began in July and August 1941. By the end of the first phase in the euthanasia program, 1,669 patients had been transported from provincial and contracted institutions within the Hannover province from a total patient population of 7,000. All transports were conducted, at least in part, by T-4’s Gekrat. Even after Hitler had officially ended euthanasia in August 1941, more than twelve transports from Hannover province institutions occurred. As late as February 16,
1943, twenty-five patients were transported from Osnabrück to the Pomernanian institution of Meseritz-Obrawalde. Although the defendants were originally charged with these later transports, as well as a transfer on September 21, 1940, of 185 mentally ill Jews from the Wunstorf institution to an “unknown destination” in Poland, the court refused to consider them in its assessment, thus restricting their liability to the transports between March 1941 and August 1941.\(^5\)

The governor of the Hannover province, defendant Ludwig Gessner, first learned about the euthanasia planned for the region in early summer 1940, shortly before Berlin sent registration forms to the province’s mental hospitals. Even prior to this time, he had heard rumors that patients were being destroyed in other parts of the German Reich. In response to his inquiries to Berlin, he received a visit in June 1940 from two members of the Reich Chancellery. These men informed Gessner of plans to implement “humane” euthanasia in the Hannover province. When Gessner inquired about the legal basis for such a measure, he also was told a law had not yet been decreed because Hitler feared its impact on foreign propaganda. Nevertheless, Hitler’s full authority stood behind the program. At this point, according to the Hannover state court, Gessner resolved to do everything in his power to thwart the extension of euthanasia to his own province. He contacted his subordinate within the provincial administration for mental hospitals, Dr. Georg Andreae, about compiling a list of reasons describing why euthanasia was impracticable in the Hannover province. Gessner then sent a memorandum to the Reich Minister of the Interior, Dr. Wilhelm Frick, setting forth his objections to the program. In the memo—drafts of which were unavailable to the court, as they were allegedly destroyed in a fire that gutted the state office buildings in 1943\(^*\)—Gessner expounded six reasons for his principled opposition to the killing program:

1. Killing mental patients did not promote the philosophy of the Nazi Party. This occurred much more through hindering the congenitally ill from reproducing by sterilization.

2. The financial burden of caring for the mentally disabled in the Hannover province was bearable, in part because of subsidies from private payors. Thus, the euthanasia measures were not needed from an economic standpoint.

3. Neither diagnoses nor prognoses with respect to mental illness were certain enough to justify the extreme measure of killing patients.

\(^*\) Several witnesses at trial vouched for the existence of the memorandum, including Dr. Walter Creutz, already acquitted because of an analogous sabotage plan in the Rhine province.
4. The euthanasia measures could produce internal political problems, especially because the Church and a significant percentage of the population clearly condemned euthanasia.

5. It is unclear how these ideas, once set in motion, might ramify further, and to which group of patients the exterminatory philosophy of euthanasia might next be applied.

6. The euthanasia program would bring large numbers of health-care professionals into a crisis of conscience.

Conspicuously absent from the memo, as the court noted, were ethical and religious reasons for staying the hand of euthanasia. At trial, Gessner explained this absence with reference to the ideological disposition of his audience: only practical considerations would have had any chance of swaying the true believers within the Berlin government.

Quite apart from the ethical issues involved, Gessner’s six objections were eminently sensible, but they did not influence the decisions of the Berlin authorities. Although Frick was sympathetic to Gessner’s argument, Hitler, who had apparently been informed of the memo’s contents, dismissed Gessner’s misgivings and insisted on proceeding with euthanasia. Gessner contacted the president of the Hannover province, a man who had boasted he had the ear of Hitler, about persuading the Führer to reconsider the killing program for the province. Neither he nor his successor agreed to approach Hitler about the subject. Gessner’s remonstrance with Linden was likewise unsuccessful. In December 1940 and January 1941, the head of the Rhine province system for mental hospitals, Walter Creutz, visited Gessner and Andreae in Hannover. The purpose of the visit was to discuss common strategies they could pursue to minimize the destructive effects of euthanasia. They came to the conclusion that the three governors of the provinces of Hannover, the Rhineland, and Westphalia had to be persuaded to oppose the killing program. This proved to be a pipedream, as we saw, when the governor of the Rhine province, Haake, declined to support the resistance after learning that the Führer backed the operation.

The court accepted the defendants’ representations that their efforts to curb the euthanasia program were thwarted at every turn. Departmental chiefs within the Reich Ministry of the Interior reacted with horror when Gessner discussed with them the possibility of sabotage. Gessner sent Andreae to Berlin to inquire further about the legal basis for the operation, where he met with Werner Heyde. Andreae communicated to Heyde his and Gessner’s qualms about euthanasia, to which Heyde replied that the system of transit centers would reduce the risk of error. As for the legality of the program, Heyde showed Andreae Hitler’s euthanasia decree of September 1, 1939, but reminded him of
the confidentiality of the matter. Andreae later relayed these details of his interview with Heyde to Gessner. Together, they agreed there was nothing further they could do to deter the implementation of the program in the Hannover province, because it had the unqualified support of Hitler.

When the first transport lists arrived in Gessner’s office in February 1941, Gessner ordered Andreae to summon the directors of the three affected institutions (Göttingen, Lüneburg, and Hildesheim) to Hannover to discuss the situation. Andreae was to impress upon the directors Gessner’s oppositional attitude toward the euthanasia plan. At trial, the directors in attendance at this meeting testified that Andreae made such a “depressed impression” on them that they immediately discerned his opposition to the killing program. From the beginning of their discussion, Andreae made clear to them Gessner’s critical attitude. One of the directors, a Dr. Gr., expressed his belief that “such a thing could not be desired by the Führer.” Andreae thereupon revealed to him the existence of the Hitler decree that Heyde had shown him. He then gave each director a list with the names of 200 patients, from which they were to select 120 for transfer.7

In the months after this February 1941 colloquy, Andreae consulted with Dr. Heyde to obtain exemptions from transport for certain patients. He then reduced to writing the categories of patients to be exempted and attached them to a decree signed by Gessner, which was forwarded to Hannover mental institutions along with the second series of transport lists on March 25, 1941. The patients to be exempted were those suffering from war-related injuries, age-related senility, dementia, or infectious illness; patients incapable of train transportation; and, finally, workers essential to the operation of the institution. According to the court, Andreae strove to expand the range of exemptions from transport. In an April 1941 letter to the directors of the province’s mental hospitals, he related that not only patients suffering war injuries were to be withheld, but also all army veterans whose frontline military service could be verified (e.g., through possession of the Front Warrior’s Cross or evidence of war wounds). When the Berlin authorities caught wind of this new exemption, the T-4 transport office objected, claiming that in the transport lists for the Göttingen institution three patients were deemed front veterans and withheld from transport. The same occurred with other transport lists in the province. In a May 1941 letter to the provincial government, Gekrat asserted that exemptions could not be conducted solely because a patient served at the front; exemption extended only to patients whose mental illness was caused by injuries suffered in the war. The state court of Hannover cited Gekrat’s letter as evidence of the thoroughness with which the Berlin offices scrutinized the province’s exemptions—proof of the considerable limitations on the defendants’ freedom of action.8
In response to Gekrat’s criticism, Andreae negotiated with Dr. Heyde a new set of criteria for exemption that would be acceptable to Berlin. Andreae set forth the new standards in a letter to the directors of Hannover’s mental hospitals:

The following may be withheld from transport:

1. War-injured. Under this category fall not only pensioners, but also those who can be proven to suffer from a [war-related] wound.

2. Participants in the war who have received war decorations, e.g., the Iron Cross 2nd Class, Decoration of the Wounded. This does not include the War-service Cross or the Front Warrior Decoration. Participants in the war who have acquired special decorations or recognition in the field, without being in possession of decorations. The decision I retain personally for myself [Andreae].

9. Patients with a sound capacity for work.

10. Other patients who enjoy special grounds, like capacity for imminent discharge, significant retention of personality, a heartfelt relationship with their relatives or an exceptional hardship for them. I will make the decision about these groups.

By the end of the euthanasia program in the Hannover province in August 1941, the court found that only 231 deaths attributable to euthanasia killing could be proven “with certainty” (3.3 percent of all institutionalized patients in the province). The court, however, believed the actual number of victims was much higher. Its opinion was based on statements made by the Hadamar T-4 doctor, Hans-Bodo Gorgass, who testified that approximately 90 percent of the 1,669 patients transported to killing centers during the first phase were destroyed. If Gorgass’s estimate was accurate—and the court believed it was—then the figure had to be adjusted to 1,500 victims, or 21 percent of the province’s institutionalized population.

The indictment charged Gessner with crimes relating to his role in signing the order that implemented the killing program in Hannover province (decree of March 25, 1941) and otherwise promoting the transport of patients to their deaths. Similarly, Andreae was charged with relaying the transport order to the directors of the Göttingen, Lüneburg, and Hildesheim institutions and distributing transport lists. He was also accused of issuing a series of orders, which he either drafted or signed himself, that promoted the implementation of transports in the province. (The prosecutor withdrew additional charges for Andreae’s participation in the transport of Jewish patients in September 1941 and twenty-five patients from Osnabrück to Meseritz-Obrawalde.) A Dr. F., the medical departmental chief in the provincial government, was charged with overriding the reluctance of one institutional director at the
directors’ meeting in February 1941, admonishing him that he had no choice but to transport his patients. He was also charged with promoting the killing program by signing transport orders and refusing to agree to exemptions proposed by some of the Hannover institutions.

In its deliberations on the evidence, the state court of Hannover was visibly sympathetic to the defendants. Although it conceded the defendants’ role “as intermediate authorities” in transmitting the Berlin decrees to the provincial hospitals, the court insisted the defendants acted independently “only in the cases of exemptions, which, far from advancing the killing program, actually constricted it.” The defendants’ guiding principle throughout was “to defend the most vulnerable of the patients from transfer to the killing centers.” In this respect, the court held, “they succeeded to a large degree.” The court sketched the familiar dilemma facing the defendants in 1941: they could either resign their posts and thereby abandon their patients to certain disaster, or they could remain at their posts and rescue as many as possible. Through no fault of their own, the defendants were caught in a “tragic situation,” in which either alternative they chose would result in the “severest consequences.” In a remarkable passage, the court confessed to the inability of the law to deal adequately with this “conflict of conscience.” Nothing in the German Penal Code afforded a solution to this dilemma.* The excuse of necessity was inapplicable, because the defendants feared no danger to themselves in the event of their resignation. Berlin would not only have accepted Gessner’s withdrawal, but would have encouraged it, because it would have vacated his position for a more ideologically suitable replacement.

Finding the German Penal Code unhelpful on the issue, the court turned to the literature of German jurists like Eberhard Schmidt and Helmut von Weber, who believed an “extrastatutory justificatory ground” existed in such cases. The court quoted Schmidt’s statement in a 1949 article: “The state may not charge the commission of an illegal act against a person in a situation of moral distress, who without moral fault is forced to commit an illegal act, the noncommission of which would burden his moral conscience.” The opinion notes that the Schwurgericht adopted Schmidt’s position. Complementary with Schmidt’s statement, the court invoked the mystical language of Helmut von Weber, cited two years previously by the state court of Koblenz in the Scheuern case:

The solution of such conflicts can be found only in the conscience; the individual must come to terms with his God about it. The legal order

* The doctrine of extrastatutory necessity was not codified in the German Penal Code until 1975.
provides no standard for its solution. On account of this deficit in competence, however, the decision made by someone after earnest examination of his conscience should not be criminalized.

The Hannover court expressed its agreement with this mystagogic interpretation, holding that “whoever therefore decides in such a conflict to remain at his post, at the price of participating in a criminal operation in order to rescue whoever can be rescued, should be excused from criminal wrongdoing.”

The prominence of theology in the court’s verdict was accentuated by the testimony of Protestant ministers during the trial. Asked about the church’s view of the defendants’ actions, a Pastor D. of the Inner Mission replied, “[I]t was solely a matter for the individual person . . . to make a decision that he would be able to defend before his conscience and before his God.” Pastor D. related the example of the Württemberg monks who, refusing to be a party to euthanasia, quit their posts in protest. The price, however, was a higher mortality rate among the patients of their hospital. In his view, the higher duty was to remain with one’s patients and to do everything possible to shield them from harm—a view that Pastor D. claimed the deceased Pastor von Bodelschwingh of the Bethel institution had shared. Such testimony further convinced the Schwurgericht “that the actions of the defendants are morally justified.” The defendants were therefore acquitted by reason of an “extrastatutory collision of duties that excludes fault.”

Much of the court’s rationale in the Hannover province case derived from the alleged moral probity of the defendants and the (relatively) low mortality rate among provincial hospitals, for which the defendants were given partial credit. As Dick de Mildt rightly observes, because the documentary record was largely destroyed during the war, much of the evidence favorable to the defendants was obtained from the defendants themselves or from their medical colleagues, some of whom (like Creutz) had faced similar indictments for their participation in the killing program. Each of the defendants had longstanding affiliations with the Nazi Party, to which he owed his professional advancement in the provincial ministry. All three of them were members of the bastion of ideological Nazism, the SS. Despite these allegiances, the court accepted witness accolades about the defendants’ decency and professionalism on their face. In de Mildt’s words, “such an approach made the exoneration of the former ‘euthanasia’ accomplices an almost foregone conclusion.”

Quite apart from its questionable assessment of the defendants’ professional record, the court’s treatment of the “collision of duties” defense is conceptually fuzzy. Typically, a collision of duties involves a situation in which an actor confronts two mutually irreconcilable legal duties; by performing one, the actor necessarily violates the other. In its verdict the court does not specify the conflicting duties. The defendants assuredly had a legal duty not to collude
in the destruction of their patients; but in what sense did they have a legal
duty to rescue as many patients as possible? The example of the Württemberg
religious order cited by Pastor D. is illustrative here: the monks refused to
collaborate in the killing, but their “distancing” of themselves from the crime
violated no law. Although Pastor D. opined that the brothers were derelict in
satisfying the demands of the moral law—an opinion the court apparently
shared—they cannot be accused of violating a legal duty, which is precisely
what the collision of duties requires. This conceptual obscurity in the court’s
position may have propelled it into the arms of theology for a solution: where
the law afforded no relief, God would.

Expendible Life Revisited: The Andernach Case

The spectacle of euthanasia accomplices leaving German courtrooms as
free and morally rehabilitated men reached its peak in the July 1950 retrial of
the director and staff doctor of the Andernach mental hospital. The director
was Dr. Recktenwald, who had occupied that position at Andernach in the
Rhine province since 1934; his subordinate, Dr. Kreitsch, had worked as chief
doctor of the Andernach men’s ward since 1932. In July 1948, they were both
charged and prosecuted for aiding and abetting murder and crimes against
humanity for their contributions to Nazi euthanasia. Both were convicted. A
year later their appeal finally made it to the appellate court of Koblenz, which
reversed their conviction and remanded the case to the state court of Koblenz
for retrial. Their acquittal in the second state court proceeding firmly cemented
the case within the strain of euthanasia verdicts that not only exonerated
their defendants, but transformed them into champions of higher virtue. Fur-
ther, the case is without peer for its keen interest in the defendants’ state of
mind during their participation in the Nazi euthanasia program.

Rhineland mental hospitals received their first registration forms from
the Reich Ministry of the Interior in June 1940. The secrecy draped over the
killing program concealed its true purpose from the institutional directors. As
previously noted, many of them assumed the forms were being compiled for
statistical reasons; others believed they were designed to register workers for
the armaments industry. Recktenwald thought the forms were part of a planned
division of mental institutions into nursing homes for more advanced cases
and mental hospitals for less severe patients. Kreitsch assumed the forms re-
lated to a Reich card index maintained on mental patients. Guided by these
erroneous assumptions, doctors throughout the Rhine province, including the
defendants, filled out the forms and returned them to Berlin. When the pro-
vincial ministry discovered the actual reason for the forms, Walter Creutz
took affirmative steps to hinder the extension of euthanasia to the Rhineland.
His efforts, however, miscarried when state governor Haake refused to oppose a measure supported by Hitler. The Berlin authorities demanded that the Andernach and Galkhausen institutions be converted into transit centers for assembling the patients designated for euthanasia. The two facilities were chosen because of their proximity to arteries of transportation: with ready access to the autobahn and the German rail system, T-4 could more easily transfer the doomed patients from the transit centers to the killing institutions. Only the directors of Galkhausen and Andernach were to be initiated into the killing program; all other staff members were to be kept in the dark.14

When Creutz informed Recktenwald of the operation, Recktenwald allegedly threatened to quit. Creutz pleaded with him to remain in his job and save as many patients as he could. He then told Recktenwald about Werner Heyde’s promise that a subsequent exam could be performed in the transit centers, on the basis of which patients might be exempted from transport. Such exams would afford an opportunity to save patients who would otherwise be killed. Creutz’s suasion was effective, in part because he told Recktenwald that Dr. Kreitsch and another doctor had been designated to perform the subsequent exams at Andernach. According to the court, after his conversation with Creutz, Recktenwald spoke with other physicians about his “crisis of conscience.” All told him he ought to remain in his job and collaborate with Creutz’s sabotage plan. An attorney friend from Wuppertal explained to him that mere participation in the operation to oppose it from within did not fulfill the elements of homicide. These inputs apparently tipped the scales even further in favor of his participation. He agreed to remain director of Andernach in order to work at cross-purposes with the euthanasia program.

On March 29, 1941, Recktenwald attended a meeting of the directors of Rhineland mental hospitals in Grafenberg held by Walter Creutz. At this meeting Creutz unveiled his plan to mount a concerted sabotage of the euthanasia program. After securing the assent of all the participants to his plan, Creutz described how they could minimize the number of transportees by consciously bringing as many patients as possible within the exemptions Berlin had allowed. This could best be accomplished by exploiting the vagueness of Berlin’s directives in subsequent examinations conducted in both the home institutions and the transit centers. Creutz urged his listeners to practice chicanery as needed in order to save patients’ lives: thus, where appropriate, they were to characterize the condition of patients injured in accidents as being combat-related. Throughout his presentation Creutz emphasized the need for caution, because the Berlin authorities, he warned, would analyze their exemptions and might require Creutz personally to justify them. In the sabotage plan Creutz outlined, Recktenwald and Kreitsch confronted the most “thankless task”: they were to devise some way of exempting patients transferred to
the Andernach transit center who had been deemed “hopeless” by their home institutions.\textsuperscript{15}

For intensity of interest in a defendant’s psychological makeup, none of the postwar trials of euthanasia defendants matched the Koblenz court in the Recktenwald case. The court was impressed with Recktenwald’s “humanistic education,” which supposedly inoculated him against the “realistic utilitarian thinking” of Nazi euthanasia. The court also stressed Recktenwald’s pioneering work in modern psychiatric therapy. He was the first director of an institution in the Rhine province to apply “the most modern methods of healing to ‘hopeless’ cases,” including work, insulin, and shock therapy. “It would have been foreign to his life’s work,” the court maintained, “if he who had dedicated his life to the mentally ill and observed a strict professional ethos, should now violate all his sacred principles and his life’s work by killing the very patients so dear to him.” Recktenwald had never flinched from expressing his critical attitude toward the euthanasia program, an attitude he shared not only with his friends and most intimate colleagues, but with T-4 potentates like Hefelmann, von Hegener, Heyde, and Paul Nitsche. These Nazi worthies were aware of Recktenwald’s position and complained about it. Heyde and some of his colleagues met in Düsseldorf to reexamine some of the patients Recktenwald had exempted from transport.

As for Dr. Kreitsch, the court described him as enjoying the “complete faith” of Recktenwald. Creutz regarded him as a staunch opponent of euthanasia, and for this reason appointed him to conduct the subsequent examinations of patients at Andernach. Based on his known antipathy for the killing program, Kreitsch was inserted as a monkey wrench to disrupt the smooth functioning of the operation. His task was to examine the patients earmarked for killing by the Berlin expert evaluators and to propose to Dr. Recktenwald possibilities for their exemption. One witness testified that Kreitsch had confided in him his uncompromising rejection of euthanasia, referring to it as a “disgrace.”\textsuperscript{16}

In the eyes of the court, the heart of the prosecution’s case against Recktenwald and Kreitsch was their collaboration with the transport of patients from Andernach to Hadamar in 1941. Between May 9 and July 11, 1941, some 517 patients were sent from their home institutions in the Rhine province to the transit center at Andernach. After July 11 until the cessation of euthanasia in August 1941, another 352 transportees arrived there from the same home institutions. Upon arrival at Andernach, Recktenwald examined each patient as well as the accompanying medical records. Although he had been sent the “worst material,” he and Kreitsch subjected the patients to work therapy treatment, managing in some cases to enable the patient to perform “productive work,” which Recktenwald then used as a ground for exemption.
“This intensive treatment of the transferred patients,” the court remarked, “already violated Berlin’s orders, because Berlin had permitted only a subsequent exam in the transit center, not treatment of the patients removed there.” Of the 517 patients transferred to Andernach before July 11, Recktenwald and Kreitsch exempted 42 of them from transport to Hadamar. The court was convinced that several of these exemptions were patent acts of sabotage. It reconstructed the final lists of the numbers of the disabled later transferred to Hadamar, arriving at a figure of 447 patients ultimately killed in Hadamar after transport from Andernach. Because of Hitler’s order in late August 1941 to stop the killing program, the additional 352 patients transferred to Andernach after July 11 were spared killing at Hadamar. The court added this figure to the 42 patients exempted by the defendants (including 26 who had died in the meantime of natural causes) to reach a grand total of 420 patients rescued by them from the euthanasia program, or 50 percent of the patients originally earmarked for killing.17

We may question the court’s fuzzy math in arriving at this percentage, but there is no disputing the court’s admiration for the defendants’ achievement—especially as compared with other provincial German health systems during the war. As the Düsseldorf court had done in the Creutz trial, the Koblenz court cited the example of Professor Gu., the head of the Vienna health system, who had refused in 1940 to collaborate in the killing program and was replaced with a more pliable representative. The result was the extermination of one-half of Vienna’s disabled patients. One witness, the chief doctor at the Bethel institution, testified that the staffs of two institutions, Stettin and Zwiefalten, had refused to complete the T-4 registration forms. Consequently, teams of SS doctors arrived at the hospitals to perform their own examinations on the patients, resulting in their near total destruction. Comparison with the other Rhine province transit center, Galkhausen, also accrued to Recktenwald’s credit. Of the 542 patients transported to Galkhausen, the medical staff exempted 24 and discharged 2—figures that fall short of Andernach, which had exempted 37 of the 517 patients and discharged 5. At trial, witnesses—all of them doctors—declared that to abandon the patients and miss the opportunity to save at least some of them would have been an act of desertion.

In assessing the defendants’ culpability in furthering the criminal aims of T-4, the court found no evidence that the defendants promoted the killing program through their actions. They did not select patients for transport to Andernach; this had been done chiefly by the Berlin commission under Professor Paul Nitsche. The subsequent examinations undertaken by the defendants did not facilitate the program, but rather stymied it by exempting some patients who would have been transported to their deaths but for the exams. The critical issue, however, was the defendants’ role in transporting patients
not considered suitable for exemption. These non-exemptions, the court held, did not promote the euthanasia program, because they involved the most “hopeless” cases; their exemption would have aroused the suspicion of the Berlin authorities, who would surely have sent their own commission to Andernach to examine and transfer the patients to Hadamar. Had Recktenwald exempted all the patients transported to Andernach, regardless of their condition, he would have endangered Creutz’s sabotage plan and Berlin would have recognized immediately what Creutz and his fellow saboteurs were doing. Far from promoting Berlin’s design, Recktenwald made extraordinary contributions to foil it, especially by applying his modern therapeutic measures to improve the conditions of some severely ill patients to the point where he could justify their exemption. This was an important point for the court: Recktenwald managed to rescue patients whom his co-conspirators in the sabotage plan “had not dared to retain.” For this reason, Recktenwald and Kreitsch’s role in the province-wide sabotage plan was “essential” and “decisive.”

Recktenwald and Kreitsch were finally acquitted on the basis of a collision of duties. On the one hand, they had the legal duty “to use their medical arts for the healing of their patients to the best of their ability”; this duty could be satisfied only “if they participated in the operation and accepted the necessity of surrendering the unsavable.” On the other hand, they had a legal duty to abstain from participation in the killing of patients. This second duty, in the view of the court’s Schwurgericht, was subordinate to the overriding duty to save patients. To hold the defendants criminally liable for aiding and abetting murder under these circumstances would violate the “natural sense of justice” (natürliches Rechtsempfinden). Insofar as the court restricted its rationale for acquittal to the collision of duties, its decision was defensible. In a strange obiter dictum, however, the court also justified its acquittal of the defendants with reference to preserving the “higher legal good”—that is, the lives of the healthier patients—by sacrificing the lesser good—that is, the lives of the “hopeless” cases. Such a sacrifice, the court stated, “is not illegal”; it is comparable to the case of a doctor aborting the life of a fetus (the lesser legal good) to save the life of the mother (the higher good). By injecting this reflection into its verdict, the court suggested that the value of human lives could be measured against each other, and one group legally proclaimed superior to the other. Such a style of thought, as noted in connection with the Creutz trial, is redolent of the Nazis’ own hierarchy of valuable and less valuable groups of human life. It suggests that, however subtle or unconscious, the judges shared an affinity with the Nazi thought world that affected their deliberations on the defendants’ complicity in murder.

The diametrical interpretations of the factual record in the Andernach case underscores the power of nonlegal factors to shape and even determine
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the outcomes of trials. Recktenwald and Kreitsch emerged from the Koblenz courtroom not only assoiled of all wrongdoing, but as moral heroes. That this interpretation was not the only one deducible from the evidence is demonstrated by the defendants’ conviction in the first trial. With reference to the same factual record, the Koblenz court in the first proceeding arrived at a dramatically different conclusion:

[The defendants] consciously let themselves become engaged in the murderous undertaking of the euthanasia program. They willingly, if reluctantly, accepted the role designed for them . . . and by and large performed it as expected of them. By doing so they made an essential contribution to the euthanasia program and were links in the chain which runs from the “Führer Chancellery” and the Reich Ministry of the Interior down to the gas chamber and the crematorium in Hadamar.19

In the theoretical discourse of Critical Legal Studies, such a dissonance among interpretations of the same evidentiary record is called “flipability.” The term is a playful but incisive critique of the indeterminacy of legal “facts” and doctrines—an idea that challenges at its root the very idea of value-free adjudication.20 The “flipability” of legal decisions points to the role of non-formalistic factors in legal reasoning, such as social, economic, or political considerations that often function as the de facto motors driving judicial process. The force of these extra-juridical factors may operate consciously or unconsciously within the minds of judges, and in different degrees of intensity at various times. Again, it cannot be stressed enough that the German judges in these cases were steeped in a cultural milieu thirsting for a break with the recent National Socialist past, and yearning for a fresh start at a renewed German nationhood.

Leniency and the True Believer: The Eglfing-Haar Case

In the 1947 U.S. Doctors’ Trial, a schoolteacher named Ludwig Lehner testified about his visit to the Eglfing-Haar mental hospital during the war. In the course of his visit, the institution’s director, Dr. Hermann Pfannmüller, escorted him to the children’s ward. Along the way, Pfannmüller’s language was peppered with references to “life unworthy of life.” Arriving in the ward, he pulled a child out of his bed and showed him to the onlookers. “While he exhibited the child like a dead rabbit,” Lehner testified, “he stated with the air of an expert and a cynical grin: ‘With this one it will only be two or three more days.’ The image of the fat grinning man, in his pudgy hand the whimpering skeleton, surrounded by the other starving children, I can never forget.”21

In March 1951 it was Pfannmüller’s turn to stand before the bar of justice, charged with murder for his role in transporting patients to killing centers and
for the deaths of children in the Eglfing-Haar children’s ward. At the time of his trial, Pfannmüller was in his mid-sixties, and thus belonged to the cohort of Nazi doctors subjected to the traumas and privations of World War I. Unlike most of the doctors we have considered, who typically joined the Nazi Party after 1933 for career-related reasons, he was an “old fighter” (alter Kämpfer) who had joined the party in the early 1920s. His reputation as a devoted Nazi and medical expert earned him appointment to the Office for Technology, in which he was tasked with medically examining the “talented” children of soldiers killed in action in order to determine whether they were genetically “worthy” of preferential investment by the office. The Nazi Party recognized his skills by using him as an expert lecturer in public meetings. The aim of his lectures was to “instruct” the German population on the contents of the recently promulgated Hereditary Health Law from the perspective of “racial-political” and “hereditary-medical” concerns.

At trial Pfannmüller told the court he had become involved in the euthanasia question after the death of his father. The elder Pfannmüller suffered from a chronic kidney disorder that caused him terrible pain until he received a lethal injection from his attending physician. This experience was seared into the junior Pfannmüller’s mind, as were his experiences during the Great War as a doctor in the psychiatric hospital in Homburg, where he witnessed the deaths of patients “like flies” from malnutrition “under the most horrifying conditions.” According to Pfannmüller, the highest mortality rate affected the “working patients,” while the incurable non-working patients, the “human corpses,” survived. After the war, still affected by his experiences, he delved into the literature on euthanasia, especially the work of Alfred Hoche and Karl Binding. This work left a lasting impression on Pfannmüller’s thought. He even had occasion to meet Hoche during a congress in Freiburg in 1922. In this fashion, as related in his own words, he became a firm adherent of euthanasia.

The Bavarian government appointed Pfannmüller director of the mental institution of Eglfing-Haar in 1938, a position he held until the end of the war. In November 1939 he submitted a report to the public insurance examining board regarding the maintenance of “life unworthy of life” in state hospitals. He voiced his opinion on the need to “eradicate” such patients with lapidary clarity:

As a confessionally unattached and fervent National Socialist director of a mental hospital, I feel myself obligated to demonstrate an actual conservation measure that is suitable to influence favorably the economic standing of the institutions. In this position, I believe it appropriate to refer clearly to the need for us doctors to grasp the importance of eradicating life unworthy of life. Those unfortunate patients who live only a
shadow life of a normal human being, who have become perfectly useless for social membership in the human community by virtue of their illness, whose existence is to themselves, their relatives, and their surroundings a torment and a burden, must be subjected to rigorous eradication.

Pfannmüller continued:

Precisely these days, in which the heaviest sacrifice of blood and life is demanded of our most valuable men, teach us emphatically that it should not be possible on economic grounds to fill institutions with living corpses for the sake of a high principle of medical care that is no longer relevant. For me it is unimaginable that the best, blooming youth die at the front while incorrigible asocials and irresponsible antisocials have a secure existence in our institutions.

The “high principle of medical care” Pfannmüller referred to is the physician’s devotion to the well-being of the patient, as enjoined by the Hippocratic oath.

Sometime in summer 1940 he attended a meeting in Berlin to discuss the overcrowding in German mental institutions and ways to provide health care to patients amenable to treatment. In attendance were Philipp Bouhler, Reich Health Leader Leonardo Conti, Viktor Brack, Karl Brandt, and Herbert Linden. At this meeting, according to Pfannmüller, Bouhler revealed that all institutionalized patients were to be medically evaluated in order to separate the incurable patients from those responsive to treatment. The incurables would ultimately be accommodated in facilities specially equipped for their care. For this purpose, registration forms would be distributed to all institutions, which were to be filled out and returned to the Reich Cooperative for State Hospitals and Nursing Homes in Berlin. Here, expert commissions would review the forms to determine whether the patient should be transported to the special facility.

At Eglsfing-Haar, Pfannmüller distributed the forms to his staff doctors and explained to them the guidelines for filling them out. He also swore them to the strictest secrecy. After his doctors had completed the forms and returned them to Pfannmüller, he examined the patients himself to guarantee the accuracy of the report. He then sent the forms with his signature to Berlin. In September 1940 Berlin notified him that a certain number of incurable patients were to be transported on orders of the Reich Defense Commissar. He was to prepare the patients whose names appeared on the transport list for a trip lasting several hours. Gekrat in Berlin would contact him with dates for picking up these patients. The court could not determine whether Pfannmüller knew of the true purpose behind the first transport, the patients of which were murdered almost without exception. It was proven, however, that after the first transport had left, Bouhler visited him at Eglsfing-Haar and showed him
Hitler’s decree of September 1, 1939, explaining that the selected patients were to receive a “mercy death.” Despite Bouhler’s disclosure, Pfannmüller continued to prepare his patients for transfer to the killing centers at Grafeneck and Hartheim. Nearly all were killed. The last transport before the cessation of the official killing program in August left Eglfing-Haar in June 1941.23

According to the court, Pfannmüller was aware that at least 918 of the patients who left Eglfing-Haar were being transported to their deaths. Exact figures regarding how many of these transportees were actually killed were unavailable, because Pfannmüller incinerated the institution’s records before the arrival of U.S. troops.

In addition to his complicity in sending patients to the killing centers, Pfannmüller was charged with collaborating in the destruction of handicapped children. In October 1941 he installed a children’s ward at Eglfing-Haar to receive the Reich Committee children, that is, children designated for killing by T-4’s Reich Committee for the Scientific Registration of Severe Hereditary Ailments. The determination was made by three T-4 evaluators, who conveyed their assessment to the child’s home institution. The designated children were either killed on the spot or transferred to a children’s ward designed, like Pfannmüller’s, for the express purpose of killing them. The ward at Eglfing-Haar accommodated on average between fifty and sixty children. When the “treatment authorization” arrived from Berlin, Pfannmüller examined the affected children; if he was satisfied that the child was incurable, and thus a specimen of “life unworthy of life,” he authorized his staff doctor to euthanize the child. From October 1941 until late April 1945 at least 120 children, ranging in ages from a few months to sixteen years, were killed with overdoses of luminal (usually sprinkled in their food) or with injections of morphine and scopolamine. Death typically occurred within three days, although some patients suffered longer death throes, dying of acute pneumonia after three weeks. The advantage of these forms of killing, by Pfannmüller’s own admission, resided in their close resemblance to natural causes of death—a charade important to the success of the operation, because it hoodwinked parents who visited their children on a regular basis.

Around the time that the “special treatment” was administered, the parents or relatives were notified that their child was incurably ill. A short time later, a letter arrived informing them their child had died and the burial already concluded. In no cases were bodies returned to the next of kin. The letters often cited pneumonia or tuberculosis as causes of death. On Pfannmüller’s orders the corpses of the dead children were dissected and their brains sent to a research center in Berlin, where they were processed into cross sections. In at least two cases involving severely deformed children, Pfannmüller himself gave the lethal injections.
Pfannmüller’s defense insisted that euthanasia was justifiable on ethical and moral grounds. Euthanasia might be debated and discussed, as it had been for centuries, but attaching criminal liability to its practitioners was inadmissible. As he had at the U.S. Doctors’ Trial, he struck the pose of a humanitarian committed to the welfare of his patients. Although the Munich state court refused to accept these arguments as a basis for acquittal, it treated Pfannmüller with kid gloves he hardly deserved. First, in the face of evidence that showed Pfannmüller’s calloused attitude toward the mentally disabled, the court characterized him as an accomplice, not a perpetrator, because he “by no means had the animus auctoris [intent to act for one’s own purposes],” and “stood outside the actual circle of those who drove forward these mass killings of mental patients.” Second, Pfannmüller could be convicted only of aiding and abetting manslaughter, not murder, because he was unaware “of those circumstances of the crime which made the killing of the transported patients either malicious or cruel” as required by the German law of murder. Acknowledging that the overarching euthanasia program was a “malicious and cruel procedure,” the court refused to characterize Pfannmüller’s role in it with the same language. The court conceded that he had been aware the patients and their relatives were being deceived about the goals of the transports, but held it was unproven that he had been personally aware of “the methods of selection, the fundamentals according to which the selections were made, and the entire tactics of deception outside his own institution.” Apparently, in the eyes of this court, such knowledge was essential to finding him guilty of aiding and abetting murder for organizing transports of his own patients to their deaths. All that could be proven was that he aided and abetted a form of killing that fell short of legal murder—namely, manslaughter (Totschlag). Third, the court inexplicably denied that the destruction of disabled children in the Eglfing-Haar ward amounted to murder, because none of the conditions for murder specified by section 211 were present: the killings were not base, malicious, or cruel. In fact, the court accepted Pfannmüller’s self-portrayal as an advocate of euthanasia for “humane” motives.

Finally, the Munich state court paid Pfannmüller the courtesy of denying any wrongdoing for his role in starving patients to death through a premeditated system of reduced food rations. Because of dislocations caused by the war, the Bavarian Interior Ministry published an order on November 30, 1942, instructing the directors of Bavarian mental hospitals to provide a “special

* The court’s view of Pfannmüller stands in stark contrast with Viktor Brack’s testimony at the Doctors’ Trial, where Brack identified Pfannmüller as an important cog in the euthanasia machine.
ration” (Sonderkost) for their non-working patients. This special ration was to be stripped of fat and meat, and consisted of little more than boiled vegetables and water. The court timidly referred to the special ration as a means of transferring essential nutriment from non-working to working patients. In fact, at the conference of directors that preceded publication of the November decree, Dr. Valentin Falthauser, director of the Kaufbeuren mental hospital, declared that after cancellation of the formal euthanasia program in August 1941, eliminating patients could now be done by gradually starving them to death. The Sonderkost was Falthauser’s brainchild, and he left no question that it was intended to cause the patient’s death within three months.25 Not surprisingly, Pfannmüller offered a more benign interpretation of the special ration: it was designed only to guarantee the working patients an extra portion to compensate for their higher expenditure of calories, not to cause the deaths of non-working patients through starvation. He claimed that he had personally instructed his chief cook to supplement the Sonderkost with meat and fat, and that he had even sampled it on several occasions. The court accepted Pfannmüller’s account without demur, calling the Sonderkost “meager fare,” but denying that it caused malnourishment, because the addition of fat in the preparation furnished the necessary amount of protein. Because Pfannmüller’s aim with the Sonderkost was not to starve bedridden patients, the court acquitted him of all deaths associated with it.

Notwithstanding his documented collaboration in the murders of patients, the Munich court convicted Pfannmüller of aiding and abetting manslaughter. In considering his punishment, the court reprised Pfannmüller’s self-portrait as a humanitarian—and did so in the cadences of social Darwinism: “On the basis of his experiences within his own family and during his time as a doctor in mental hospitals in the First World War, he became convinced that the killing of incurable patients was a deliverance for them. It was a measure tantamount to a natural selection process” (emphasis added). Moreover, the court considered it a factor in mitigation that Pfannmüller, like all Germans under Nazism, was no doubt influenced through war propaganda to assign a reduced moral value to human life, thus transmuting the act of killing into something trivial. In view of these mitigating factors, as well as his grave illness and advanced age, he was sentenced to a five-year prison term. This sentence was further whittled down to two years after crediting him with time already served.

The Pfannmüller case, although not acquitting its defendant outright, was nonetheless a travesty of justice in the postwar era. The case indicated the German judiciary’s willingness not only to treat egregious offenders as accomplices (a trend emerging already in the late 1940s), but to deny altogether that their actions were murder under German criminal law. The novelty of the Pfannmüller case, as German expert on Nazi criminality Willi Dressen has
asserted, is its denial of the element of “malice” (Heimtücke)* in its assessment of euthanasia killing. As we have seen in our analysis of the German cases, courts rarely found that defendants acted out of “base motives.” In most of the trials we have examined, however, German courts upheld the existence of malice in order to find defendants guilty of aiding and abetting murder. The Pfannmüller case changed the complexion of this assessment. In the ensuing years covered by our study, no euthanasia doctors would be convicted by West German courts of murder. Pfannmüller’s trial was a decisive step down this path toward leniency and acquittal.

THE TURN OF THE SCREW: THE “EXERTION OF CONSCIENCE” CASES

On March 18, 1952, the West German Supreme Court issued a verdict destined to have a profound impact on the adjudication of euthanasia trials thereafter. The High Court held that a defendant could be punished for a criminal act only if he or she was capable of conforming to the law’s requirements. When perpetrators, after maximum exertions of their understanding, could not reconcile the demands of the law with their own conscience, no criminal liability attached if they chose to follow their conscience in violation of the law—so long as they acted “conscientiously.”

The Supreme Court’s holding would offer regional courts fresh opportunities to acquit euthanasia defendants in the years after 1952. A trio of cases decided in December 1953 premised their acquittals on this “exertion of conscience” doctrine. An analysis of the opinions reveals that, as in the extrastatutory necessity/collision of duties cases, the outcomes of these trials were conditioned less by the neutral application of legal theory to the facts than by the court’s preexisting will to acquit.

The Conscientious Childkiller: The Sachsenberg Case

Among the first cases to acquit a euthanasia defendant on the basis of an “exertion of conscience” defense was that of Dr. Alfred Leu, a physician at the Sachsenberg psychiatric hospital near Schwerin (in the province of Mecklenburg) where he had worked from 1929 until April 1945. In his first trial in October 1951, Leu was charged with complicity in the murders of adults and

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* Malice under German law means that a defendant has killed or collaborated in killing in a manner that exploits the vulnerability of the victim. Secretly lacing a victim’s food with poison, for example, qualified as a “malicious” killing in the earlier cases.
children at the Sachsenberg institution. His defense was the classic sabotage argument: he collaborated in the killings only in order to minimize the damage and save as many people as possible. Had he resigned his post, a more zealous doctor would have replaced him, resulting in the deaths of still more patients. The state court of Cologne accepted this argument, holding that it would be a miscarriage of justice to convict a defendant ensnared like Leu in a “tragic predicament.” Leu was acquitted and his case appealed to the German Supreme Court, which reversed and remanded it for retrial.

In its findings of fact on retrial, the Cologne state court found that Leu filled out the first shipments of registration forms without knowledge of their purpose. Not until late 1940 or early 1941 did he learn of the euthanasia program. With the discovery, he realized that open refusal to complete the forms would invite a visit from a commission of SS doctors whose ideological zeal would ensure that two-thirds or more of his patients would be registered for the killing program. He resolved to continue filling out the forms in order to accentuate, where possible, his patients’ capacity for work. In this way, he could bend and distort his reports to save patients who otherwise would fall prey to the assessments of an SS physician. He felt obligated by his “medical conscience” to contribute to the destruction of hopeless terminal cases so as to save patients still amenable to therapy. This was the strategy Leu followed henceforth, the court found. On one occasion in early 1941, Leu added the names of three newly arrived patients to a transport list. They, along with a collection of patients from Leu’s nursing station, were taken to the killing center at Bernburg and gassed.27

In summer 1941 the military confiscated the Lewenberg mental institution for use as a military reserve hospital. Lewenberg was the site of a children’s ward designed to euthanize handicapped youngsters. With the conversion of Lewenberg into a military hospital, the 280 patients of its children’s ward were sent to Sachsenberg, where they were accommodated in Leu’s empty nursing station. (His station had been depopulated by the transports to Bernburg.) Sachsenberg’s director, Dr. Fischer, appointed Leu head of the new children’s ward and reported the appointment to the Reich Ministry of the Interior. In September 1941 the Reich Chancellery summoned Leu to a meeting in Berlin with the directors of the Reich Committee, Drs. Hefelmann and von Hegener. During this meeting the committee’s directors told Leu that the new ward in Sachsenberg under his supervision would undertake the destruction of disabled children. Leu claimed at trial that he declined his participation in the planned measures, a refusal that Hefelmann and von Hegener accepted. This notwithstanding, a few weeks later “treatment authorizations” arrived at Sachsenberg from the Reich Committee, identifying 180 patients in Leu’s children’s ward for euthanasia. The Reich Committee’s chief medical experts
had chosen these patients based on forms submitted to them by the former head of the ward at Lewenberg.

In a subsequent meeting with Hefelmann and von Hegener, Leu was told he could exempt 5 percent of the children from transport without any further justification. They also permitted him to withhold other children from transfer, so long as he could support the exemption in writing to the Reich Committee in accordance with the applicable guidelines (i.e., the educability of the exempted child). Returning to Schwerin, Leu decided to assume responsibility for the killing program in the ward. Leu claimed he knew the killing program was wrong, even if it was sanctioned by a valid law; on the other hand, cooperating with it was the only way to rescue some of the children from death. The court sketched Leu's dilemma as a prototypical collision of duties: “The defendant stood before a choice: either to distance himself from the killing and refuse the order given by Berlin, thereby abandoning two-thirds of his department to destruction; or to carry out the extermination orders, thereby participating in the deaths of some children in order to rescue a considerable number of other patients who would otherwise be killed.” Leu felt compelled by his conscience to “sabotage the goals of the Reich Committee and the euthanasia program it sponsored.” He thus believed it was his duty to collude in the destruction of a “limited” number of patients to save others.28

Having made his decision, Leu spoke with the Sachsenberg director, Dr. Fischer, about detailing experienced nurses to the operation. Leu chose the four nurses himself, whom he initiated into the plan to kill “incurable” children on orders from Berlin. The children would be dispatched with excessive dosages of veronal and luminal. Afterward, he swore each of the nurses to silence about the program. When the first lists of patients arrived from Berlin, they contained the names of 180 children. The court found that Leu exceeded the Reich Committee’s guidelines in exempting 110 children from euthanasia. The remaining 70, described by one witness as being in a “horrible” physical state, were killed in the ward.

In the striking incongruity between the adverse evidence of criminal wrongdoing and the final verdict of acquittal, the Leu case may be unique among German euthanasia trials. Statements by Leu in support of the euthanasia program were abundantly documented. Several witnesses testified that Leu had professed to them his unwavering commitment to euthanasia. Other witnesses stepped forward to incriminate Leu, claiming that they personally witnessed unaccountable deaths in the departments under his supervision. These witnesses attested to their beliefs at the time that Leu had caused the patients’ deaths through overdoses of narcotics. Their belief rested on the observed fact that patients who seemed perfectly healthy were dead only days later. A staff doctor at Sachsenberg, a Dr. Br., described events in Leu’s stations that con-
vinced him the defendant was murdering his patients with overdoses. Dr. Br. had been so upset by these occurrences that he spoke of the Sachsenberg facility as a “murder institution.” He believed Leu continued to kill adult patients after the children’s operation had been set in motion. Another witness claimed Leu had killed between 200 and 300 adults at Sachsenberg with overdoses of veronal—a charge the witness had leveled against Leu sometime in 1941. Leu had denied the charge at the time but characterized euthanasia of incurable patients as a “welcome measure.” During their meeting with the Berlin authorities, Leu denounced this witness and Dr. Br. to the Reich Committee. Hefelmann and von Hegener responded by praising Leu as a “great guy” who “acted entirely in accordance with the wishes of the Reich Committee.”

Leu’s defense against these allegations during his trial was predictable: he had projected the appearance of being an adherent of euthanasia in order to avoid suspicion. Had he gone public with his inward opposition to it, his reports to the Reich Committee would have been analyzed with a fine-tooth comb, thus jeopardizing his sabotage scheme. To the charges that adult patients were killed with overdoses of narcotics, Leu countered that the witnesses had misinterpreted their brief glimpse of patients in a drug-induced deep sleep, mistaking them for patients on the verge of death. Leu denied authorizing the killing of adults with excessive dosages of veronal or luminal. The narcotics he administered were all in the medically prescribed doses to alleviate chronic motor restlessness. Finding the witness testimony credible, the lay assessors nonetheless refused to accept it. According to the assessors, the witnesses were not in a position to observe and report accurately on occurrences in Leu’s station. They knew nothing about the patients’ medical histories or the narcotics prescribed for them; they made no inquiries of the nursing staff nor ascertained the actual cause of death through autopsy. Fatal to the acceptance of their testimony was the witnesses’ inability to cite a single verifiable case in which drug overdoses caused by Leu resulted in a patient’s death. To the witnesses’ adamant claim that healthy patients who entered Leu’s station were seen shortly thereafter in a coma-like state followed by reports of their deaths, the court replied that they may not have seen what they thought they saw. The patients’ conditions might have been caused by liberal doses of narcotics given to suppress their violently restless motor activity, as Leu had claimed. Their subsequent deaths may have ensued as a result of prolonged sleep that weakened the patients through inactivity and malnutrition, making them more susceptible to illness. The court accepted this improbable scenario as “unrefuted” against Leu.29

Acquitting Leu of the charge of killing adults at Sachsenberg, the court next turned to the children’s ward killings. Here, the court appeared to accept Leu’s representation of sabotage in toto. Leu, the court held, had participated
in euthanasia only to save as many patients as possible. He could not, however, have carried off the deception unless he conveyed the impression of being an ardent supporter of euthanasia. This could be accomplished only by characterizing some of the children in the forms as incurable and incapable of work. Although this effectively sealed the fates of these children, any other characterization would have excited Berlin’s attention, and his sabotage plan would have been betrayed. He would then have been dismissed from his position and a more ideologically committed doctor appointed to succeed him. He sacrificed children “who were, from a psychological standpoint, completely below the zero line” in order to rescue other patients. Despite numerous witnesses who testified that Leu was a true believer in loyal service to the killing program, the court accepted Leu’s claim that he had to transmit this impression to everyone around him lest his opposition plan be foiled. A lack of collegial solidarity in Sachsenberg, moreover, may have deterred Leu from sharing his mind with his colleagues. In sum, the court endorsed Leu’s defense that his “actual inner attitude” toward euthanasia was critical and oppositional, not supportive.

With respect to the undisputed killings in the children’s ward, the court refused to consider them base or malicious. Respected scholars like Binding and Hoche had debated for decades the permissibility of “delivering from their vegetative existence” severely ill patients. Leu was aware of this debate, and his ideas about euthanasia reflected the academically serious—and non-reprehensible—thoughts of sober men. He was also familiar with the results of the Melzer survey conducted in the early 1920s, indicating that many parents advocated the “mercy killing” of their severely handicapped children on humanitarian grounds. Leu’s attitude toward the deaths of these incurable patients was thus not “base” as defined under the German law of murder. Neither was it malicious, because Leu did not exploit the victims’ vulnerability in a reprehensible manner. Because Leu’s involvement in the killings did not constitute murder, the only charge he faced was the lesser included offense of manslaughter.

At this point in its verdict, the court could have simply acquitted Leu on the basis of a collision of duties. It had already set forth, albeit implausibly, a fact pattern that led to such an interpretation. Instead, the court introduced a new exculpatory rationale into euthanasia adjudication—the “exertion of conscience” defense. The court began by citing the “landmark” decision of the German Supreme Court from March 1952, in which the High Court held a criminal action punishable only if the defendant was able to conform to the demands of the law. At the same time, the defendant had the duty to “exert his conscience” in a degree commensurate with his life experience and professional training in determining whether a contemplated action was legal. Conversely, if an actor faced with a conflict between the demands of the law and
the demands of his conscience chose to follow his conscience, then he could not be held criminally liable. His immunity to criminal guilt, however, assumed that “he has exerted the intellectual and moral powers of his conscience in order to recognize what is right or wrong, and acts in accordance with this insight.” This exertion of conscience defense became the crux of Leu’s acquittal. The law required Leu to refrain from killing; yet, his conscience commanded him to participate outwardly in it for the purpose of rescuing patients. Leu had “exerted his conscience” to its utmost extent and felt that he had to follow its insistent voice. On this ground, Leu was exonerated of all criminal charges related to the deaths of children in the Sachsenberg ward.31

From both a legal and a moral perspective, the Leu verdict may be the most extraordinary of the postwar euthanasia trials. In contrast with some of the other defendants acquitted after 1947 (such as Creutz and Recktenwald), Leu had not only transferred patients to their deaths in the killing centers but had organized and administered euthanasia with his own hands. Yet, the Leu decision provided West German courts with yet another rationale for acquitting medical killers.

Doing Away With the Monsters: The Uchtspringe Case

At roughly the same time as the Cologne court freed Alfred Leu, the state court of Göttingen applied a similar rationale to the cases of two doctors implicated in euthanasia killings, Gerhard Wenzel and Hildegard Wesse. Wenzel was accused of either personally administering or authorizing nursing staff to poison 130 children during his tenure from June 1941 to August 1943 as director of the children’s ward at the Uchtspringe mental hospital (near Magdeburg). His codefendant was his successor in the directorship of the children’s ward, Dr. Hildegard Wesse (wife of the ill-starred T-4 doctor Hermann Wesse), charged like Wenzel with killing approximately sixty disabled children with overdoses of morphine, but also with giving lethal injections to thirty female patients.

In May 1941, Wenzel was serving as head doctor on a Luftwaffe field air base in France, when he was summoned to the KdF in Berlin. On arrival he was received by Hefelmann, von Hegener, and the director of the Uchtspringe mental hospital, a Dr. B. During their discussion, Wenzel was asked about his attitude toward the euthanasia of “fully idiotic children.” He replied that these “life forms” were an “onerous psychological burden” for their doctors, nursing personnel, and their families. As a doctor at Uchtspringe, Wenzel was often approached by parents requesting that he “deliver” their children from suffering. Based on these experiences, he considered euthanasia an ethically defensible solution to incurable suffering, provided that it was regulated by a legal procedure. Hefelmann replied that a legal basis for euthanasia had been established,
at which point he read the Hitler order and the draft of a euthanasia law to Wenzel. For “war-related reasons” the law was unpublished, although, Hefelmann assured him, it was known within the state service. Hefelmann outlined the work of the Reich Committee, then informed Wenzel he was being declared “indispensable” and reassigned to the children’s ward in Uchtspringe. As the ward’s director, he would receive transports of mentally handicapped children whom he was to observe and later report on to the Reich Committee. The report would summarize the patient’s condition with special attention to their responsiveness to treatment. The incurable children were to be killed, and doubtful cases would be reserved for further observation or discharged. Wenzel accepted the job offered him and returned to his unit in France.

A few weeks later, he reported to Uchtspringe’s children’s ward, which housed between 350 and 400 children in four separate buildings. He remained there (with one interruption in his service) until August 1943, when he tendered his resignation. During his time as director of the ward, the court estimated he had prepared 1,000 to 2,000 reports, characterizing eighty children as incurable. The euphemistically worded “authorizations for treatment” arrived from Berlin for these children. Wenzel understood the word “treatment” in the Berlin authorizations to mean “killing.” He passed on the authorization to the station nurse, who gave the children overdoses of luminal in their soup or milk in accordance with Wenzel’s instructions. These overdoses caused the patients’ death within a few hours. Sometimes Wenzel ordered the ward nurse to inject the children with morphine; on occasion he injected them himself. He concocted false causes of death in the notices sent to the children’s parents, partly because euthanasia was top-secret, partly to spare their feelings.

Wenzel’s defense at trial was that he had believed at the time in the ethical permissibility of euthanasia. Eminent cognoscenti had discussed it for decades, and it had won not a few respected proponents. He had accepted the expertise of the Reich Committee, the leaders of which were represented to him as the leading experts in the field. Procedurally, every safeguard against abuse had been observed. His involvement in killing was purely scientific and humane. For these reasons, he argued, he should be acquitted on the basis of a mistake of law (Verbotsirrtum).

Previous euthanasia defendants had, of course, raised similar arguments. Typically, however, West German courts until the Uchtspringe trial had rejected this defense, claiming that no matter how much support for euthanasia was marshaled by the Nazi authorities, a reasonable person could plainly see that the mass murder of defenseless patients violated the “natural moral law,” which was superior to the positive law of the Third Reich. Because natural law was accessible to all rational beings, all were bound by its prescriptions and prohibitions, no matter what the law of a particular government commanded.
The Göttingen state court did not deny the existence or obligatory quality of the natural law; instead, it adopted a highly subjective analysis of the actor’s ability to discern whether his conduct violated the law or not. An actor’s duty to “exert his conscience” hinged on “the circumstances of the case and the life and professional background of the individual.” This meant that the actor had to “mobilize all his intellectual powers of recognition and all his conceptions of value . . . to develop a judgment about the legality or illegality of a certain action. If, notwithstanding [such exertion], he is unable to perceive the illegality of his action, his error is unavoidable, and he cannot be held criminally liable for it.”

The court found that Wenzel fell into this category of actors whose exertions of conscience were incapable of grasping the wrongfulness of their actions. During his meeting in Berlin with Hefelmann and von Hegener, it was explained to him that a euthanasia law existed and was known throughout the civil service, although it remained unpublished. The court accepted his claim that he had trusted in the representations by the leading men of the KdF. These considerations were the prelude to an extraordinary disquisition by the court on “life unworthy of life,” the destruction of which, the court noted, could not be regarded “a priori” as “immoral.” In the pre-Christian era, authorities as various as Plato and Seneca had expressed support for destroying “monsters” (Monstra). Under the influence of the Catholic Church, which branded euthanasia a hubristic intervention in affairs better left to God, the destruction of unworthy life entered a period of eclipse. Nevertheless, there was evidence of its resurgence in the late medieval era in Thomas More’s Utopia (1516), which “discusses the putting to sleep of incurable patients . . . in a way that reveals the social thought [of the time].” In his Table Talks, Martin Luther had advocated drowning a twelve-year-old child believed to be a changeling, because it was legal to kill a mere “piece of flesh” that had “no inner soul.” The court admitted that German law in the modern period had criminalized such killing, but added that “permitting [it] is not entirely strange to [German law].” The court cited nineteenth-century authorities like the Pandects and the Prussian General State Law, which had given special dispensation for “doing away with the monsters.” Even the Braunschweig Penal Code of 1840 had punished a mother convicted of killing her baby “lacking human form” with only a minor fine and a jail term of six weeks.

The court cited Binding and Hoche to show how earnestly the subject had been taken up in the interwar years. It quoted from The Permission to Destroy Life Unworthy of Life that “it can be forbidden from neither a legal, social, ethical, nor a religious viewpoint to destroy these individuals, who form the horrid counterpart of authentic humanity, and who in almost every case arouse the horror of those they meet.” On the contrary, “it strains the concept
of humanity to want to preserve life unworthy of life unconditionally.” Ac-
cording to the court, these ideas were endorsed by many other authorities,
including German, Swiss, and Danish politicians during the 1920s, as well as
theologians like Dr. Thrändorf, who chided a culture that would “let capable
people go to rack and ruin in favor of incapable members of the society, for
whom new palaces were built and who lived a carefree life at the expense of the
healthy taxpayer.” The opinions of learned jurists, doctors, politicians, and
theologians confirmed the intuitive feelings of the German people. The
Göttingen court referred to the high percentage (73 percent) of parental sup-
port for covert euthanasia expressed in the 1920 Melzer survey. One father
quoted by the court wrote: “Certainly there are many who deplore the barbar-
ity and heartlessness [of euthanasia], but that is of course the outpouring of a
false humanity; the outsider cannot in such cases pass judgment.” For the
court, the overwhelming support for euthanasia “cannot simply be shrugged off.”

These ruminations led the court to conclude that euthanasia “cannot be
called . . . a measure that contradicts the general moral law, or the funda-
mental ideas of justice and humanity.” Wenzel was aware that “leading minds” had
approved the “release” of “life unworthy of life.” In view of this broad, centu-
ries-old support for the idea among distinguished thinkers and the public at
large, how could Wenzel be charged with knowingly violating the natural law
when he put these ideas into practice? Nor could Wenzel have “exerted his
conscience” sufficiently to grasp the illegality of the Reich Committee’s pro-
gram: it had all the outward indicia of “orderliness,” including panels of expert
evaluators who enjoyed reputations for working “carefully and conscientiously.”
Although the procedures may not have conformed perfectly to those prescribed
by Binding and Hoche, Wenzel could not be charged with knowledge of these
minor deviations. Insofar as Wenzel’s experience with the bureaucratic guide-
lines that structured euthanasia was concerned, “the procedure offered . . .
security against abuses and gross errors.” Because Wenzel “could not have ar-
rived at a different result by a more conscientious examination [of the mat-
ter],” he had to be acquitted of the killings in the Uchtspringe children’s ward.34

Wenzel’s replacement as director of the children’s ward, Dr. Hildegard Wesse,
came to Uchtspringe from the University Clinic for Children in Leipzig. Prior
to this appointment, she had been the director of the men’s department in the
Waldniel institution. In August 1943 she arrived at Uchtspringe as Wenzel’s
successor. She did not immediately assume the directorship of the children’s
ward, however; this position was held by her husband, Hermann Wesse, until
he was inducted into the German army in December 1943. At this time, and
with alleged reluctance, she became director of the children’s ward, a position
she held until July 1945. She had first become aware of the euthanasia pro-
gram during her work at the Waldniel institution, when her husband became
director of the Waldniel children’s ward in October 1942. Around this same time, on orders from the Reich Committee, he had introduced the euthanasia of “fully idiotic” children into the ward. At trial she claimed her husband only acquainted her with his work in broad strokes, because he wanted to spare her, as a woman, so grave a “psychological burden.” A lesser gentleman, Dr. Werner Catel (a member of the planning committee for the children’s euthanasia and one of its three expert evaluators), provided her with more detailed information during her stint at the Leipzig Clinic. He told her that three experts had been charged with overseeing the program. He reassured her that only “full idiots” were being targeted, and that killing could go forward only when all three experts had agreed the case was hopeless.

When she was appointed to replace her husband in the children’s ward, Hildegard Wesse claimed she had misgivings—not because she disapproved of euthanasia, which she affirmed in theory, but because she did not know if she was equal to the task of carrying it out herself. She eventually accepted the appointment, however, and thereafter carried out the same type of killing that Wenzel had done before her. From January 1944 to January 1945 she prepared 400 to 500 reports on the ward’s children for review by the Reich Committee. Like Wenzel, she offered her prognosis on the children, characterizing them either as incurable or as capable of improvement. Because the Berlin authorities generally followed her recommendations, she assumed the committee’s experts were carefully examining each case she submitted. When Berlin sent “treatment authorizations” to her for sixty children, she instructed the floor nurse to give the children doses of luminal or trional tablets in their food. The children lost consciousness and died after a couple of days. For hardier children she ordered morphine injections, which were administered by the nurse or Wesse herself. After their deaths, Wesse sent notices to the children’s families listing fabricated causes of death. She had no compunction about this deception, because she felt it was “right” to spare their feelings.35

Wesse, like her predecessor Wenzel, was acquitted of wrongdoing in connection with the killings in the Uchtspringe children’s ward. The rationale for acquittal of the charge was the same in both cases: like Wenzel, Wesse could not have exerted her conscience any further to understand the wrongfulness of her actions. She reasonably assumed the procedure was “well-organized and reliable from an ethical-medical standpoint.” The cautious attitudes exhibited by the experts in the Reich Committee reassured her that the program was being administered conscientiously and with scientific precision. She had, in short, no good reason to doubt the ethical or legal timbre of the killing procedure. According to the court’s interpretation, it was ethically and legally defensible for a lower-level functionary to accept a “conscientious” and “scientifically precise” procedure ordered by the top of the institutional chain.
If Wesse's activities had been restricted to the children's ward, she would have walked out of the Göttingen courtroom a free woman. Her murderous work at Waldniel, however, also involved thirty disabled women, and for these killings the court refused to accept a mistake of law. At the end of 1944, Wesse was informed of Berlin's decision to order the killing of mentally ill adults in the Waldniel men's and women's departments. By contrast with the procedure in the children's ward, no prior observation and expert review would be observed with these killings, because this would unduly delay the process. Wesse was assigned responsibility for euthanizing incurable patients in the women's department. She accepted the assignment, reasoning to herself that the pressures of the war had forced Berlin to deviate from the cautious procedures that governed euthanasia in the children's ward. Another doctor segregated the severest cases among the female patients and removed them to Wesse's children's ward. She reviewed the patient records of these handicapped women and decided to “put to sleep” thirty of them. Wesse carried out the killings of these women herself with morphine injections. At her trial, she raised the defense that she was motivated by pity to destroy these patients, and that she never doubted their killing was in harmony with the wishes of the Berlin authorities.

Apparently, the Göttingen court's magnanimity toward the killers of disabled patients was not unlimited, because it rejected Wesse's argument and held her criminally liable for the deaths of the thirty women. The critical factor in distinguishing these killings from the euthanasia of the children was their unregulated character. The killings were done on a summary basis, without procedural safeguards in place to convey the appearance of ethical and legal legitimacy. Had Wesse roused her conscience sufficiently—as was her legal duty—she would have recognized the glaring illegality of these makeshift orders. “If she had [exerted her conscience],” the court held, “then, with her exceptional intelligence, she would have seen that something was not in order—that entrusting a young assistant doctor [like herself] with deciding alone about the euthanasia of mental patients is simply indefensible.” In other words, she would have understood that any “law” that permitted such a haphazard procedure “must have exceeded the limits of what is legally permissible.” Wesse could have acted differently than she did; she could have expressed to the Reich Committee, with whom she was on good terms, her refusal to participate in the anarchic destruction of patients. Because she failed to “exert her conscience according to the measure of her intellectual powers to recognize what is right and wrong,” she was criminally liable for these deaths.36

Despite this finding, the court refused to characterize her killings of these women as murder under German law, inasmuch as the killings lacked the characteristics of reprehensibility (base motives, maliciousness, and so forth). For
this reason, she was convicted of manslaughter. In the sentencing phase of the trial, the court considered mitigation appropriate because Wesse had been medically trained in an era when “utilitarian considerations” undermined the doctor-patient relationship. She was given a remarkably lenient jail term of six months per patient killed, a sentence the court deemed “appropriate and sufficient.” But even this disproportionate punishment was never carried out, because on December 27, 1954, the Göttingen court decreed the sentence null and void.*

The Uchtspringe case represents with the verdict in Leu the floodtide in the coddling of euthanasia defendants by West German courts. Leu, Wenzel, and Wesse had all killed scores of patients, often with their own hands. If, as Ulrich Herbert argues, the Christmas Amnesty of 1949 had sent a message to the German population that the era of punishing Nazi crimes had ended, then the wave of acquittals in the early 1950s culminating in the exoneration of the child-murderers Leu, Wenzel, and Wesse must have been seen for what it was—a sign of the refusal of West German courts to convict the murderers in their midst.

The Cruel Month: The Warstein Case

T. S. Eliot may have thought April was the “cruelest month,” but from the perspective of postwar justice that title better describes the month of December 1953, when three separate courts in three trials acquitted euthanasia defendants. We have already discussed two of these cases. The third and final case involved two doctors, a Dr. P. and a Dr. S., employed during the war in the largest of the Westphalian mental hospitals, Warstein. Dr. P. became director of Warstein in July 1934; Dr. S. served as assistant doctor there beginning in January 1931, rising to chief doctor in March of that year. In 1937, S. also assumed the directorship of a ward created at Warstein by P. to accommodate mentally ill patients with tuberculosis. During the war, both men split their professional lives between military service and work at Warstein.

Warstein was swept up into the killing operation in summer 1941, along with the other Westphalian mental hospitals. From June 1941 to August 1941, some 2,720 patients from these institutions were transferred to transit centers in Hesse. Of this number, the Dortmund state court found that 1,227 patients

* Nullification of the sentence was carried out pursuant to the “Law for Exemption from Punishment” (Straffreiheitsgesetz) of 1954, which exempted from punishment cases of manslaughter punishable with a prison term of three years or less. The law covered crimes committed between October 1, 1944, and July 31, 1945. See de Mildt, In the Name of the People, 354n151.
were subsequently sent to killing centers and gassed. Only 125 of the 2,720 transferees survived the transfer. The fate of the remaining 1,368 patients, however, was unknown. Ten transports with 902 patients were transferred from Warstein to the transit centers. It was proven that, from 1941 to 1944, 401 of these patients died and 36 survived. What became of the other 465 could not be ascertained at the time of the trial.

The transports from Warstein followed the same pattern that prevailed in other home institutions throughout Germany. Registration forms were sent to Dr. P. for distribution to his staff doctors, who filled them out on their patients and returned them to Berlin. Months later, transport lists from Berlin arrived in P.’s office. The court was satisfied that both defendants were aware of the purpose of the transports when they assembled their patients for transfer. The indictment charged them with aiding and abetting murder and crimes against humanity for their knowing participation in furthering these transports of patients designated for killing.38

The defendants’ odyssey through the German judicial system was one of the most sinuous among the euthanasia cases. The trial in December 1953 was the end of a long, snaking road of indictment, acquittal, appeal, and retrial, involving not fewer than three separate trials (the first in October 1948) and two appellate reviews and reversals. The number of conflicting verdicts and counter-verdicts offers a poignant example of the “flipability” in post-1947 euthanasia judgments. The will to exonerate the defendants was present already in the 1948 trial, when the Schwurgericht of Münster acquitted P. and S. on the ground of an extrastatutory necessity. By December 1953, thanks to the German Supreme Court’s verdict of March 18, 1952,39 a new rationale had emerged to support the defendants’ acquittal: the exertion of conscience doctrine. Although the Dortmund state court found that both men had knowingly promoted the crime of murder, it also found that neither was aware that his actions were illegal. The court’s holding was grounded in an acceptance of the defendants’ argument that they had participated in euthanasia only to save as many of their patients as possible. By remaining in their posts and sabotaging the program where they could, the defendants had rescued as many as 30 percent of their patients by striking their names from the transport lists, discharging them from the hospital, or arranging their transfer to Catholic hospitals not yet imperiled by the killing operation. Both defendants moreover were devout Catholics without ideological ties to the Nazi Party. Clearly, they had fully “exerted” their consciences and decided to “remotely collaborate” with the euthanasia program in order to undermine it. Despite their conscientious reflection, they had no awareness that their minimal promotion of the killing program was illegal—quite to the contrary, they believed that outward compliance with the program in order to save patients was legally required.
The Dortmund court, unlike the earlier state courts that had acquitted P. and S., did not hold that it was legal to sacrifice some patients in order to save others. Rather, it held that the defendants were justified in believing their contributions to the sacrifice of some patients were legally permitted. This was because of the “moral turbulence” of German society under the Third Reich, a time “when normal values had been overturned.” Legal authorities had disagreed on the wrongfulness of sacrificing some in order to save others; thus, a defendant could not be held accountable for conscientiously “arriving at an erroneous decision,” about which even distinguished jurists could not agree. This applied a fortiori to P. and S., who were “insufficiently prepared and armed for the decision of such an extraordinarily difficult question of law and conscience.” The court went on:

The measure of the required exertion of conscience depends on . . . the life and professional background of the individual. The entire educational and professional training of the defendants—in their specializations one-sidedly medical—were not oriented to communicate to a young person sufficiently clear and unambiguous . . . . The defendants were therefore, through no fault of their own, intellectually and spiritually unequipped for an extraordinarily complicated situation. They lacked the casuistic, ethical, and legal education for the correct solution. Insofar they cannot be held criminally responsible for their erroneous decision. 40

P. and S., in brief, had “exerted their conscience” to the maximum degree. Nothing further could have been required of them.

The Sachsenberg, Uchtspringe, and Warstein cases—all decided in December 1953—inaugurated a subtle shift in the acquittal of euthanasia doctors. The prior tendency to acquit them with recourse to a collision of duties or extrastatutory necessity gave way by 1953 to acquittals based on “exertion of conscience” (a form of mistake of law). The new emphasis on a defendant’s capacity for moral reflection held sway in West German courts for the next two decades.

Flipability and the Case of Dr. Sch.

One defendant who did not appear in the Warstein case of December 1953 was a doctor of law and Westphalian civil servant, Dr. Sch. He had been indicted along with P. and S. in 1948 for aiding and abetting murder and crimes against humanity, based on his participation with them in organizing the Nazis’ euthanasia program in Westphalia. At the first trial in October 1948, he claimed he had no knowledge of the killing ordered by the authorities and had therefore only unwittingly promoted the euthanasia program by forwarding Berlin’s registration forms and transport lists to Westphalian mental
institutions. The Schwurgericht in Münster agreed that no evidence existed to prove his knowledge of the goals of the transports. At this same trial, Sch.’s codefendants P. and S. had admitted to knowing of the lethal purpose behind the transports but argued they had collaborated only to avoid greater harm to their patients. Both were acquitted on the basis of an extrastatutory necessity. In March 1949, the Supreme Court for the British Zone reversed the verdict of the Münster Schwurgericht and remanded the case for retrial, noting the contradictions in the findings of fact regarding Dr. Sch. On remand, in August 1949 the Münster court convicted Dr. Sch. of aiding and abetting murder. The German Supreme Court rejected his appeal of this verdict in November 1952. He thereafter filed a petition for amnesty, which effectively stayed execution of the sentence against him.

In November 1954 he applied for a new trial, now arguing that, contrary to his claims in earlier trials, he really had known all along about the euthanasia program but decided quietly to join the sabotage operation of other provincial doctors. No doubt emboldened by the exertion of conscience cases, he added that he had searched his conscience at the time and decided it was not wrongful to sacrifice some patients in order to save others. His applications were rejected in May 1955. He appealed this determination to the appellate court in Hamm, which overturned the lower court’s rejection in May 1956, thereby permitting a new trial. The case went forward on January 28, 1959.41

Ample evidence was available to rebut Dr. Sch.’s defense that he had acted only in the best of faith to minimize the damage of the killing program. Unlike his earlier codefendants, Dr. Sch. had failed to raise this defense until six years after his first trial in 1948. Second, his political affiliations suggested that Nazi functionaries had considered him a reliable party member to whom sensitive party offices could be entrusted. Two witnesses testified during his trial that he had always impressed them as a devout National Socialist. Despite the shadow this evidence cast on Sch.’s defense, the Münster state court acquitted him of aiding and abetting murder. (Crimes against humanity under Control Council Law #10 ceased to be chargeable against defendants tried in West German courts for Nazi crimes after August 31, 1951.) The court clearly felt that he had “exerted his conscience” to the best of his ability, qualifying his actions as the product of a mistake of law. Complicating Sch.’s ability to discern the wrongfulness of his conduct was the novelty of the situation he found himself in—a situation for which his legal studies could not have prepared him. “The situation here was completely new,” the court held. “Never before in history had a state ordered the mass killings of innocent patients. . . . Accordingly, the defendant could find no solution to the problem in his studies of legal literature.” The court found it meaningful in this context that Sch. was “only of mediocre talent as a jurist.”42
With his acquittal in 1959, Dr. Sch. could join the ranks of other Nazi defendants scrubbed clean of moral and legal blemish for their willing participation in the Third Reich’s assault on humanity.

DEVELOPMENTS IN THE PROSECUTION OF NAZI EUTHANASIA POST-1953

German physicians and civil servants were not the only beneficiaries of the judiciary’s lenient attitude toward euthanasia crimes. Since the late 1940s, German courts had declared nursing staff involved in killing patients innocent of criminal wrongdoing. Even before the “exertion of conscience” cases, German courts had acquitted nurses with reference to the mistake of law doctrine, on the grounds that their lack of education rendered them incapable of recognizing the illegality of their actions, or that the Führer order backing it up had no legal effect. The same rationale was employed to acquit the nursing staff of the Meseritz-Obrawalde institution, prosecuted in the Munich state court in 1965. The court iterated the familiar language about the defendants’ intellectual and moral incapacity to understand that killing patients was illegal. By virtue of this defect, they could not “exert their conscience” sufficiently to adjudge the euthanasia program wrongful, especially because their supervisor-doctors ordered it, a law was alleged to support it, and neither the police nor the local prosecutors had intervened to stop it. The “fog of doubt” enveloping their actions prevented any morally autonomous action.

The trend toward acquitting euthanasia defendants based on an exertion of conscience/mistake of law rationale would continue after 1965. In 1967, T-4 gassing technicians Heinrich Bunke, Aquilin Ulrich, and Klaus Endruweit were acquitted because an “unavoidable mistake of law” clouded their “awareness of the illegality of their actions.” Although the German Supreme Court reversed their acquittal in 1970, the case on remand eventuated in yet another miscarriage of justice: Bunke, Ulrich, and Endruweit were declared “unfit for trial” on medical grounds, and a fourth T-4 doctor prosecuted with them, Kurt Borm, was acquitted in 1972 by the Munich state court on a mistake of law theory—a verdict upheld by the Supreme Court on appeal in 1974. As Willi Dressen has observed, the decision in the Borm case contradicted the holdings of earlier courts that no defendant could invoke his or her reliance on a law repugnant to the “natural law.” Dressen’s statement is partially correct: the Munich court’s verdict did clash with the holdings of earlier courts. That turn, however, had occurred much earlier than 1972, as the exertion of conscience cases of the early 1950s prove.

The German euthanasia trials demonstrate that the law can be a fragile refuge for justice. A defining feature of criminal law is its role in reducing
interpersonal violence between members of a social order. Rather than entrust justice to private individuals and personal blood feuds, society vests the determination of guilt or innocence in a court system charged with applying the law with fairness and impartiality. Legal “science,” not extrajuridical forces, is supposed to govern a court’s deliberations. During the Third Reich, the homicide laws had failed to arrest Germany’s descent into genocide and mass murder. In the postwar era, law revealed itself again to be at the mercy of geopolitical, ideological, and psychological forces. Whether using the language of extrastatutory necessity, collision of duties, or exertion of conscience, West German courtrooms after 1947 became a force field in which these vectors were given free play. The upshot, as we have seen, was the acquittal or lenient treatment of hundred- and thousandfold murderers.

Even the U.S. euthanasia trials were not immune to such forces. From the beginning of their plans to try Nazi war criminals, the United States had committed itself to the position that the crimes of euthanasia doctors (like those of Nazi perpetrators generally) were bound up with the Nazis’ plot to wage aggressive war. By killing patients, resources could be freed up to supply the army in its campaign to Germanize the European continent. The United States hewed to this interpretation for political reasons: if the euthanasia program was disconnected from Nazi military aggression, a precedent would be set for intervening in the domestic affairs of sovereign nations. The principle of sovereignty was at the center of U.S. concern. Commitment to a war-centered theory of genocide led the United States to construe Nazi euthanasia as an outgrowth of Hitler’s boundless imperialism—a conception that relegated the ideology of destroying “life unworthy of life” to a secondary role. By the late 1940s, as the horizon of the Cold War lowered over Europe, acquittals in both U.S. and West German courts became more common. Although the law demanded the prosecution and punishment of war criminals, the will to acquit won out. Once more, as it had during the war, the law had proven to be deficient as a firewall against criminality and injustice.

Examination of the U.S. and West German euthanasia trials opens a window on the role of extralegal factors in criminal adjudication. The trials show us how easily the law becomes the servant of power, and that power, rather than exerting its influence from a position external to legal process, is in reality deeply interfused with it. What legal positivists have for decades ascribed to a realm extrinsic to law is, on the contrary, intrinsic to it. In the U.S. and West German euthanasia cases, the ability of power to affect legal adjudication was so pronounced that it inverted burdens of proof. For the United States, the principle of assuming innocence until guilt is proven was overturned during the Hadamar and medical trials. For U.S. officials, to sever the euthanasia program from the conduct of the war had portentous longterm implications
for U.S. sovereignty. Concerns with preserving national power induced U.S. jurists to assume the guilt of euthanasia defendants as co-perpetrators with Hitler of the crime of waging aggressive war. For the Germans, their presumption of guilt with formal indictment was similarly inverted: they tended to assume the innocence of euthanasia defendants (especially after 1947) and sought ways to vindicate this presumption. With respect to the West Germans, too, power considerations played a central role in this transposition. Seeking to recoup a national sovereignty that had seemed irrecoverable in May 1945, by the late 1940s West German authorities felt the need to close the book on their criminal past. Psychological, political, and geopolitical needs made such closure possible. Democratic, philosemitic, capitalist, and anti-Communist, the new Federal Republic turned a fresh, unblemished countenance to the Western allies, prepared to defend the West against the Soviet menace. Behind that carefully rouged face lay the rot of a past that would prove in coming years—and in defiance of all efforts to deal with it—to be unmasterable.