Confronting the "Good Death"

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In November 1954 Dietrich Allers, a German jurist who had served as the manager of T-4’s Central Office, sent a letter to his former colleague and fellow jurist Reinhold Vorberg, the one-time director of Office IIc of the KdF. Sanguine about the changed fortunes of T-4 perpetrators in the years since the end of the war, Allers wrote:

Take a look around and think back to the time around 1947. At that time, all of us envisioned a miserable personal future for ourselves. Today most of us have again become something, and it is my opinion that we should not demand too much. Certainly quite a few people who held totally different positions [before] have landed well on their feet.\(^1\)

Allers may have spoken too soon: in December 1968 he and Vorberg were convicted of complicity in the deaths of 70,273 mentally ill patients during the war. Vorberg was sentenced to a ten-year jail term, Allers to eight years. (They were credited with time already served during preventive detention and freed without spending a day in jail.) Their subsequent conviction notwithstanding, Allers’s rosy assessment of the improved situation of euthanasia killers after
1947 was an accurate one. Our study of the verdicts from the U.S. and West German euthanasia trials confirms his perspective on postwar justice in the Federal Republic. It suggests the following periodization: a brief two-year interval between 1945 and 1947 characterized by convictions of euthanasia defendants as perpetrators of murder or crimes against humanity, and an extended period after 1947 characterized by the lenient treatment of these defendants, including mild sentences, acquittals, and, in the event of conviction, their portrayal as accomplices rather than perpetrators.

In the German trials, the precedent of the Bathtub Case was applied with greater frequency after 1947 to reduce the defendants’ wrongdoing from perpetration to complicity. Relatively new defenses, such as extrastatutory necessity and collision of duties, were adopted to acquit participants in the euthanasia program. By the early 1950s, in the wake of a German Supreme Court decision on the mistake of law doctrine, German courts employed a different theory to exculpate euthanasia defendants—the exertion of conscience defense. None of the facts in the cases we examined compelled West German courts to accept any these defenses. Just as easily, the courts could have rejected the proffered defenses as insufficient to justify participation in a program to kill the mentally disabled. Not value-free legal science but political, social, and cultural forces were at work in these trials, shaping, forming, and often distorting the courts’ verdicts.

The adjudication of euthanasia criminality in the postwar years was a subset of a larger confrontation with the manifold crimes of National Socialism. Like Nazi criminal trials generally, the euthanasia cases were instrumentalized after 1947 to enable the West German state to achieve full sovereignty. In short, they became an important fourth pillar of what Norbert Frei has termed West Germany’s “policy toward the past,” which Frei described as consisting of (1) amnestying Nazi perpetrators, (2) integrating them into the new Federal Republic, and (3) “normatively demarcating” West Germany from anti-democratic movements on the right and the left. To this trinity of factors can be added judicial lenience toward German professionals like the doctors, nurses, and bureaucrats examined in this study. Many of the individuals we have discussed returned after their trials to a medical practice or the civil service where they became unobjectionable professionals of the Federal Republic. Whether through liquidating trials, acquitting the defendants, or mitigating their punishment, the West German judiciary contributed to the Federal Republic’s quest for national power by facilitating the reintegration of compromised elites into postwar German society.

The Cold War was a boon to this quest for German sovereignty. The defense of Western Europe required a democratic West Germany securely moored to the United States as a counterweight to the Soviet bloc. With the
proclamation of the Truman Doctrine in 1947, the United States made clear its intention to oppose with “counterforce” the USSR throughout the world—an intention that signified U.S. commitment to establishing West Germany as a member in good standing of the Atlantic alliance. By 1950 the United States was seeking support in Europe for a European Defense Community, to which a rearmed West Germany would contribute troops. The West Germans were in a position to bargain, and they did not hesitate to use it to their advantage. As we have seen, the nascent Cold War created the opportunity for the Federal Republic’s leaders to offer the West a quid pro quo: recovery of sovereignty, which included quashing legal proceedings against Nazi war criminals, in exchange for West Germany’s participation in the anti-Soviet alliance. In the Bundestag debates about German rearmament preceding the General Treaty of May 1952, the sentiments of a majority of the delegates were forcefully expressed in a resolution, setting forth demands “that those Germans charged with war crimes and either already convicted by Allied courts or still held without a verdict be released, so long as what is at issue is not a crime as the word is ordinarily understood, that is, for which a single individual is responsible. An objective examination of the individual cases must follow without delay.” Such demands were in keeping with the German chancellor’s view that only the “real criminals” of the Nazi regime should be punished, while soldiers and others who merely discharged their duty—those who did not commit “a crime as the word is ordinarily understood,” to quote the Bundestag resolution—would suffer no legal prejudice. In this manner, the geopolitical realities of the Cold War became the occasion for an internal repression of Germany’s recent past, an act of forgetting driven by the desire to rekindle national power.

The quest for renewed sovereignty, anchored in a policy of amnesty, integration, normative demarcation, and liquidation of continued trials of Nazi perpetrators, serviced profound psychological needs in the immediate postwar era. It both palliated the sting of a calamitous military defeat and nurtured a tottering sense of hope for Germany’s survival as a sovereign country. Perhaps for this reason, the course charted by the Federal Republic received broad support within the German population, from lawyers like the Heidelberg Circle, journalists, church leaders, fugitives from the East, and small parties in the Bundestag (e.g., the Free Democratic Party [FDP] and the German Party) to representatives of major political parties like the CDU and Social Democrats, who felt growing popular pressure to bring to an end the era of Nazi war crimes trials. Such an end would not only certify the Federal Republic of Germany to the world as a nation ready to assume its role in the coalition against “totalitarianism”; it would also deflect the gaze of social control from the crimes of German elites in a society still characterized by the paradigm of a shame culture.
National self-esteem was at stake should the trials continue and German elites be punished. The euthanasia trials were deeply entangled in this political, geopolitical, and psychological maelstrom.

If power lay at the root of West Germany’s suppression of further trials, considerations of national sovereignty also affected the prosecution of Nazi euthanasia defendants in U.S. military courts. Even before the end of the war, the United States discussed the possibility of making conspiracy the centerpiece of postwar trials of Nazi war criminals. Faithful to the originators of the conspiracy theory, the U.S. drafters of the London Charter regarded all crimes leveled against the major war criminals—crimes against peace, war crimes, and crimes against humanity—as outgrowths of the Nazis’ conspiracy to wage aggressive war against the countries of Europe. On this theory, Nazi criminality was a byproduct of the plan to bring Europe under the heel of German domination. Euthanasia emerged as a scheme to transfer resources from “useless eaters” to German soldiers in order to fortify them in their conquests. The theory of conspiracy enabled U.S. prosecutors to charge their defendants as perpetrators rather than as accomplices. By contrast, West German courts did not regard euthanasia as driven by the engine of a conspiracy to wage aggressive war. Instead, particularly from 1945 until 1947, they focused on their defendants’ actual contributions to the euthanasia program, guided by the principle of individual culpability. At no time did German triers of fact impute criminal liability vicariously to an accused. This was a considerable advantage for the defendants, one that, when reinforced by the society-wide aspiration to free Germany from the incubus of its Nazi past, tended toward mild punishments and acquittals.

Differences in approach to euthanasia criminality—the United States guided by conspiracy, the Germans by individual culpability—did not stop here. The U.S. view of its jurisdictional rights over Nazi defendants also differed from the German conception. For the United States, the Third Reich’s violation of the traditional Laws of War created the jurisdictional basis for both the IMT and the U.S. NMT. I have repeatedly emphasized that the Anglo-American jurists were not particularly concerned with the ex post facto question. In response to objections about the retroactive effect of prosecuting Nazi war criminals, the Anglo-Americans replied either that no ex post facto problem existed, because the defendants were charged with violating internationally recognized principles of law; or, in the alternative, that the need to punish these terrible crimes outweighed the principles of legality (e.g., the ban on retroactive punishment). By contrast, German courts were more sensitive to the principles of legality, chiefly because they formed the backbone of the continental tradition of law. From the end of the war until the early 1950s, German courts neutralized the ex post facto problem by insisting on their
defendants’ ability to grasp the wrongfulness of Nazi euthanasia based on an intuitive perception of natural law. The principle of abstaining from the murder of innocents might have been suspended by the criminal orders of the Nazi state, but it was still codified in the universal law of nature, to which all rational beings had access. By 1953, this revival of natural law was tacitly overruled as West German courts began to express doubts about the ability of euthanasia defendants to comprehend the wrongfulness of their actions. Henceforth, all that would matter was whether defendants had in good faith roused their consciences in an effort to understand the moral quality of their contemplated acts.

The changes in the administration of justice described above were far from a mechanical application of neutral legal principles. Rather, they were to a significant degree the products of extralegal factors, chief among them the craving for restored sovereignty. The potency of extra-juridical forces was such that it inverted burden of proof standards in both sets of national trials. The geopolitical need to link euthanasia with the plan to wage aggressive war led the United States to presume the euthanasia defendants guilty; the West Germans’ need to recover their sovereignty and forget their traumatic past led them to presume their defendants innocent.

The conclusions yielded in this study contradict Robert Jackson’s optimistic assertion at Nuremberg that the IMT would be “an independent agency responsible only to the law.” Jackson’s hopeful statement sums up the aspirational core of Anglo-American principles of due process and the rule of law. In reality, the law in the trials we have examined was captive to the political needs (real or perceived) of the United States and West Germany in the postwar era. We should hardly be shocked by the degree to which power politics affected Nazi trials beginning in 1945. The United States has long been allergic to international organizations that might, however remotely, erode its sovereignty: subversion of Turkish war crimes trial proposals after World War I, the refusal of the U.S. Senate to join the League of Nations in 1919, refusal to ratify the 1948 U.N. Convention on Genocide until 1986, and recent opposition to the International Criminal Court are all examples of U.S. historical distrust of international bodies. In view of this history, we should not puzzle over U.S. insistence on knitting together all aspects of Nazi criminality (especially euthanasia) under a grand theory of conspiracy to wage aggressive war—even if such a theory obscured the actual misdeeds of Nazi doctors or distorted history on behalf of realpolitik. As for West Germany’s judicial confrontation with its criminal past, it is hardly surprising that a nation accused of participating in the murder of millions would flinch when examining its recent forays into genocide with the probing eye of the criminal law—particularly when the recollection of these events was still painfully fresh. To
expect a disinterested pursuit of justice in such circumstances may be to expect too much.

It is of course tempting to blame the West Germans for failing to impose punishment on the likes of Leu, Recktenwald, and Wenzel commensurate with their abhorrent crimes. In any moral analysis, however, condemnation is justified only if the actor could have acted differently but consciously chose an unethical path. Norbert Frei makes a powerful case that a more searching confrontation with perpetrators of Nazi crimes after the war might have jeopardized West Germany’s reinvention as a democratic, pro-Western state. Continued engagement with war crimes investigations was unpopular among the German populace. Facing popular pressure, and harried by far-right extremists who waved the bloody shirt of war crimes trials in a bid to win votes, the CDU-CSU and SPD had little room for maneuver. The Federal Republic’s “policy toward the past” was an expedient strategy to placate the West German people, secure votes for the mainstream parties, and fend off the threat posed by extremists within the FDP and the German Party. Any other approach may have driven the German electorate to turn to authoritarian “alternatives.”

In a review of Frei’s book, Jeffrey Herf takes issue with his defense of West Germany’s policy toward the past. For Herf, Frei’s evidence does not support the claim “that democratization had to arrive in precisely this way.” Rather, a more intensive judicial investigation of the crimes of National Socialism may have not only strengthened democracy within the Federal Republic, but would have tapped the vibrant memories of eyewitnesses to ensure maximum prosecution and punishment of Nazi offenders. In the end, Herf concludes, “a different path to democracy . . . was conceivable”—a path that, far from skirting war crimes trials, would have plunged the Germans into their very heart. Herf’s critique proceeds from the aspirational core of war crimes trial theory, the notion articulated by Robert Jackson that the pure pursuit of justice should guide society’s treatment of heinous criminality. Given the actual constraints facing political leaders like Konrad Adenauer in postwar West Germany, however, the liquidation of war crimes trials may have seemed the only tenable solution at the time to stabilize German democracy, particularly with radicals in the wings poised to exploit the war criminal issue for their electoral advantage.

The behavior of other actors in Germany’s war crimes drama, on the other hand, is more culpable. Members of the amnesty lobby—churchmen, lawyers within the Heidelberg Circle, ex-soldiers, journalists, and many others—were less concerned with placing the new German democracy on secure footing than in avoiding the evocation of a painful and incriminating national disgrace. Yet, even with respect to these groups, our moral condemnation should be tempered by the awareness that resistance to publicizing atrocities commit-
The “imagined communities” conjured by the nationalist imagination breed an imaginary self-esteem that rises or falls with the fortunes of the state. The glorious deeds of the nation infuse the citizens with pride; the infamous crimes of the nation diminish that self-esteem, provoking demoralization or denial of terrible truths. When the most visible source of national pride, full sovereignty, is involved, and when recovery of sovereign power intersects with the yearning of millions to repress the memory of past crimes in which many had participated, an honest confrontation with the nation’s history is, at best, unlikely. This is true for any country, be it capitalist or communist, a dictatorship or democracy.

“That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason,” Robert Jackson famously averred in his opening statement before the Nuremberg IMT. To a degree, Jackson was assuredly correct. Contrary to Soviet (and even British) proposals to shoot Nazi war criminals in a massive auto-da-fé after the war, the Big Four subjected the major war criminals to a legitimate, litigated trial, complete with defense counsel and the opportunity to call and cross-examine witnesses. What Jackson did not see when he uttered these words was that Power would have its revenge on Reason in the years between 1945 and 1953. Ultimately, our expectations that prosecution of human rights offenders can be, in Jackson’s words, “responsible only to the law” may be excessive, as the history recounted in this study shows.

A considerable amount of history has been covered in these pages. We have traced the rise of negative eugenics in Germany during the scarifying years of the Weimar Republic, culminating in the rise to power of a political party that located negative eugenics at the center of its ideology. We have seen how negative eugenics led to the Nazi euthanasia program in 1939, and we have witnessed the process whereby euthanasia became both precedent and training ground for the extermination of entire ethnic groups, particularly the European Jews. We have studied U.S. and West German judicial responses to euthanasia criminality—responses that were conditioned by both the need to punish appalling forms of criminality and to preserve (United States) or recover (West Germany) national sovereignty.

In closing, I would like to consider briefly some additional conclusions that might be gleaned from the trial records we have considered. Because of
the traumatic character of Nazi genocide and the complexity of judicial encounters with it, the crime and its punishment naturally invite a broad summing up—an effort to find some nugget of wisdom in an event so terrible and a suffering so vast. What remains of this woeful history for us today? How might we appropriate the significance of Nazi crimes and their punishment in our contemporary world? I would like to ponder two important lessons suggested by the trial materials: the first related to the nature of prosecuting state-sponsored crimes, the second to the nature of the crimes themselves.

First, in examining the historical prologue to the IMT and U.S. NMT, we saw that legal niceties like the ban on ex post facto prosecutions evaporated in the face of Nazi crimes. Questions of jurisdiction and retroactivity were subordinated to the need to punish these enormities. Although the Martens Clause had opened the door to criminalizing acts not specifically condemned by the 1907 Hague convention (“until a more complete code . . . has been issued, . . . belligerents remain under the . . . law of nations”), no international instrument had proscribed crimes against humanity until the London Charter in 1945. In the years since the Nuremberg trials, international law has condemned with exquisite particularity the kinds of excesses perpetrated by the Nazis: the U.N. Convention for the Prevention and Punishment of the Crime of Genocide (1948), the four Geneva conventions for the Protection of War Victims (1949), the Helsinki Accords (1975), and the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (1977) all seek to criminalize Nazi-style assaults on civilian populations. Enhanced linguistic specificity, however, does not mean that current international statutes will cover all future acts of global violence, given the human imagination’s endless fecundity in devising new methods of torture and mass death. If we someday face a situation similar to that confronting the Allies in 1945, the will to punish can be expected to outweigh formalistic concerns about retroactivity and due process.

Second, a crucial factor in a criminal regime’s ability to transvalue the morality of a civil population is time laden with intense experience. Most of the perpetrators in this study retained their awareness that killing innocent people was wrongful at some level, be it legal or moral. In some cases (regrettably few in number), doctors approached about collaborating in the euthanasia program refused to participate. When Ludwig Sprauer informed the director of the Illenau institution, a Dr. R., about the program in December 1939, R. flatly rejected Sprauer’s invitation to collaborate with it. Thereafter, Dr. R. vainly tried to organize a resistance among other Baden directors against Sprauer before taking a three-month “vacation.” On his return, he continued to joust with Sprauer over exempting Illenau from the euthanasia program. Sprauer
not only refused to grant this exemption, but demanded that R. prepare a list of sixty patients for transport to the transit center of Reichenau. His efforts to oppose the program thwarted, R. retired a few months later. Other directors of Baden institutions opposed attempts to transport patients from their facilities to the killing center at Grafeneck. The examples of Dr. R. and the Baden directors prove that not all German physicians had abandoned devotion to the welfare of their patients.

Why was this so? The Nazi Party was only in power twelve years—long enough to affect the moral landscape in Germany, but not long enough to effect a complete “transvaluation” of German mores. Yet, the Nazis were remarkably efficient in investing this brief window of opportunity for indoctrination with maximum propaganda effect. The time available to them, in other words, was laden with the experience of the National Socialist thought world. Despite the brevity of the regime’s existence, evidence of an incipient transvaluation does exist, particularly within the indoctrinated party cells of the SS, Gestapo, and Security Services. Hans-Heinrich Jescheck, during the war a Wehrmacht officer serving in eastern Europe, had occasion to observe the combat units of the SS. He was struck by the fact that these SS soldiers neglected the recovery and care of their wounded comrades, an attitude that contradicted the duty to care for the war-wounded within the German army. The stormtroopers had internalized the Nazi Party’s ethic of the total expendibility of the individual—a transvaluation of values the Nazis had effected in less than a decade. In the field of Nazi medicine, German bioethicist Eckhard Herych relates the story of his now deceased godmother, who was educated at the chief medical training center for SS doctors, the Würzburg College of Medicine. Throughout most of her postwar career, she was able to dissemble her attitudes toward the mentally disabled. At the end of her life, however, the onset of senile dementia made it increasingly difficult to hide her feelings. On one occasion, as she was walking with Herych through the crowded streets of a German city, she encountered a handicapped person in a wheelchair, about whom she quipped: “We would know what to do with him back then.” The menace in this remark is unmistakable: she was clearly referring to the Nazi euthanasia program. If the Nazis could transform the moral consciousness of the party’s ideological vanguards within twelve years, what might they have achieved with more time?

The baneful genius of National Socialism was to mobilize tens of thousands of ordinary citizens to engage in acts of almost inconceivable violence. Its success was partly the result of the insinuation of National Socialist values into the moral resources of common people. By exploiting negative attitudes toward minority groups like the mentally disabled, Jews, and others, the Nazis “miked” the internal auditoria of their accomplices, making them receptive to
the criminal messages of party ideology. The voices of conventional morality, however, were never entirely silenced; many of the perpetrators retained a clear understanding that Nazi violence was both illegal and immoral.

These aspects of Nazi criminality—the mundaneness of the killers and their unremarkable vulnerability to the commands and enticements of a genocidal system of authority—suggest that the evil done by the National Socialists was not interred with their bones. The words of the late Fritz Bauer, a judicial activist in the prosecution of Nazi criminals in West Germany until his death in 1969, reach us over the ruin of decades with a disturbing hint of prophecy: “It appears certain to me that nothing belongs to the past, everything is still present and can become future.”