The Normalization of Nazi Crime in Postwar West German Trials

Although this conference has already shown us that both East and West Germany made attempts to deal with the Nazi past through the law, it is surprising to many to discover that in West-Germany an enormous number of Nazi defendants were brought to trial - over 6000, in fact. A great many more - about 100,000 - were investigated but never tried. They sat in court accused not of crimes against humanity, but regular murder, as defined by the German penal code in 1871. In this paper I would like to shed light on these trials, and particularly on the extraordinary difficulty prosecutors had in bringing former Nazis to trial, in getting them convicted, and then finally, in ensuring they served their time. Focusing on the period between 1960 and 1980, I will argue that there was a massive divide between the young and eager prosecutors and the older, more conservative, largely former Nazi judiciary. There is no clear cut picture of complicit jurists; in nearly every state in West-Germany there was evidence of a young, committed, and probing prosecution. But they had to work within a system that was defined by the generation of jurists who came before them and who still wielded extraordinary influence over the West German judicial system; in some states, 100% of Nazi judges had maintained or returned to their former posts. These judges sent a message to the public - through their interpretation of the laws - that the Nazi past was being dealt with properly. They developed the notion of the middleman as neutral, and therefore innocent; this representation of Nazi crime, reinforced time and again by trial verdicts, created a society in which there was no public will to deal with the Nazi past through the law, to punish Nazism fully. This is what Joachim Perels has called a normalization of the NS system from the elites. We have discussed here the legacy of Nuremberg, and I would like to explore the legacy of West German trials of Nazi perpetrators. Through an examination of the legal reforms in the 1960s, and by giving examples from 3 major investigations - The Auschwitz Trial, the RSHA investigation, and the Majdanek trial - I will show that changes to the law made it easier and easier for those who had the most power in the Nazi regime - the desktop murderers - to go free or escape trial, and in the end really only the most sadistic - and exceptional - of Nazi criminals, usually camp guards, were tried and convicted of murder. On the one hand, there were thousands of trials. On the other, the continuities in the jurist’s personnel made the sentences and interpretation of the laws extremely favourable to the defendants.

In the past decade there has been an explosion of historical research about West German confrontation with the past; in their work, most historians point to an undeniable presence of former Nazis in all parts of public life: in the civil service, the government, academia, the press, and most especially, in the judiciary. According to Ingo Müller, despite the best efforts of the Allies to purge the judicial system of its Nazi members, this proved to be virtually impossible as it would have left the justice system without any functionaries. Therefore, during the reconstruction period of 1945-49, the Allies made more and more exceptions to their initial rule that anyone who had even nominally participated in the Hitler regime should lose their jobs. First, all those who had retired or been fired in 1933 were called back; next, anyone who joined the party after 1937 was given a clean slate; then, for every judge with a clean record, a tainted judge could be hired; and finally, all judges who had gone through the flimsy denazification process could be brought back. This meant that by 1949, for example, 93% of court officers in Westphalia had been affiliated with the Nazi party, in Schweinfurt 100%, and in the enormous state of Bavaria, 81% of judges were former Nazis.1 Astonishingly, as Joachim Perels has pointed out, historians have not been willing to make the connection between the jurists and the laws that they generated, arguing that the new laws of the Federal Republic were basically purged of any antidemocratic tendencies from the Nazi period. However, upon examination, it becomes clear that legal theorists actively introduced road blocks to the

conviction of former Nazis. This was an intentional act so that jurists could shield themselves from conviction as lawmakers and law enforcers during the Nazi period. The best proof of the lasting heritage of Nazi law on postwar law is the fact that there were only 2 judgments of lawyers or judges who instituted and carried out the Nazi program, and both were before 1949 (by the West German courts). There was certainly a connection between the jurists creating and interpreting the law, and the law itself, as we shall see.

The perception of Nazi crime was very different in the early postwar period; according to Norbert Frei, during the Adenauer years there was "A widespread desire to see the purging project's circle of 'victims' narrowed to the smallest possible group of 'main offenders' corresponded to an increasingly prevalent theory limiting the blame for Nazi crimes to the narrow band of top Nazi leaders." This perception of Nazi crime - that only the top leaders were guilty - was slowly eroded after the Nuremberg trials, whereby the prosecution of desktop murderers lost its urgency in West German courts and in turn in public consciousness as well. Tired of victor's justice, swayed by the perception that all the major Nazis had already been tried by the Allies, and wanting to move forward instead of continuing to shamefully look back, West Germans were ready and willing to accept the changes enforced by the judiciary which led to a very different kind of Nazi convict and, I would argue, a distorted perception of Nazi crime.

We have already seen that in 1949 the newly formed Justice Ministry rejected the incorporation of the international criminal charges into the West German penal code. What did this mean for Nazi trials? There were serious problems with using the West German penal code to prosecute crimes of mass murder. Prosecutors had to adhere to rigid interpretations of the murder statute and subjective definitions of perpetrators and accomplices that, in the end, condemned only those who had gone above and beyond ordered acts of murder. In effect, those who carried out the state-ordered genocide were convicted only - if they were convicted at all - as accomplices to murder; and after 1968, not even accomplices could be tried.

The reasons for this lie in the law that was used. First, the murder charge stipulated that the prosecution prove the subjective inner motivation of the defendant. Elements of intent in murder included sadism, lust for murder, sexual drive for killing, treachery, malicious intent, cruelty, and finally, base motives (which the post-war German courts defined as race-hatred for the Nazi trials). Second, the distinction between perpetrator and accomplice in the penal code specified that the primary perpetrator must show individual initiative and knowledge of the illegality of the act. This meant that the state had to prove beyond doubt that each defendant had acted individually and with personal initiative in order to be convicted of murder. In the case of bureaucratic or political entities of the Third Reich, where physical acts of murder did not take place, the only unquestioned perpetrators of murder - those with base motives - were the people who dreamt up the Final Solution: Hitler, Himmler, and Heydrich. All other state functionaries, no matter their rank, could (and usually did) claim that they were simply doing their jobs. Third, the statute of limitations prevented the courts from using the manslaughter charge, as any crimes with possible sentences of 15 years or less were statute barred 15 years after the crimes had been committed; in the case of Nazi crimes, this meant that manslaughter could not be charged after 1960. This made the state's task much more difficult as it was limited to proving murder or the far lesser charge of aiding and abetting.

The law is of course not inanimate, and there were important discussions within judicial circles that led to the constant redefining of the murder charge, the manslaughter charge, and the definition of perpetrator and accomplice. Specifically, in the 1950s and 1960s legal theoreticians fell into different camps regarding the definition of perpetration as an objective or subjective act. The objective definition saw the perpetrator as the one who pulled the trigger, and was generally considered too narrow a

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2 Joachim Perels, DAS JURISTISCHE ERBE DES "DRITTEN REICHES": BESCHÄDIGUNGEN DER DEMOKRATISCHEN RECHTSORDNUNG, 23 (Frankfurt am Main: Campus, 1999).

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definition. Ultimately more conservative scholars, and in turn the German High Court of Appeals, adopted an entirely subjective definition, which determined perpetration entirely by the presence of will, regardless of whether the defendant physically committed the act - thus allowing for the possibility that the person who committed the act not be guilty of murder. This was the standard adopted by most judges in Nazi trials, before 1968. In addition to this, German criminal law requires, uniquely, that the prosecution prove that the defendant possesses "Knowledge of the illegality of the act;" this means that, unlike Anglo-American law where it is assumed that citizens know the law, defendants can use the excuse that they did not know they were committing a crime. This leads, in Nazi trials, to a perverse result: the more a defendant claimed that he believed in and identified with the Nazi world view, the less likely he was to be convicted. In turn, the more doubt a defendant showed about the morality and legality of Nazi laws - i.e. the more remorse he showed - the more likely he was to be convicted.  

And so it was already difficult for prosecutors to convict anyone who did not show individual initiative. This becomes most obvious if we take the Auschwitz Trial as our example. This enormous and very public trial - probably the first and sadly the last major Nazi trial that either the newspapers or the public really cared about - had on its defendant's stand 20 Auschwitz perpetrators, from a kapo to two adjutants to the commander, representing a cross section of all the possible criminals at Auschwitz. The trial began in 1963, lasted two years and produced tens of thousands of pages of files, made use of over 400 witnesses, and made history in that it brought to light for the first time what Auschwitz really was, to a willfully uninformed German public. The prosecution was led by Fritz Bauer, attorney general of the state of Hesse, and his determined and dedicated state attorneys were very much devoted to putting the whole of the "Auschwitz complex" on trial. This was not to be, however. Because of the incredibly narrow interpretation of the laws, and because of a very conservative (and former Nazi) judge, only the most sadistic of defendants, who had murdered people drunkenly, wantonly, and without official orders, was convicted of perpetrating murder and sentenced to life in prison. The rest, the vast majority, got mild sentences that usually were reduced to time served at the end of the trial. They remained ordinary citizens who were basically decent and reluctant in their tasks, while the others, the sadists and "excess perpetrators," were monsters and animals and devils that in no way bore resemblance to the majority of society. The murder of millions in the gas chambers, or the creation and execution of laws that allowed for the murder of Jews, the handicapped and political prisoners, became a lesser crime, with a lighter sentence, than the murder of one person without orders from superiors. The German public learned to chastise and denounce the sadistic "excess perpetrators" of Auschwitz, and to forgive the order-followers whose crimes of complicity were never the true focus of the trial, the law, or the extensive press coverage from which people obtained their information about the trial and, I would argue, about Auschwitz.

The prosecution of desktop murderers and Nazi lawmakers became even more difficult with the introduction of an extremely controversial amendment to the criminal code in 1968. Arguably introduced in order to reduce the sentences of defendants convicted of traffic offenses, jurists began already in 1955, to discuss ways to amend the law and introduce more "humane" and "democratic" sentences for less serious offenses. According to the old version of § 50 of the German Criminal Code, anyone who was convicted as an accomplice to a crime was subject to the same penalty as the perpetrator. This meant, ostensibly, that a Nazi defendant who was convicted as an accomplice to murder could be sentenced to life in prison. In 1968 the amendment to § 50 Section 2 Criminal Code was finally introduced:  

Now, in order to sentence a convicted accomplice to life in prison, the prosecution had to show that the defendant possessed "base motives." Otherwise, the defendant had to be given a shorter sentence, which would be 15 years or less. You will recall that base motives, in the case of Nazi trials, meant racial hatred or anti-Semitism. In the case of desktop murderers - civil servants, bureaucrats, and jurists - base motives were virtually impossible to prove, as defendants could

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4 Perels, DAS JURISTISCHE ERBE, 27.
5 This provision is to be found in § 28 Section 1 of the revised German Criminal Code.
always claim that they had no anti-Semitic motivation. So prosecutors were faced with the daunting task of somehow showing that a pen-pusher or a lawmaker had hatred as an inner motivation. If the prosecution could not do this, then the defendant had to be given a milder sentence. The problem here lies with the statute of limitations, mentioned earlier: all crimes carrying sentences of 15 years or less were no longer prosecutable after 1960, because they became statute barred 15 years after the crime was committed. Effectively, this amendment meant that no one could even be tried as an accomplice after 1968 unless their base motives can be proven.\(^6\)

Historians and legal scholars disagree about the motivation behind the introduction of this amendment; Adalbert Rückerl, Joachim Perels, and Michael Wildt all argue that the change was brought in without regard for what it would mean for Nazi trials, and its disastrous effect on the prosecution of Nazis was the result of an oversight; Ingo Müller, a much more ferocious and often one-sided critic of the German legal system, contends that it was introduced precisely to make it impossible to try Nazi desktop killers. Müller may be imputing too much importance to the Nazi past for jurists in the 1960s, who had long repressed their own complicity and were much more preoccupied with immediate crimes against the state (not the least of which were the increasingly violent student protests of the New Left); however, it is also striking that the main jurist heading the commission for criminal law reform during the 1960s was a man named Eduard Dreher. Dreher was the former prosecutor at the “Sondergericht” – special courts set up by the Nazis that regularly sentenced people to death for the smallest of infractions – in Innsbruch during the Nazi period, and is presumed to be responsible for the execution of hundreds of innocent people.\(^7\) He represents perhaps the most powerful of many former Nazi jurists in the postwar period, as he wrote the most widely used commentary on the criminal law during the 1960s. Surely Dreher’s past, and that of so many jurists making reforms to the legal system, played a role their worldview.

Whatever the case, this amendment had devastating effects for a massive investigation that was going on in Berlin at this time. The Berlin Court of Appeal, in conjunction with East Berlin prosecutors, had opened an investigation of the high command of the RSHA, or Main Reich Security Office. Located in Berlin, the RSHA was responsible – on the bureaucratic level – for all aspects of state security, including the police, the Gestapo, the Einsatzgruppen, and the concentration camp administration. About 7,000 people worked for the RSHA (which was headed by Reinhard Heydrich), and so the prosecution had their work cut out for them. Prosecutors had high hopes for the investigation and divided the proposed proceedings into three groups: those who had been involved in the implementation of the Final Solution, those involved in the administration of the Einsatzgruppen and development of the mobile gas vans, and those in charge of POWs, slave labourers, political prisoners, and their eventual murder.\(^8\) Unlike the Auschwitz trial, where prosecutors tried to prove the individual crimes of particularly sadistic people, in Berlin the state attorneys were faced with having to explain the whole world of the RSHA, its structure and hierarchy, as well as the acts of individuals. The RSHA was a political entity, and was therefore even more difficult to investigate than the world of hands-on murder that was Auschwitz. The main perpetrators in the RSHA were not physically involved killers; their motives would be very difficult to prove. And yet, before 1968, prosecutors were not concerned with this problem, and felt extremely optimistic about the prospects for this colossal trial.

When the 1968 amendment was introduced, the RSHA investigation fell apart. Defense lawyers for former Nazis who had already been indicted were the first to recognize this new loophole as advantageous for their clients. For example, in 1969, Otto Bovensiepen, former head of Gestapo in Berlin, found himself on the defendant’s bench. He wrote to Werner Best, former head of Office 1 of the RSHA, later Reich’s representative in Denmark, who after the war was one of the most active jurists in the largely successful movement to amnesty former Nazi civil servants. Best judiciously observed to

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6 Michael Wildt, GENERATION DES UNBEDINGTEN, 831 (Hamburg: HIS Verlag, 2002).
8 Wildt, GENERATION, 825.
Bovensiepen, “if our interpretation is correct, nobody accused of aiding and abetting can be punished anymore, if base motives cannot be established.” This proved to be correct, and Bovensiepen’s trial was suspended.

What is ironic about this loophole for Nazi defendants is that in practice, no defendant who was convicted of aiding and abetting was ever actually subjected to a life sentence – only perpetrators were. Mostly, judges were already lenient with accomplices, as is evidenced in the Auschwitz trial, where only six defendants were sentenced to life imprisonment (all for perpetrating murder), three were acquitted, and the eleven remaining all were convicted to less than 15 years as accomplices. So even though judges could mete out harsher punishment, in the case of Nazi defendants, they rarely did. After 1968, however, they no longer had to face this dilemma, as no prosecutor would be given the green light to indict anyone as an accomplice if his base motives were not provable.

The Berlin prosecution office scrambled to stop their investigation from falling apart; they argued, cleverly, that the base motives of racial hatred or anti-Semitism should, logically, apply to the crime itself, and not to the person who committed the crime. After all, the mass extermination of the Jews was clearly a crime with base motives and therefore all Nazi crimes should be exempt from the amendment that was otherwise being used to deal with individual crimes like traffic offenses. The Federal Court of Appeal, however, denied this motion and insisted that base motives had to be shown in the defendant himself, not just in his crime.10

The devastating result of this ruling was that the plan to try the whole administrative complex responsible for the mass murder of the Jews fell apart on a technicality. The prosecution’s efforts to have the amendment overturned in the case of Nazi trials were wasted. According to Adalbert Rürckerl, one of the harshest critics of the conservative legal community during the 1960s, “[i]t is too late…. The small men, who shot, will continue to be caught through their treachery or cruelty. But the big men, who didn’t commit the murder with their own hands, can only be prosecuted for aiding and abetting murder with base motives. Since today it’s virtually impossible to prove that they possessed these motives, they benefit the most.”11

My preliminary research into later trials in West Germany confirms Rürckerl’s dismal projection. After 1968, only four RSHA members were ever tried, and only for crimes related to base motives and hands on murder. The largest trial of the 1970s, the Majdanek trial in Düsseldorf, was a trial of camp guards who were mainly charged with crimes of excess and gruesome cruelty. The trial lasted from 1975 to 1981 and was plagued by legal limitations: endless debates about eradicating the statute of limitations on murder; aging and dying defendants; survivors whose memories were fading and who were more and more reluctant to appear at yet another trial for fear of being branded “professional witnesses”; a disinterested press; and a public who felt that these senior citizens who had lived productive lives for the last 30 years were harmless in comparison to the “state enemies” on trial in Stuttgart at the same time, namely the Baader-Meinhof gang. After all, the Nazi defendants had been acting in the name of the state, had not shown individual initiative except in the most extreme and rare of cases, and had, for the last 30 years, been represented in legal language as mainly functionaries of a perverted state. Demonstrative of the priorities of the conservative judiciary and the frightened public was the fact that while over 100,000 Nazi were investigated and 6,000 tried in the postwar period, over 125,000 Communists were investigated and 6,500 tried.12 By 1975, when the Stammheim trial of the RAF terrorists was in full swing, the state and the public was no longer very interested in the distant crimes of a few old men and women, despite the fact that their atrocities far outweighed the crimes of the RAF in magnitude. In the end, at the Majdanek trial, the press showed up only at the very beginning and the very end; while the Auschwitz trial had over 20,000 visitors and 900 press articles, the

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5 Werner Best in Ulrich Herbert, BEST. BIOGRAPHISCHE STUDIEN ÜBER RADIKALISMUS, WELTANSCHAUUNG UND VERNUNFT 1903-1989, 510 (Bonn: Dietz Verlag, 1996).
10 Wildt, GENERATION, 834.
11 Adalbert Rürckerl in Der Spiegel, Jan 1 1969, in Wildt, GENERATION, 335.
12 Müller, HITLER’S JUSTICE, 223.
Düsseldorf courtroom was mainly empty except for a new kind of spectator, the right wing extremist. Of the 15 indicted defendants, nine were men and six were women; the focus was entirely on the sadistic actions especially of the female guards, whose excessive cruelty was especially shocking and sensational because of their gender. Otherwise, the trial dragged on interminably; four defendants were acquitted at an early phase because of lack of evidence. Only 1 defendant, known as “Bloody Brigitte,” was sentence to life in prison, and of the rest no one received more than twelve years.

Scholars have recently turned to the question of continuity between Nazi and postwar Germany. A handful of new books have demonstrated that there was a general willful failure among early postwar German journalists, scholars, politicians, and jurists, to earnestly face up to their roles in perpetuating the racist, persecutory policies of the Third Reich. Challenging the protestations of almost all professionals that they remained outside of Nazism as silent resisters, scholars of postwar Germany now agree that the most influential members of society readily complied with the demands of the regime, pursued professional programs that would please the state, and by their denial allowed the foundations of the new West German state to be built – at least partially – on the remnants of the Nazi political and social structure. However, just as these continuities are being recognized, there is still not enough examination of the continuities in the law, the legal personnel, and what this meant not only for Nazi trials but for the public perception of Nazi criminality. We know of course that the most heinous of Nazi laws were repealed: the Nuremberg laws, arbitrary death sentences, persecution on racial and religious grounds, or based on sexuality or mental capacity; all were removed from the penal code during the reconstruction period. However, many changes made in the Nazi period remained. Legal precedents set during the Nazi period, often by the same judges who would later work on Nazi trials, were judged wholly appropriate in the postwar setting. A good example of this continuity in legal interpretation was the so called “bathtub-case” of 1940, which went a long way towards defining perpetrator motivation: in a case where a woman drowned her sister’s baby, it was determined that the mother of the child had willed the act and that therefore the actual killer of the child, the sister, was not guilty of perpetrating but aiding and abetting murder due to her lack of will. Precisely this interpretation was used again and again in postwar Nazi trials, in which hands on killers without individual initiative were convicted as accomplices. Finally, it is astounding to note that the Volksgerichtshof was only recognized as a state operated instrument of terror in 1985, and the summary dismissal of all criminal judgments issued during the Nazi period occurred finally in 1998. Such delays in historical justice are not surprising, considering the constituency of the postwar judiciary. The desire of former Nazi judges to protect themselves from possible prosecution led to a deeply conservative postwar legal system, whereby Nazi perpetrators, although valiantly pursued by state attorneys, mostly escaped punishment, and the public absorbed a largely distorted image of the Nazi criminal. The law was not the setting in which Germans would come to recognize the wholesale complicity of an entire generation: this would occur through left wing agitation, mainstream television broadcasts (like the Holocaust in 1979), and earnest historical inquiry which helped to erode prevailing myths about Nazi crime.

\[13\] Reports of the Reichsgericht in Criminal Matters, 74 RGSt 84.
\[15\] Perels, DAS JURISTISCHE ERBE, 37.
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**Die Normalisierung von NS-Kriegsverbrechen in den Nachkriegs-Prozessen der Bundesrepublik Deutschland**