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# THE NAZI HOLOCAUST

Historical Articles on the Destruction of European Jews

# 9. The End of the Holocaust

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Er gab einer 70-jährigen Frau auf deren Frage, wann sie zurückkäme, zur Antwort: "Als Urne".

Er drohte an, sie ins KZ zu bringen, damit sie dort "verrecke".

"Wo du hinkommst, gibt es kein zurück mehr."

Als die Zeugin ihn um Erlaubnis bat, ihrem Ehemann eine Hose bringen zu dürfen, erwiderte er: "Der Dreckjud braucht keine Hose, der verreckt ja doch in Auschwitz".

Er drohte an, ihn "dahin zu bringen, wo es kein Wiedersehen mehr gibt".

Die Frau, die in der Haft einen Gallenanfall erlitt, schrieb ihrem Ehemann, dass er ihr gegenüber geäussert hat, sie habe "bald ausgegallt".

Er sagte der Zeugin, sie sehe ihren Ehemann nicht wieder, das sei ein Abschied fürs Leben.

"Der Jud wandert aus nach Buchenwald, das gibt im Schornstein blauen Dunst."

The Court concluded that all Jews and *Mischlinge* committed by Baab to Auschwitz (and other concentration camps) were sent there to be killed. It further found that Baab knew this and that he acted with intent. Thus when the victims were sent to Auschwitz and died there, he was guilty of murder. The Court found this to be true in 55 cases. It therefore sentenced Baab to the obligatory life in prison under Article 211 of the penal code.

The Court also concluded that Baab had intended the same result even in instances where the victims survived. The survival was due to fortunate circumstances; it did not alter Baab's intent. In such instances he had attempted murder, but had not succeeded. The same applied in those instances where the victim had survived Auschwitz, but had perished during or after its evacuation. Baab could not have foreseen this development. The attempt to kill the victim in Auschwitz had failed. The Court found attempted murder in 21 cases, and applied Article 211 in combination with Articles 43 and 44 of the penal code.[120] It sentenced Baab to eight years in prison in each of 21 instances. The Court also found that Baab had not intended to kill non-Jewish victims – relatives of Jews – he sent to concentration camps. In these instances – a total of 22 cases – it convicted for deprivation of liberty under Article 239 of the penal code, and sentenced for an average of two years in prison in each of 22 instances. Combining these term sentences under Article 74 of the penal code,[121] the Court imposed on Baab a term of fifteen years, to run concurrently with his life sentence.

During the Second World War the Nazis murdered at least 250,000 German, Austrian, and Czech Jews.[122] The deportations from the Greater German *Reich* to the East made these murders possible, but the trials of those responsible did not result in justice. Unlike those who did the actual killings, the *Schreibtischtäter* of the Gestapo were usually able to evade their just rewards.

[120] Art. 43 StGB defines attempt (*Versuch*). Art. 44 StGB provides a lesser sentence for the attempt than for the completed crime. In the case of murder, the sentence for an attempt is to be no less than three years.

[121] Art. 74 StGB provides for a combination of a series of term sentences. The combination, not to exceed fifteen years, must be higher than the highest of the series but lower than their total. Art. 14 StGB defines sentences: life or term; term not to exceed fifteen years.

[122] Hilberg, *Destruction*, p. 767. This total does not include German Jews who had emigrated and were then deported from their places of refuge after they were conquered by the Germans.



# THE JUDICIARY AND NAZI CRIMES IN POSTWAR GERMANY

*HENRY FRIEDLANDER*

In May 1945, following Germany's unconditional surrender, Allied military rule replaced the government of the defeated Nazi state. All German institutions ceased to function. But to prevent total collapse, the Allies ordered all civil servants to remain at their post until dismissed.[1] As the Allies moved to denazify and reshape the bureaucratic structure, they viewed one area as particularly sensitive: the Law. There Germans had to confront and deal with the crimes of the Nazi regime. But the success and failure of the legal system in confronting the past have until now largely been hidden from public view.[2]

Upon surrender, all German courts ceased to function, creating an unprecedented "complete standstill of justice."[3] Late in 1945, the Allies moved to establish a "new democratic judicial system based on the achievements of democracy, civilization, and justice."[4] The Allied Control Council and the Military Government promulgated laws and issued proclamations regulating the German legal order; the directives were designed to exclude Nazi

members and Nazi ideas from the reconstituted judicial system.[5] First, the Allies repealed the most important discriminatory laws, ordinances, and decrees "upon which the Nazi regime rested."[6] Second, they proclaimed "Fundamental Principles of Judicial Reform," including the requirement that "all persons are equal before the law," regardless of "race, nationality, or religion."[7] Third, they reopened the German ordinary courts: Magistrate Courts (*Amtsgerichte*), District Courts (*Landgerichte*), and Circuit Courts (*Oberlandgerichte*); all special and party tribunals, including the People's Court, were dissolved, and the former Supreme Court, the *Reichsgericht*, remained closed permanently.[8]

Implementation was left to the Allied commanders and, differing somewhat from zone to zone, commenced at the local level. The most notorious Nazis, including judges and prosecutors, were interned under the imposition of "mandatory arrest."[9] They were replaced in key positions—Chief Judge of the Circuit Court and State Attorney General—by men not implicated in the Nazi administration of justice, mostly older jurists who had been active in the Weimar Republic and had retired upon the Nazi assumption of power.[10] But there were not enough unimplicated judges, prosecutors, and court clerks available to staff the ordinary courts; over 90 percent of all judicial officials had belonged to the Nazi party.[11] In the Soviet zone, Nazi jurists were absolutely excluded, and there the occupation authorities appointed lay judges who were legally unqualified but politically reliable.[12] In the western zones, only qualified professional jurists were eligible for judicial office. In the United States zone, and to a lesser degree in the French, this meant virtually no appointments; the courts were understaffed and slow to commence functioning.[13] In the British zone, the absence of unimplicated jurists led to pragmatic compromise. The British introduced a 50:50 rule known as the "piggyback system" (*Huckepack-Regel*): every unimplicated jurist could bring along one Nazi jurist.[14] As the Cold War commenced in 1948, the western Allies ended their restrictions on jurists with a Nazi past, and slowly the implicated judges and prosecutors returned to office, occupying the line-jobs their colleagues had kept open for them.[15] In 1951, after the establishment of the Federal Republic, the 131-Law returned all civil servants not actually convicted of a crime to their old jobs.[16]



Allied attempts to reform German law were equally futile. Obviously, the revocation of key pieces of Nazi legislation—the racial laws or the *Heimtücke* laws—could only be the first step. Allied officers, especially emigré jurists returning in Allied uniforms, viewed the Nazi years as a period of total injustice that had to be extirpated from German legal history. In contrast, German jurists, both Nazi and anti-Nazi, recognized and accepted the continuity of German law. At first the Allies "suggested that the clock be put back, by one resolute stroke, to January 30, 1933."[17] But the "wholesale repeal" of everything enacted between 1933 and 1945 would have produced chaos and was thus considered impractical.[18] Instead, the Allies reinstituted the Penal Code of 1871, the Court Organization Act of 1877, and the Code of Criminal Procedure of 1877, including all later amendments.[19] Only obviously Nazi laws and sections of laws reflecting Nazi ideas were revoked, but this task was left to the German courts.[20]

The German courts have largely fulfilled their obligation to weed Nazi ideas from the law. They have rejected the vestiges of racial law, declaring void all legislation discriminating against the Jews.[21] They have struck down the secret Hitler decrees, refusing, for example, to accept as a defense the legality of his euthanasia order.[22] But in less obvious cases the courts have often failed to recognize the discontinuity of German law. Just one example:

A deserter from the *Wehrmacht* had been sentenced to death by a military court in wartime Germany. He escaped and eventually reached Switzerland. However, he was able to escape only by attacking and wounding a police officer. After his return to Germany in 1946, the State Attorney indicted him, the Lübeck District Court convicted him, and the Circuit Court in Kiel upheld the sentence under §224 (Causing Serious Bodily Injury) and §113 (Resisting Lawful Arrest) of the Penal Code.[23]

The language used by the courts at times also shows a lack of sensitivity to Nazi criminality. Two examples:

1. The Federal Court (*Bundesgerichtshof*) condemned the activities of a German civil servant who aided Jews in contravention of Nazi laws as a "violation of official duties" (*Amtspflichtverletzung*).[24]
2. In sentencing a concentration camp administrator for killings committed in Sachsenhausen, the District Court in Nuremberg-Fürth concluded: "The Court did not find sufficient reason to

revoke the defendant's civil rights, because it could not be proven that, as an SS officer, he lacked honorable character."[25]

The Allies reconstituted the German judicial system only to deal with ordinary crimes, but they retained exclusive jurisdiction in all cases involving the Allied armies, Allied nationals, and Axis war crimes. Using previously prepared lists of war criminals, the Allies arrested and detained large numbers of suspects, removing all potential defendants from the jurisdiction of any German court.[26]

The Allies rapidly moved to deal with Nazi war criminals. First, the International Military Tribunal, sitting in Nuremberg from October 1945 to October 1946, tried twenty-one leading Nazis, sentencing eleven to death, three to life in prison, and four to long prison terms; it also convicted a number of organizations, including the SS, the SD, and the Gestapo.[27] Second, many Nazi criminals were extradited to face trial and conviction in the national courts of the countries formerly occupied by Germany.[28] Third, the four Allied occupation armies established tribunals to try Nazi criminals under Control Council Law No. 10; this law had been issued in December 1945 to provide a "uniform legal basis in Germany for the prosecution of war criminals and other similar offenders."[29]

Most prominent and widely publicized were the trials held under Law No. 10 at Nuremberg in the American zone; there United States military tribunals judged cabinet and subcabinet Nazi leaders in twelve trials between October 1946 and April 1949. In addition, United States military commissions tried large numbers of Nazi criminals at Wiesbaden, Ludwigshafen, and Dachau. The British held trials in Germany and Italy; the French held them in Germany, France, and North Africa. Altogether, the three western Allies convicted more than 5,000 Nazis, sentencing over 800 to death, and executing almost 500.[30] Although no accurate figures are available, the Soviets probably convicted even more Nazi criminals.[31]

Control Council Law No. 4 had specifically excluded the German courts from dealing with Nazi crimes, and until 1950 no German court was permitted to judge crimes committed against Allied nationals; this effectively removed most wartime offenses, including the mass murder of the Jews, from German judicial



jurisdiction.[32] But Control Council Law No. 10, which provided for the creation of tribunals to try Axis war criminals, included a possible exception:

> Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities.[33]

The application of Law No. 10 differed from zone to zone. In the British and French zones (and also in the Soviet zone), military government granted blanket authorization; in the United States zone, however, German courts received permission only rarely.[34]

Control Council Law No. 10 had been designed for use against Germans in Allied courts; therefore, the first two crimes covered by the law—"Crimes against Peace" and "War Crimes"—could not apply in cases tried before German courts.[35] In fact, the use of the term "war crimes" and "war criminals" by Allied courts has confounded all discussions about Nazi criminality. The overwhelming majority of Nazi crimes, and all those tried in German courts since 1945, were legally unrelated to wartime conditions; the war was used by the Nazi leaders only as an excuse—and by their apologists today as a rationalization—to hide the ideological basis of their crimes.[36]

Only one crime defined by Law No. 10 applied directly to proceedings in ordinary German courts:

> CRIMES AGAINST HUMANITY *(Humanitätsverbrechen)*. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[37]

The use of the *Humanitätsverbrechen* offered great advantages. It made no distinction between the perpetrator and his accomplice, rejected the defense of superior orders, and provided for penalties higher than the German penal code (which limited sentences other than death or life to a maximum of fifteen years).[38] Further, it made conviction possible for a variety of deeds not previously pro-

hibited by the German penal code. The most prominent of these was the "crime of the informer" (*Denunziantenverbrechen*). This crime covered those who had denounced the July 20th plotters as well as those who had informed on their neighbors.[39] It was also used to convict German men who during the war had divorced their Jewish wives, thus causing their deportation to the East.[40]

But the use of Control Council Law No. 10 by German courts also involved liabilities. This law had to be applied even if no German law had been violated. (Thus informers had not broken any German laws when they truthfully reported statements made by their neighbors to the duly constituted police authorities.) Such application violated the legal principle *nullum crimen sine lege.* Although the courts accepted this retroactive law as binding, judges objected that it forced them to act contrary to their principles. They wanted to reestablish the legal positivism of the *Rechtsstaat*; they argued that the Nazis had also legislated retroactively and that the Allies had at first prohibited retroactive law.[41] The British Legal Division commented that "German jurists have wasted much time and energy in academic debates concerning the problems of Law No. 10."[42] Finally, in 1951 the Allies yielded to massive German pressure and prohibited the use of Law No. 10 in German courts.[43] Thereafter, conviction of Nazi criminals could be obtained only on the basis of the German penal code. The legislature and the courts of the Federal Republic refused to apply new, and therefore retroactive, law to Nazi crimes of genocide (a method used by the German Democratic Republic and the Republic of Austria).[44] Thus Nazi criminals faced their judges as ordinary criminals who had violated the regular provisions of the penal code; although they and their public might claim political victimization, they appeared in court as killers, rapists, and thieves.

During the immediate postwar years, most trials involving Nazi crimes dealt with relatively simple questions of law and fact. The cases concerned political killings during 1933–34; violence that accompanied *Kristallnacht*; crimes of the informers; and killings of defeatists during the last weeks of the war. They did not require a great deal of investigation; they came to trial because one of the local victims had denounced the perpetrator.[45] The complex factual and legal issues raised by the crimes of mass murder—



deportations, *Einsatzgruppen*, killing centers—were argued in Allied courts; because these cases involved Allied nationals, German courts had no jurisdiction. The only mass killings confronting the German judiciary during the late 1940s were the so-called euthanasia cases. Involving the mass murder of German nationals, these "institutional killings" could be tried in German courts under the applicable German law.[46] Only after 1950 could the courts of the Federal Republic deal with all mass killings.

The largest number of Nazi criminals were tried in the period 1946 to 1950. During the 1950s, the number of trials declined. It was widely believed that the Allies had tried and convicted most Nazi criminals. State attorneys had neither the interest, the time, nor the resources to initiate and pursue lengthy investigations about crimes committed in distant places. The Tilsit *Einsatzgruppen* trial before the District Court in Ulm in 1958 changed attitudes. It revealed the extent and seriousness of crimes committed in the East during World War II. Thus, suddenly aware of the numbers of still unsolved Nazi crimes, the judicial authorities moved to speed the investigation and trial of Nazi criminals. The establishment of the *Zentrale Stelle* (Central Office for the Investigation of Nazi Crimes) in Ludwigsburg made possible an increasing number of indictments in the two decades following the Ulm trial.[47]

The immediate postwar period saw not only the largest number of trials but also the largest number of convictions and the most severe sentences. Since then, the rate of conviction has dropped and the severity of sentences has consistently decreased. In 1966, a special conference of legal experts involved in the prosecution of Nazi crimes met under the auspices of the German Bar Association; in an unanimous resolution, they pointed to the trend of fewer convictions and less severe sentences and they called for changes in the way Nazi criminals were judged.[48]

How can we account for the failure of severity in the trials of Nazi criminals? Some answers appear obvious. In the immediate postwar years, public opinion supported conviction. As time passed, opinion changed. Lack of interest, open hostility, even "irrational resentment" greeted the continued Nazi trials.[49] In addition, changes in the composition of the courts contributed to this trend. Because the Nazis had abolished the jury system, only professional

judges in penal chambers (*Strafkammern*) judged Nazi criminals in the immediate postwar years. In 1950, the pre-1939 system of lay judges voting with professional judges (*Schwurgericht*) was reintroduced in the Federal Republic; henceforth members of the public as jurors could outvote the jurists.[50] But public opinion alone does not explain the lack of severity. The development of German law itself has also influenced patterns of convictions and sentencing.

Continental law, unlike Anglo-Saxon common law, is based on statutory penal codes. In Germany this is the Penal Code of 1871. In it, §211 and §212 defined intentional homicide. Article 211 defined murder as an intentional killing "accomplished with premeditation" and provided a mandatory sentence of death. Article 212 defined manslaughter (*Totschlag*) as an intentional killing without premeditation and provided a sentence of "no less than five years."[51] But the test of premeditation for murder no longer applied after World War II. In 1941 the homicide provisions of the German Penal Code had been changed to conform with those of other European countries. The new language had been copied from the penal code of Switzerland.[52] After the collapse of the Third Reich, the new provisions continued in force with Allied permission. In trials of Nazi criminals, German courts therefore had to apply §211 and §212 in their new versions:

> § 211. The murderer shall be punished by death. A murderer is someone who kills a human being out of bloodthirst, for the satisfaction of sexual desires, for greed or any other base motives, in a cunning or cruel manner or by means causing common danger, or to make possible or conceal another felony.

Article 212, with an unchanged penalty of no less than five years for manslaughter, applied whenever an intentional killing lacked the attributes defining murder.[53]

Article 211, which previously defined murder as involving "premeditation," now defined it as a killing that is "particularly reprehensible." At the same time, the article spelled out the circumstances that classified the killing as reprehensible. Some of these described the nature of the deed (cruelty, cunning, concealment), some described the motives of the perpetrator (bloodthirst, greed, sexual desires, base motives), and some described the setting (concealment, common danger). In cases of Nazi crimes only



three of these attributes usually applied: cruelty (*Grausamkeit*), cunning (*Heimtücke*), and base motives (*niedrige Beweggründe*). In almost all trials of Nazi mass killings these three latter attributes applied. The courts judged killings for racial reasons as base motives; the killings by mass executions or gas chambers as cruel; and the use of subterfuge to lure people to their death as cunning.[54]

Not all Nazi crimes were classified as murder. The courts often convicted only for manslaughter under §212. One example: Early in 1945 two members of the Gestapo captured an American pilot. During the trip to headquarters, they killed the U.S. officer, shooting him with a machine pistol while he walked before them. One of the Gestapo men was convicted and executed by an Allied court. In the 1962 trial of the second Gestapo man, the District Court in Koblenz did not find any of the attributes defined in §211; it did not judge the killing of the U.S. officer as "particularly reprehensible." The killing was not cruel: the officer died immediately and thus did not suffer special tortures. The killing was not cunning: the pilot had no reason to trust his captors. The killing did not reflect base motives: the Gestapo men shared the understandable popular antagonism toward Allied pilots. For these reasons the court convicted under §212 for manslaughter and imposed a sentence of one year imprisonment.[55]

The difference between murder and manslaughter was substantial. A murder conviction carried a mandatory death sentence; a conviction for manslaughter resulted in imprisonment for life or for a specified term. The relationship was not altered when the Federal Republic abolished the death sentence. The courts simply substituted mandatory life imprisonment for the death penalty; thereafter manslaughter carried a maximum of fifteen years, which, apart from life imprisonment, is the most severe sentence permitted by German law.[56]

But not every murderer received a mandatory life sentence. The courts had to determine the nature of participation; they had to distinguish between perpetrator (*Täter*) and accomplice (*Gehilfe*).[57] This distinction proved particularly problematic in cases of mass killings organized and directed by the highest authorities of the state. Defendants claimed that they had only followed orders, that there had been no choice but to obey. The courts rejected this defense; they pointed out that German law, spelled out in the

Civil Service Law and the Military Penal Code, did not excuse the subordinate who knowingly carried out a criminal order.[58]

After the early years of rigid judgments and stiff sentences, the courts retreated from their tough stance on the Nazi crime of mass murder. Courts would no longer convict the killers as perpetrators, a conviction that carried the mandatory sentence of life for murder; instead they convicted them only as accomplices, which made possible a substantial reduction of the sentence.[59] This maneuver was legalized by a new interpretation concerning degrees of participation; it had been advanced only a few years before the end of the war. The crucial decision was issued by the German Supreme Court in February 1940 and is known as the Bathtub Case (*Badewanne Fall*):

> The female defendant had drowned her sister Maria's newly born illegitimate infant in a bathtub. The lower court had convicted for murder. The Supreme Court reversed. Both women had killed the infant together. One would be perpetrator, the other accomplice. The fact that the defendant had personally drowned the baby, and had thus actually committed the killing, is not relevant in determining the degree of participation. That is based on the motivation of the perpetrator: his or her personal interest in the success of the undertaking. Maria, the mother of the baby, had this interest; she would have suffered the stigma if the infant had lived. The defendant, her sister, did not have a personal interest in the outcome; she only acted to support the deed of another. She is therefore only an accomplice.[60]

This so-called subjective interpretation enabled the courts to convict as an accomplice someone who had personally killed. In the immediate postwar years, some courts still rejected this interpretation. They refused to classify Nazi killers as accomplices; they saw the "degree of personal interest" as only one criterion of how to judge participation. These courts convicted the killers as perpetrators.[61] But eventually most courts accepted the subjective interpretation of the Bathtub Case.[62] After 1948, this interpretation was applied more and more often to almost all Nazi criminals; thus commanders of *Einsatzgruppen*, senior officers of the extermination camps, and chiefs of the Gestapo were convicted as the accomplices of the senior perpetrators: Hitler, Goering, Himmler,



and Heydrich. All this had become accepted practice long before the highest federal court, the *Bundesgerichtshof*, reaffirmed this interpretation in its 1962 Staschynski decision.[63]

Even conviction as an accomplice did not automatically prevent the imposition of a stiff sentence. A life sentence was permissible; a reduction from the mandatory sentence of perpetrator was only suggested—not required—for the accomplice. Even if the possible life sentence was not imposed, a fifteen-year prison term could be pronounced. This, however, was not the trend. The courts rarely imposed such heavy sentences. Usually only a few years, often less than five, were imposed as punishment for an accomplice in the murder of thousands. The reasons advanced to explain this leniency were often bizarre. For example, in one case a court ruled as follows:

> In passing sentence, the Court considered as a mitigating circumstance that the defendant suffered protracted psychological stress because, fearful of unjust punishment and extradition to foreign powers, he concealed himself for years in his apartment.[64]

In 1968 a change in the law made conviction far more difficult. By that time, the statute of limitations had expired on all Nazi crimes except murder. Each time the statute of limitations threatened to expire on murder, the legislature extended it after long debates. But the statute does not mention murder or manslaughter. Instead, it defines murder as a crime punishable by life imprisonment and manslaughter as a crime punishable by fifteen years imprisonment. The statute of limitations on the latter expired in 1960. The former, which has not expired, applies to the perpetrator; it also applied to the accomplice, who seldom received a life sentence but who could have received it. In 1968, a change in §50 of the Penal Code made the reduction of sentence mandatory for the accomplice if he did not share the base motives of the perpetrator. Such a reduction to no more than fifteen years meant that the statute of limitations would have expired in 1960 for this kind of accomplice to murder.[65]

Compared to the record of other parts of German society, *Vergangenheitsbewältigung* (confrontation with the past) by the judiciary must nevertheless be rated fairly high. Faced with public indifference, even hostility, the judicial authorities have continued

to investigate, indict, and try Nazi criminals for the past thirty-five years. The offices of the state attorneys—in Ludwigsburg, at the *Kammergericht*, and at almost every District Court—have compiled innumerable indictments based on the careful investigation of all types of Nazi crimes. They have compiled a record of Nazi criminality unmatched by anyone else; historians will be permanently in their debt. Longer than anyone else, the judiciary has faced the Nazi past.

At the same time, judicial interpretations have prevented justice in cases of Nazi crimes. Large numbers of Nazi criminals have not been brought to trial; many others have not been convicted. Most have received sentences far too low for the crimes committed.

On balance, however, the entire German population must share these strictures with the judiciary: they viewed the trials with indifference and hostility, and they provided the lay judges who could—and did—outvote the professionals.

More important is the responsibility of the political leadership. In the world of legal positivism of the civil law, final responsibility does not rest with the judiciary (as it does in the United States), but with the legislature. Only the legislature can correct errors of judicial interpretation by clarifying the meaning of the law. The political cowardice of the Bundestag has prevented legislative changes that would have enabled the judiciary to convict Nazi criminals without fear that they could escape their deserved sentence through the loopholes provided by present legal interpretations.



## *NOTES*

This is a revised version of a paper presented at the Western Association for German Studies (WAGS), El Paso, Texas, 1982.

1. Joachim Reinhold Wenzlau, *Der Wiederaufbau der Justiz in Nordwestdeutschland 1945 bis 1949* (Koenigstein/Ts, 1979), 64-65; Herbert Ruscheweyh in *Festschrift für Wilhelm Kiesselbach* (Hamburg, 1947), 41-42.

2. See Leonard Krieger, "The Inter-Regnum in Germany, March-August 1945," *Political Science Quarterly* 64 (1949): 507; and John Gimbel, "American Military Government and the Education of a New German Leadership," *Pol. Sci. Q.* 83 (1968): 249.

3. *Festschrift für Wilhelm Kiesselbach*, 39; Friedrich Scholz, *Berlin und seine Justiz. Die Geschichte des Kammergerichtsbezirks 1945 bis 1980* (Berlin and New York, 1982), 3. See also Karl Loewenstein, "Reconstruction of the Administration of Justice in American-Occupied Germany," *Harvard Law Review* 61 (1948): 420.

4. Control Council Proclamation No. 3 (20 October 1945), in *The Statutory Criminal Law of Germany with Comments*, ed. Eldon R. James (Washington: Library of Congress, 1947), 211-12 [hereafter cited as Lib. Cong. *Statutory Criminal Law*]. See also Eli E. Nobleman, "The Administration of Justice in the United States Zone of Germany," *Federal Bar Journal* 8 (1946): 91.

5. See *Justiz- und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen.* [hereafter cited as JuNSV] Registerheft, 71 ff. Also Loewenstein in *Harvard Law Rev.* 61: 419, and Nobleman in *Federal Bar J.* 8:70.

6. Control Council Law No. 1 (20 September 1945), in Lib. Cong. *Statutory Criminal Law*, 209-11. Also Law No. 11: ibid., 213-15; Law No. 55: JuNSV Registerheft, 77-78. See also Karl Loewenstein, "Law and Legislative Process in Occupied Germany," *Yale Law Journal* 57 (1948): 730.

7. Control Council Proclamation No. 3 [see above, note 4]. Also Loewenstein in *Harvard Law Rev.* 61:421.

8. Control Council Law No. 4 (30 October 1945), in JuNSV Registerheft, 72-73. For a discussion of the German criminal justice system, courts and jurists, see Hans Julius Wolff, "Criminal Justice in Germany," *Michigan Law Review* 42 (1944): 1067, and 43 (1944): 155; Burke Shartel

and Hans Julius Wolff, "German Lawyers—Training and Functions," *Michigan Law Rev.* 42 (1943): 521.

9. Elmer Plischke, "Denazification Law and Procedure," *American Journal of International Law* 41 (1947): 811.

10. Wenzlau, *Wiederaufbau der Justiz*, 105 ff.; Scholz, *Berlin und seine Justiz*, 22-23.

11. Wenzlau, *Wiederaufbau der Justiz*, 103-4.

12. Martin Broszat, "Siegerjustiz oder strafrechtliche Selbstreinigung," *Vierteljahrshefte für Zeitgeschichte* 29 (1981): 487.

13. Wenzlau, *Wiederaufbau der Justiz*, 103-4; Plischke in *American J. Internat. Law* 41: 814. One revolutionary innovation was the appointment of lawyers (formerly disqualified) as judges and prosecutors (Wenzlau, 113).

14. Wenzlau, *Wiederaufbau der Justiz*, 130 ff.

15. Ibid., 140-42. See also Justus Fürstenau, *Entnazifizierung* (Neuwied and Berlin, 1969); Lutz Niethammer, *Entnazifizierung in Bayern* (Frankfurt/Main, 1972); John H. Herz, "The Fiasco of Denazification in Germany," *Pol. Sci. Q.* 63 (1948): 569.

16. Wenzlau, *Wiederaufbau der Justiz*, 143.

17. Loewenstein in *Yale Law J.* 57: 736.

18. Ibid. Further, some laws of the Nazi period had modernized the legal system: for example, the marriage law of 1938 permitted divorce on the ground of incompatibility (ibid., n. 50 on p. 737). See also Scholz, *Berlin und seine Justiz*, 80.

19. See Wolff in *Michigan Law Rev.* 42: n. 7 on p. 1069.

20. Loewenstein in *Yale Law J.* 57: 737 ff.; Scholz, *Berlin und seine Justiz*, 80.

21. Decision of Amtsgericht (AG) Wiesbaden declaring the confiscation of Jewish property invalid, in *Süddeutsche Juristenzeitung* [hereafter cited as SJZ] 1 (1946): 36.

22. See, for example, Landgericht (LG) Berlin in JuNSV 1: 33 and Kammergericht in *Juristische Rundschau* 2 (1948): 139.

23. Oberlandgericht (OLG) Kiel in SJZ 2 (1947): 323 and comment by Adolf Arndt in SJZ 2 (1947): 330. A similar case in the Soviet zone led to a "not guilty" verdict (SJZ 1 [1947]: 107).



24. Bundesgerichtshof (BGH) in *Neue Juristische Wochenschrift* [hereafter cited as NJW] 15 (1962): n. 3 on p. 431.

25. JuNSV 17: 150.

26. See Military Government Germany, *Technical Manual for Legal and Prison Officers*, Restricted (2nd ed.; n.p., n.d.).

27. *Trial of the Major War Criminals before the International Military Tribunal* [Blue Series] (42 vols.; Nuremberg, 1947-49) [hereafter cited as TMWC]: for the London Agreement (8 August 1945) establishing the Tribunal, see TMWC 1: 8-9; for the sentences, see TMWC 1: 365-67 (the above list does not include Martin Bormann); for the convicted organizations, see TMWC 1: 262-73 (the failure to include Kripo and Orpo among the convicted organizations had serious consequences for the eventual denazification of and the removal of criminals from the police in the Federal Republic). For background on the trial of Nazi leaders and organizations, see Bradley F. Smith, *The Road to Nuremberg* (New York, 1981).

28. Der Bundesminister der Justiz, "Bericht über die Verfolgung nationalsozialistischer Straftaten," Deutscher Bundestag, 4. Wahlperiode, Drucksache IV/3124, p. 12.

29. Control Council Law No. 10 (20 December 1945), in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* [Green Series] (14 vols.; Washington, 1950-52) [hereafter cited as TWC] 1: xvi-xix. German ed. in JuNSV Registerheft, 73-76. For the problems of translation (no Allied laws were ever issued officially in German), see Loewenstein in *Yale Law J.* 57: 743.

30. Bundesjustizministerium, *Die Verfolgung nationalsozialistischer Straftaten im Gebiet der BRD seit 1945* (Bonn, 1964), 37-38.

31. Adalbert Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978* (Heidelberg and Karlsruhe, 1979), 31-32.

32. JuNSV Registerheft, 72-73; JuNSV 1: xi-xiii. See also Adalbert Rückerl ed., *NS-Prozesse* (Karlsruhe, 1971), 18.

33. Control Council Law No. 10, Article III, Section 1d, in TWC 1: xviii.

34. JuNSV 1: xi-xiii; British Military Government Order No. 47, in JuNSV Registerheft, 87-88; French Military Government in Baden Order, in JuNSV Registerheft, 88. Thus numerous Gestapo informers were tried under Law No. 10 in Berlin, the British zone, and the French

zone, but none in the U.S. zone (Loewenstein in *Harvard Law Rev.* 61: 436-7).

35. Control Council Law No. 10, Article II, Sections 1a + 1b, in TWC 1: xvii.

36. Herbert Jäger, *Verbrechen unter totalitärer Herrschaft* (Olten and Freiburg, 1967), 329 ff.; Richard Henkys, *Die nationalsozialistischen Gewaltverbrechen* (Stuttgart, 1964), 25 ff.

37. Control Council Law No. 10, Article II, Section 1c, in TWC 1: xvii.

38. OLG Schwerin in *Neue Justiz* [hereafter cited as NJ] 1 (1947): 165; OLG Dresden in NJ 1 (1947): 107, 108 and NJ 2 (1948): 115; OLG Halle in NJ 3 (1949): 22. See also Meyer in *Monatsschrift für Deutsches Recht* [hereafter cited as MDR] 1 (1947): 110; Werner in NJW 2 (1949): 170; Jagusch in SJZ 4 (1949): 620.

39. JuNSV 1: No. 32; ibid., No. 6. See also Richard Lange, "Zum Denunziantenproblem," SJZ 3 (1948): 302 ff.; Th. Klefisch, "Die NS-Denunzianten in der Rechtsprechung des OGHBZ," MDR 3 (1949): 324 ff.

40. OLG Dresden in NJ 1 (1947): 196; Landgericht (LG) Hamburg in JuNSV 2: No. 57.

41. For a leading attack on Law No. 10, see Hodo Frhr. von Hodenberg in SJZ 2 (1947): 113. For opinions more or less supporting Law No. 10, see August Wimmer in SJZ 2 (1947): 123; Gustav Radbruch in SJZ 2 (1949): 131; Richard Lange in SJZ 3 (1948): 655; R.H. Graveson in MDR 1 (1947): 278; Wilhelm Kiesselbach in MDR 2 (1947): 2.

42. Cited in Wenzlau, *Wiederaufbau der Justiz*, 249-50.

43. Fritz Bauer in *Zwanzig Jahre danach: Eine deutsche Bilanz*, ed. Helmut Hammerschmidt (Munich, Vienna, Basel, 1965), 303.

44. See *Strafgesetzbuch der Deutschen Demokratischen Republik* (Berlin, 1981); Bundesministerium für Justiz, *Volk-Gerichtsbarkeit und Verfolgung von nationalsozialistischen Gewaltverbrechen in Oesterreich 1945 bis 1972: Eine Dokumentation* (Vienna, 1977).

45. For the West, see the cases listed in Bundesjustizministerium, *Verfolgung nationalsozialistischer Straftaten*, 78 ff. For the East, see Ministerium der Justiz der DDR, *Die Haltung der beiden deutschen Staaten zu den Nazi-und Kriegsverbrechen* (Berlin, 1965), cases listed on 32 ff.



46. See, for example, *Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen* [hereafter cited as OGHSt.]1: 321.

47. Henkys, *Gewaltverbrechen*, 191 ff.; Rückerl, *NS-Prozesse*, 13 ff.; Rückerl, *Strafverfolgung*, 33 ff.; Ulrich-Dieter Oppitz, *Strafverfahren und Strafvollstreckung bei NS-Gewaltverbrechen* (Ulm, 1979), 44 ff.; Bundesminister der Justiz, Deutscher Bundestag, 4. Wahlperiode, Drucksache IV/3124, pp. 16 ff.

48. "Probleme der Verfolgung und Ahndung von nationalsozialistischen Gewaltverbrechen," *Verhandlungen des 46. Deutschen Juristentages, Essen 1966* (Munich and Berlin, 1967), C 8-C 11. See also Oppitz, *Strafverfahren und Strafvollstreckung*, 39 ff.

49. *Verhandlungen des 46. Deutschen Juristentages*, 59 ff.

50. Articles 79-92 Gerichtsverfassungsgesetz.

51. Articles 211 and 212 Strafgesetzbuch (StGB): *Strafgesetzbuch (Leipziger Kommentar) begründet von Ebermayer, Lobe, Rosenberg* (1925 ed.), 635, 637 [hereafter cited as *Leipz. Kommentar*].

52. See Lib. Cong. *Statutory Criminal Law*, 124-27.

53. *Leipz. Kommentar* (1958 ed.), 202, 209.

54. For a definition of base motives, see *Entscheidungen des Bundesgerichtshofs in Strafsachen* [hereafter cited as BGHSt.] 3 (1952): 133; for cruelty, see *Entscheidungen des Reichsgerichts in Strafsachen* [hereafter cited as RGSt.] 77 (1943): 45 and BGHSt. 3 (1952): 180, 264; for cunning, see RGSt. 77 (1943): 44, and BGHSt. 2 (1951): 60. Bloodthirst applied in cases of the so-called *Exzesstäter*; greed applied in cases where officials stole without government authorization; concealment only involved Commando No. 1005, the designation for the enterprise of exhuming and burning of the corpses from mass graves.

55. JuNSV 18: No. 538.

56. Article 14 StGB. See also *Höchstrichterliche Entscheidungen in Strafsachen* [hereafter cited as HESt.] 2: 276 and JuNSV 6: 539.

57. Article 47, 49 StGB. See also *Leipz. Kommentar* (1954 ed.), 240 ff.; Lib. Cong. *Statutory Criminal Law*, 36-37.

58. See LG Freiburg in JuNSV 6: 516: "Civil Servants (*Beamte*) are obligated to obey, but not blindly." The applicable provisions are §47 of the Military Penal Code and § 7 of the Civil Service Law of 1937. See

also Hellmuth von Weber, "Die strafrechtliche Verantwortlichkeit für Handeln auf Befehl," MDR 2 (1948): 34.

59. Article 49, 44 StGB. See JuNSV 2: No. 42; JuNSV 3: 75; JuNSV 5: No. 155.

60. RGSt. 74: 84, my summary of the case.

61. OLG Frankfurt in JuNSV 1 (1948): 268, 269.

62. Thus LG Munich I in JuNSV 3 (1948): 19, 24 and OLG Munich in JuNSV 3 (1948): 29, 30.

63. BGHSt. 18 (1962): 87. Staschynskij had assassinated two persons. This act was judged as murder. He had done this as a Soviet agent on the orders of his Moscow superiors. The perpetrators, who had an interest in the success of the undertaking, were the chief of the KGB and his associates. Staschynskij, the actual assassin, had no personal interest in the outcome. He was thus only an accomplice (my summary).

64. JuNSV 12: 599.

65. BGH in NJW 22 (1969): 1181.



# Nazi Criminals in the United States: *The Fedorenko Case*

Henry Friedlander and Earlean M. McCarrick

Since World War II, the United States has been morally committed to trying Nazi war criminals. In 1943, President Roosevelt joined Churchill and Stalin to issue the Moscow Declaration; in it the Allied leaders pledged to bring to justice the "Hitlerite Huns" for their "atrocities, massacres and cold-blooded mass executions." Retaining the right to try the major Axis leaders, they promised to extradite all other war criminals.[1] In 1945, the United States, represented by Associate Justice Robert H. Jackson as Chief of Counsel,[2] joined France, Great Britain, and the Soviet Union in the London Agreement: "acting in the interests of all the United Nations," the Signatories established the International Military Tribunal (IMT) "for the trial of war criminals whose offenses have no particular geographic location."[3] The list of offenses included crimes against peace, war crimes, and crimes against humanity.[4] In addition to the trial of these major war criminals before the IMT, the Allies reaffirmed their intentions to try or extradite all other Nazi criminals.[5]

In 1945, the Allied Control Council for Germany issued Law No. 10 to regulate the trials of Nazi war criminals.[6] This law defined the various offenses, including the crime against humanity,[7] and provided