

“I didn’t know what Auschwitz was”: The Frankfurt Auschwitz Trial and the German Press, 1963-1965

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On December 20, 1963, the Frankfurt Auschwitz trial opened before the State Court (*Schwurgericht*) at Frankfurt am Main. Günther Leicher, covering the trial for the *Allgemeine Zeitung/Neuer Mainzer Anzeiger*, described the scene thus: “A huge mass of journalists, photographers and camera people from all over the world and half-empty seats in the visitors’ gallery: these are the contradictory emblems of the public interest in the Auschwitz trial, which opened last Friday, four days before Christmas, in the Frankfurt City Council chambers.”¹ In this Article, I examine the seeming paradox that the Auschwitz trial could attract such considerable attention from the mass media while remaining a matter of indifference, if not open hostility, for much of the German public. In other words, I ask what the relationship is between the Auschwitz trial as a trial, as a media event, and as a “moment” in the West German public sphere.

Trials for mass atrocity are often viewed as at least potentially engendering a historical narrative of truth, one aimed at securing reconciliation and social solidarity in the aftermath of genocide.² But of course, such an understanding of trials as pedagogical events

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1. Günther Leicher, *Auschwitz Prozeß vor halbleeren Zuschauerbänken*, ALLGEMEINE ZEITUNG/NEUER MAINZER ANZEIGER, Dec. 21, 1963.

2. See, e.g., MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997).

presupposes that their students are actually learning the lessons taught. At the very least, the experience of the Auschwitz trial problematizes any easy supposition that trials can serve an unmediated public pedagogical function. Even if trials like the Auschwitz trial construct internally coherent and historically adequate narratives of the mass violence they judge (itself by no means an unproblematic assumption, as I will show), this says nothing *per se* about the public reception of such narratives. Story-telling presupposes not only a story but also an audience—and a medium for telling the story as well.³

More specifically, I make three related arguments in this Article. First, I demonstrate that Leicher's journalistic impression was indeed accurate, that there was a considerable degree of ambivalence in the public reaction to the Auschwitz trial. In this context, I also interrogate contemporaneous and current interpretations of this ambivalence toward the Auschwitz trial and toward the Nazi past more generally. I argue that the psychoanalytic framework of these interpretations is not wholly adequate to the phenomena that they seek to explain. Second, I argue that therefore only an internal account of the ambivalence toward the Auschwitz trial, one that takes into account the specific character of German criminal law, can explain the precise contours and character of the public reaction to this event. Finally, I conclude by examining the role of the press as a mediating organ, one that translated the legal understanding of the Nazi past into politically oriented rhetorical strategies, which are then disseminated throughout the German public sphere, helping to generate precisely that public ambivalence toward the trial that initially seems so puzzling. In other words, I argue that the trial helps to generate its own public reception via the press and does so in ways that produce as much resistance as acceptance. Obviously this conclusion, if accurate, might have considerable implications for what trials for "war crimes" and other mass atrocities can hope to accomplish in the process of democratic transitions.⁴

I. THE FRANKFURT AUSCHWITZ TRIAL AND THE GERMAN PUBLIC

From the very beginning it was commonplace to note that the Frankfurt Auschwitz trial was the largest and most extensive trial in postwar German history. This is certainly true in terms of the extent

3. On trials as story-telling, see JAMES BOYD WHITE, *Telling Stories in the Law and in Ordinary Life: The Oresteia and "Noon Wine,"* in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168 (1985).

4. For a general documentary survey of justice in democratic transitions, see TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995).

of the preliminary investigation, the number of accused on trial, the duration of the proceedings, and so forth. In late December 1963, twenty-two defendants, including two former camp adjutants, several members of the camp Gestapo, representatives of the camp medical staff, and one inmate "Kapo," went on trial before the state court at Frankfurt am Main for crimes committed at Auschwitz, specifically for first degree murder (*Mord*). By the time a verdict was reached in August 1965 (yielding seven life sentences, ten prison terms ranging from three years and three months to fourteen years, three acquittals, and two cases dropped for medical reasons), more than 350 witnesses had testified, the court records ran to some 124 volumes, and the closing arguments alone took more than three months to complete.⁵ On their own terms, these figures make the Auschwitz trial an impressive legal and historical event. But even more important, in terms of the history of the Federal Republic itself, is the fact that the trial also received an enormous amount of public attention. In just four major newspapers (*Die Welt*, *Frankfurter Allgemeine Zeitung*, *Frankfurter Rundschau*, and *Süddeutsche Zeitung*) there were 933 articles about the trial between November 1963 and September 1965.⁶ My own database of newspaper articles relating to the trial contains nearly 1400 articles from seventy newspapers, meaning that almost every newspaper in the Federal Republic of Germany carried at least sporadic coverage of the trial's 183 sessions.

However, to note simply that the trial was a monumental event that attracted a great deal of press coverage tells us nothing about the character or significance of this coverage. One cannot assume that because the trial was a major media event, it necessarily had a correspondingly significant public impact, quantitatively or substantively. This is particularly important given that in recent years it has become common to argue that the Auschwitz trial marked a turning point in the postwar German relationship to the Nazi past, that without it, the lessons of Nuremberg would never have "stuck."⁷

5. The best general overview of the trial remains HERMANN LANGBEIN, *DER AUSCHWITZ-PROZESS: EINE DOKUMENTATION* (2d ed. 1995).

6. See JÜRGEN WILKE ET AL., *HOLOCAUST UND NS-PROZESSE: DIE PRESSEBERICHTERSTATTUNG IN ISRAEL UND DEUTSCHLAND ZWISCHEN ANEIGNUNG UND ABWEHR* 53 (1995); see also Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *YALE L.J.* 449 (1995). In this Article I am restricting my analysis to the press, particularly to newspapers, for both pragmatic and methodological reasons. Pragmatically, newspapers are the most readily accessible of the mass media. Methodologically, newspapers are more amenable to conventional interpretative methods than television or radio. Given that the press remained the dominant news medium in Germany in the mid-1960s, such a restriction does not fundamentally distort the analysis that emerges.

7. See IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND*

And yet, from the very start, there were skeptics who questioned the trial's efficacy as a venue for such moral and historical pedagogy.

In the very first issue of Hans Magnus Enzensbeger's seminal 1960s journal, *Kursbuch*, the novelist and playwright Martin Walser sharply criticized the public reaction to the Auschwitz trial. He argued that the true significance of the trial lay not in the judicial proceedings themselves, but in the "the education (*Aufklärung*) of a population which could obviously not be brought to recognize what had happened in any other way."⁸ The problem, according to Walser, was that the nature of this *Aufklärung* was inadequate. The detailed, often almost voyeuristic recounting of atrocity stories in the press allowed the public to distance themselves from what had happened, and perhaps more significantly, from the perpetrators of these atrocities. The crimes themselves came to appear as "hideousness as such, as pure brutality."⁹ A psychological dynamic developed in which Germans were simultaneously repelled and fascinated by the brutality on display. Walser feared that, detached from any historical context, this fascination would prove short-lived at best:

And because neither Höß, nor Heydrich, nor Himmler, nor some racial ideologue or IG-Farben general director sits on the dock, it would still be conceivable for the Auschwitz trial to become a monstrous jumble of murder trials for us; that would involve us merely as consumers of shrill headlines. And these are forgotten as soon as they are replaced by new headlines.¹⁰

So, if this trial and others like it went no further than awakening a fleeting fascination with brutality, if no political consequences were drawn from it, contemporary Germans would be able to maintain a comfortable distance from what happened, as if they had not been responsible for it. "Our" culpability as "co-liable" (*Mitgewisser*), as part of the historical context that generated such brutality, would be all the more effectively hidden by our fascination with that brutality.

Walser's concern with the public reaction to the Auschwitz trial was by no means unique. At the very beginning of the trial, the author Erich Kuby expressed a related concern that the trial would encounter an "inner resistance" among the general population. "Nothing can be changed about that. Social reality is the way it is and it would be utopian to expect that the public would not seek to repress this trial just like it represses everything uncomfortable to

JAPAN 149 (1994). In a similar vein, see OSIEL, *supra* note 2, at 192-95, and Gordon Craig, *The Inability to Mourn*, N.Y. REV. BOOKS, July 14, 1994, at 43-44.

8. Martin Walser, *Unser Auschwitz*, 1 KURSBUCH 189, 189 (1965).

9. *Id.* at 192.

10. *Id.* at 195.

it.”¹¹ Like Walser, he felt that the central significance of the trial was political, that it must use any fleeting interest it might garner to teach the German people a lesson about their own responsibility for Auschwitz. “You didn’t just say yes to this. In your overwhelming majority, you participated.”¹²

Both Walser and Kuby highlighted the unease among contemporary German observers regarding the extra-judicial significance of the Auschwitz trial, its status as a public event. Broadly speaking, there were two concerns. On the one hand, there was a general concern, expressed by Kuby, that although the trial was enormous, it would encounter so much “inner resistance” that, despite the ubiquitous press coverage, it would simply be ignored by the broad German public. On the other hand, there was a more specific concern, expressed by Walser, that even if people did follow the trial closely, they would learn the wrong lessons. How justified were these concerns?

To begin at the general level: Was there significant “inner resistance” among the German population to this trial? This is a tricky question to answer retrospectively, since it is no longer possible poll public attitudes toward the trial at the time. Fortunately, however, some relevant survey data does exist. For example, a DIVO-Institut survey taken in June 1964 revealed that 40% of those surveyed had not followed the Auschwitz trial in any of the media (press, radio, or television).¹³ This statistic may indicate at least significant indifference to the trial, particularly when contrasted with the 95% of Germans who had followed the Eichmann trial a few years earlier.¹⁴ However, another survey a month later, conducted by the Institut für angewandte Sozialwissenschaft, indicated that 83% of Germans had heard of the Auschwitz trial and 42% were able to specify that it was taking place in Frankfurt.¹⁵ These numbers approach the Eichmann trial in resonance:¹⁶ Eighty-seven percent of Germans had heard of the Eichmann trial and 46%

11. Erich Kuby, *Auschwitz und die bundesdeutsche Gegenwart*, in *AUSCHWITZ—EIN PROZESS: GESCHICHTE-FRAGEN-WIRKUNGEN* 7, 7 (Ulrich Schneider ed., 1994) (originally printed in the student magazine *konkrete* in late 1963).

12. *Id.* at 9.

13. See REGINA SCHMIDT & EGON BECKER, *REAKTIONEN AUF POLITISCHE VORGÄNGE: DREI MEINUNGSSTUDIEN AUS DER BUNDESREPUBLIK* 111 (1967).

14. See *id.* at 108.

15. See *Wer weiß etwas über den Auschwitz-Prozess? Jugend nicht gut informiert*, *DIE WELT*, July 9, 1964.

16. It is revealing, however, that although the public resonance of the Auschwitz trial approached that of the Eichmann trial, it did not surpass it, despite the higher level of press coverage for the Auschwitz trial in Germany. In the four major transregional German papers, there were a total of 933 articles concerning the Auschwitz trial, as opposed to 787 for the Eichmann trial. See WILKE, *supra* note 6, at 53.

had known it was in Israel.¹⁷ People between the ages of 35 and 49 were most well-informed regarding the Auschwitz trial, followed, in descending order, by people between the ages of 25 and 34, 50 and 64, 18 and 24, and those over 65 years old.¹⁸

There is also some survey data on the public stance toward Nazi trials in general. At the beginning of 1965 a survey by the Allensbach Institut für Demoskopie found that 57% of the German population opposed any *further* Nazi trials.¹⁹ Of course this opposition does not necessarily mean that Germans were against the Auschwitz trial in particular, although this might be a plausible inference. More significant, perhaps, is the fact that 1965 represented a certain high-water mark of opposition to Nazi trials.²⁰ Thus, in 1958 only 34% of the public opposed further trials, while in 1966 the number was 44%.²¹ The June 1964 DIVO-Institut survey confirms this trend, though it gives much lower total figures for the opposition to Nazi trials than the Allensbach survey. It indicated that in 1961, only 15% of those who were aware of the Eichmann trial felt it would be better not to have Nazi trials at all, while in 1964, 39% of those who had heard of the Auschwitz trial were opposed to such trials.²² Of those who had heard of the Auschwitz trial, just 53% approved of it, “in order that the German public be made aware of the horrors and suffering caused by Germans, and in order that the guilty parties be judged and punished.”²³ Of those opposed to the trial, the highest percentage (45%) fell into the 35- to 54-year-old age group.²⁴ “As an argument, they said that the trial damaged our reputation abroad; it was all just a waste of money; it was time to finally be done with all

17. See *Wer weiß etwas über der Auschwitz-Prozeß*, *supra* note 15.

18. See *id.*

19. See INSTITUT FÜR DEMOSKOPIE, VERJÄHRUNG VON NS-VERBRECHEN: ERGEBNISSE EINER SCHNELLUMFRAGE (1965), cited in Ulrich Kröger, *Die Ahndung von NS-Verbrechen vor Westdeutschen Gerichte und ihre Rezeption in der deutschen Öffentlichkeit 1958 bis 1965 unter besonderer Berücksichtigung von “Spiegel”, “Stern”, “Zeit”, “SZ”, “FAZ”, “Welt”, “Bild”, “Hamburger Abendblatt”, “NZ” und “Neuem Deutschland”* 276 (1973) (unpublished Ph.D. dissertation, University of Hamburg) (on file with author).

20. It is important not to overstate this point. Clearly there were other previous peaks in opposition to any engagement with the Nazi past. For example, prior to rearmament (and as a precondition for it), the Germans exerted considerable pressure on the Americans to provide amnesty to all Nazis still in custody for their crimes. In the process, any distinction between “war crimes” and “crimes against humanity” was ignored, and all German crimes during the war were lumped together as unfortunate, but largely unintended, consequences of total war. See the account in NORBERT FREI, *VERGANGENHEITSPOLITIK: DIE ANFÄNGE DER BUNDESREPUBLIK UND DIE NS-VERGANGENHEIT 195-233* (1996).

21. See Kröger, *supra* note 19, at 277.

22. See *Vom Auschwitz-Prozeß nichts gehört*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 14, 1964.

23. *Id.*

24. See *id.*

this.”²⁵

Much of the heightened unpopularity of Nazi trials in 1964-1965 is probably attributable to the enormous debate that was raging at the time on the statute of limitations for Nazi crimes.²⁶ This debate was explicitly concerned with the legitimacy of continuing such trials, rather than the validity of previous and/or ongoing trials. The wording of the question—Should such trials continue?—was probably intended by the pollsters to evoke a response conditioned more by this debate than by any specific trial. Nonetheless, it certainly seems fair to say that at the very least, the Auschwitz trial failed to convince a majority of Germans that the moral significance of Nazi trials made them worthwhile.

Thus, while there is a fair degree of variation among the different polling results pertaining directly or indirectly to the Auschwitz trial, all of the surveys agree on two points. On the one hand, a large proportion of the population did not follow the trial at all closely (e.g., only 42% were able to name the city in which the trial was being held); on the other hand, a substantial minority of those who did follow the trial remained hostile to it and similar trials. On this basis, it seems fair to say that there was indeed significant “inner resistance” to Nazi trials in general and to the Auschwitz trial in particular, however difficult it is to retroactively measure this resistance with any degree of precision.

In any case, the relatively limited polling data tells us little about the specific character of that resistance. In general, polling data is notoriously limited in its capacity to provide qualitative

25. *Ablehnung der KZ-Prozesse wächst*, FRANKFURTER RUNDSCHAU, Aug. 14, 1964.

26. The issue of Nazi crimes in fact provoked four major debates over the statute of limitations—in 1960, 1965, 1969, and 1979—although the 1965 debate was the most heated. The basic argument in each was between those who felt that any amendment of the statute would be a violation of the rule of law and those who felt that allowing prosecutions for Nazi crimes to lapse due to the statute of limitations would be a gross injustice. In 1960, *Totschlag* (roughly, second degree murder) was allowed to fall under the statute of limitations. But in 1965 and 1969, the opponents of allowing Nazi prosecutions to lapse won partial victories, and finally, in 1979, *Mord* (roughly equivalent to first degree murder), and Nazi crimes along with it, were made imprescriptible. The definitive history of these debates, including that of 1965, has yet to be written. For a first approximation, see Martin Hirsch, *Anlaß, Verlauf und Ergebnis der Verjährungsdebatten im Deutschen Bundestag, in VERGANGENHEITS-BEWÄLTIGUNG DURCH STRAFVERFAHREN? NS-PROZESSE IN DER BUNDESREPUBLIK DEUTSCHLAND* 40-50 (Jürgen Weber & Peter Steinbach eds., 1984). For primary documentation, see *ZUR VERJÄHRUNG NATIONALSOZIALISTISCHER VERBRECHEN: DOKUMENTATION DER PARLAMENTARISCHEN BEWÄLTIGUNG DES PROBLEMS, 1960-1979* (1980). In addition, there was an extensive debate on the issue in the German legal press and in government publications. See, e.g., Adolf Arndt, *Zum Problem der strafrechtlichen Verjährung*, 20 *JURISTENZEITUNG* 145, 145-53 (1965); Ewald Bucher, *Verlängerung der Verjährungsfrist für NS-Verbrechen: Die Freiheit wiedergewonnen, um nach Gesetz und Recht zu leben*, 4 *BULLETIN DES PRESSE- UND INFORMATIONSAMTES DER BUNDESREGIERUNG* 27, 27-28 (1965). Arndt, a member of the German Social Democratic Party (SPD) and the Bundestag was the most vocal and effective proponent of changing the law, while Bucher, the Federal Justice Minister, was its most vociferous opponent.

characterizations of social phenomena. For this, it is necessary to consider other sources.

Emmi Bonhoeffer, widow of anti-Nazi martyr Dietrich Bonhoeffer and one of the trial's more astute observers, remarked in a letter to her friend Reche Jásli: "Naturally the Auschwitz trial is unpopular. This makes it all the more peculiar that almost the entire press corps provides daily coverage, if not always very thoroughly. They write stories that nobody actually wants to read, certainly not those most in need of it."²⁷ She gives several reasons for this unpopularity, the most important being that Germans worry that the trial might implicate them as well, directly or indirectly, legally or morally, and thus disturb their "peace."²⁸ As the theologian Helmut Gollwitzer put it in his *Foreword* to the publication of these letters:

This is why countless numbers sense in their unconscious: if it is discovered what took place back then, then in many respects we are in the same boat as the defendants, then the question of guilt raised by these trials reaches into our lives. That is why people react defensively against these trials, want to see them concluded—for our own sake, for the sake of a quiet conscience, many demand that, as they put it, "We finally let the curtain fall."²⁹

This account of the "inner resistance" to the Auschwitz trial might fairly be termed an "external account," since it relies on historical and psychological factors extrinsic to the trial to explain its unpopularity. It treats the trial as encountering a pre-formed public unconsciousness in a permanently defensive stance against the Nazi past—what one can refer to as the "repression hypothesis." This is a common understanding of the German relationship to the Nazi past.³⁰ It was expressed perhaps most famously in Alexander and

27. EMMI BONHOEFFER, ZEUGEN IM AUSCHWITZ TRIAL: BEGEGNUNGEN UND GEDANKEN 15 (1965).

28. *See id.* at 15.

29. Helmut Gollwitzer, *Foreword to id.* at 7. I have chosen to modify the untranslatable German phrase "einen Schlußstrich ziehen" to "let the curtain fall." This does not translate the literal meaning (draw a concluding line under), but captures the metaphorical sense of this common German idiom.

30. The repression hypothesis is for obvious reasons most common in the psychoanalytic literature concerning the German relationship to the Nazi past. For explicitly psychoanalytic accounts see, for example, MEINHARD ADLER, VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND: EINE KULTURPSYCHIATRISCHE STUDIE ÜBER DIE "FASCHISMUSVERARBEITUNG," GESEHEN AUS DEM BLICKWINKEL DER ZWEI KULTUREN (1990); ANITA ECKSTAEDT, NATIONALSOZIALISMUS IN DER "ZWEITEN GENERATION": PSYCHOANALYSE VON HÖRIGKEITSVERHÄLTNISSEN (1989); DAS KOLLEKTIVE SCHWEIGEN: NATIONALSOZIALISTISCHE VERGANGENHEIT UND GEBROCHENE IDENTITÄT IN DER PSYCHOTHERAPIE (Barbara Heimannsberg & Christoph J. Schmidt eds., rev. ed. 1992); GENERATIONS OF THE HOLOCAUST (Martin S. Bergmann & Milton E. Jucovy eds., 1982). In addition, non-psychoanalysts have taken up the repression hypothesis in their analyses of German memory. *See, e.g.,* HEINZ BUDE, BILANZ DER NACHFOLGE: DIE BUNDESREPUBLIK UND DER

Margarete Mitscherlich's 1967 book, *The Inability to Mourn*,³¹ or more recently, in Gesine Schwan's *Politik und Schuld*.³² Broadly, this position considered the postwar German "silence" regarding the Nazi past as a destructive defense reaction to an ongoing but unacknowledged sense of guilt. The German reluctance to talk about (or even to hear about) the past is considered, often in explicitly Freudian terms, to be a pathological abreaction to the trauma of having perpetrated the greatest crime in human history. Thus Germans, both those of a certain generation and—by means of complex psychological transmission mechanisms—their descendants, all suffer from an almost permanent state of guilt, which they seek to suppress through a silence, a silence that ironically only serves to preserve their sense of guilt.

While I am in broad sympathy with such "external" accounts of the "inner resistance" to Nazi trials, there are certain crucial features of the postwar German relationship to the Nazi past that they cannot adequately explain. First and foremost, such accounts cannot readily explain ongoing historical developments within the "silence" of postwar Germany. As Foucault pointed out with regard to the Freudian repressive hypothesis, sometimes the most effective form of silence is in fact incessant talk.³³ For example, as I mentioned, 1965 represents a kind of spike in the unpopularity of Nazi trials, which would be difficult to account for on the basis of a perduring social-psychological disposition. Nor can such a spike be explained simply in terms of a generational shift; the polling data revealed a relatively greater acceptance of Nazi trials in the 1950s and a high level of antipathy to Nazi trials among people ages 35 to 54 (i.e., those who were between 15 and 34 years old at the end of the war), many of whom were too young to be culpable for Nazi crimes in any direct sense. Nor does an account based on a kind of "original traumatism"³⁴ explain the striking parallel between the heightened resistance to the trial in 1964-1965 and the extremely high levels of public discussion of Nazi crimes in this same period.

NATIONALSOZIALISMUS (1992); NADINE HAUER, DIE MITTLÄUFER: ODER DIE UNFÄHIGKEIT ZU FRAGEN: AUSWIRKUNGEN DES NATIONALSOZIALISMUS FÜR DIE DEMOKRATIE VON HEUTE (1994); RALPH GIORDANO, DIE ZWEITE SCHULD, ODER VON DER LAST DEUTSCHER ZU SEIN (1987); GESINE SCHWAN, POLITIK UND SCHULD: DIE ZERSTÖRERISCHE MACHT DES SCHWEIGENS (1997).

31. ALEXANDER & MARGARETE MITSCHERLICH, DIE UNFÄHIGKEIT ZU TRAUERN: GRUNDLAGEN KOLLEKTIVEN VERHALTENS (1967).

32. SCHWAN, *supra* note 30.

33. See MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990) (1978).

34. The phrase is Simon Critchley's. See SIMON CRITCHLEY, *The Original Traumatism: Levinas and Psychoanalysis*, in ETHICS-POLITICS-SUBJECTIVITY: ESSAYS ON DERRIDA, LEVINAS AND CONTEMPORARY FRENCH THOUGHT (1999).

Second, such “external” explanations of the hostility to Nazi trials cannot account for certain countervailing aspects of the trials. Jörg Friedrich, for example, charts what might be called the “alibi” function of such trials; that is, the ways in which, by focusing on certain limited groups of perpetrators, they implicitly exculpate the remainder of the German population.³⁵ Since relatively few of the people opposed to Nazi trials are likely to have been concentration camp guards themselves, it would have been equally plausible for them to have approved of such trials as a “legitimate” effort to punish the “small clique” of antisocial elements who were “really” responsible for Nazi crimes. But they did not view such trials in this way.

Finally, despite this “inner resistance” to Nazi trials, the fact remains, as I have indicated, that the press coverage of this trial was almost unprecedented.³⁶ One must keep in mind that the trial attracted an estimated twenty thousand attendees, even if large numbers of these were school groups (and thus not necessarily voluntary spectators).³⁷ Add to that the popularity of the contemporaneous Auschwitz Exhibit on tour in Germany, and it becomes clear that the trial provoked at least as much interest as disinterest, although much of this interest may have been restricted to members of the press.³⁸

In short, one might say that the most crucial aspect of the Frankfurt Auschwitz trial was the paradoxical antithesis (if not antipathy) between the *published* and the *public* reaction to it. As my opening quotation indicated, the trial seemed to interest journalists far more than their readers. How do we account for the simultaneous popularity and unpopularity of the trial, the compulsion of the press to publicize it to an indifferent audience? How do we account for the plethora of press attention, on the one hand, and the demonstrable public resistance to the trial, on the other? Is this merely a reflection of a political split between a

35. See JÖRG FRIEDRICH, *DIE KALTE AMNESTIE: NS-TÄTER IN DER BUNDESREPUBLIK* 334-438 (1994).

36. In the four major papers, the press coverage of the Auschwitz trial was more extensive than that of the Eichmann trial and the Demjanjuk trial combined (933 articles in four major papers, as opposed to a total of 898 for the other two trials). While some of this can be accounted for by the longer duration of the trial itself, the fact remains that the press followed this trial avidly. See WILKE ET AL., *supra* note 6, at 53.

37. See GERHARD WERLE & THOMAS WANDRES, *AUSCHWITZ VOR GERICHT: VÖLKERMORD UND BUNDESDEUTSCHE STRAFJUSTIZ* 42 (1995).

38. As Günther Schulz put it in a prominent German law review: “At the moment Nazi crimes are commanding considerable public attention in the form of the Auschwitz trial. But it is unfortunately unclear whether they are receiving as much public as press attention.” Günther Schulz, *Blick in die Zeit*, 19 *MONATSSCHRIFT FÜR DEUTSCHES RECHT* 470, 470 (1964).

“liberal” press and a “conservative” populace? Or between an elite culture of atonement and a popular culture of resentment? Or perhaps a reflection of an emerging generation gap? I think the problem is more complicated than any of these suggestions, which is why I would like to now turn to what might be called an “internal” account of the public reaction to the Auschwitz trial—an explanation of the public reaction in terms of the legal character of the trial itself.

II. GERMAN CRIMINAL LAW AND THE CONTOURS OF MEMORY

Trials are not merely passive objects of public scrutiny. Precisely because they are themselves narrative events, if highly ritualized ones, trials do not simply tell the story of the events they judge; they also tell stories about themselves.³⁹ Robert Cover’s famous account of legal *nomoi* points in the direction of what I would like to call an “internal account” of the public reaction to the Auschwitz trial, one that factors in the legal character of the trial itself.⁴⁰ For Cover, legal narrative creates a normative world, or *nomos*. From this perspective, law is a “resource of signification” that can be mobilized to create normative meaning for our actions in the world; it functions as a kind of bridge linking the world as it is to the world as we would like it to be.⁴¹ In seeking to create a normative world able to encompass, indeed, to “master,” the radical normative inversion of the Holocaust, the Auschwitz trial drew on the resources of signification intrinsic to German law and used them to tell the story of Auschwitz in a legal idiom. It was precisely this idiom that the German press picked up and translated into its own politicized narrative.

What was this idiom? Legally, the most important thing to remember about the German prosecution of Nazi criminals is that they were prosecuted under the ordinary penal code. Due to the prohibition on retroactive law codified in Article 103 of the West German Basic Law, Nazis could only be prosecuted under laws in effect during the Third Reich. Thus, as German courts regained legal autonomy in the period from 1950 to 1955, they ceased prosecuting Nazi crimes as crimes against humanity, as they had done under the requirements of the Allied Control Council Law Number 10. Instead, Nazi crimes were prosecuted as ordinary homicide, *Mord* or

39. See WHITE, *supra* note 3, at 180. On the public function of such trial narratives, see generally POPULAR TRIALS: RHETORIC, MASS MEDIA AND THE LAW (Robert Hariman ed., 1990).

40. See ROBERT COVER, *Nomos and Narrative*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 95 (Martha Minow et al. eds., 1995).

41. *Id.* at 100.

Totschlag (very roughly the equivalents of first and second degree murder in American law) under the German penal code (*Strafgesetzbuch*—StGB).⁴² Nazi crimes were therefore prosecuted under statutes designed to deal with entirely different forms of criminality, primarily crimes committed by individuals or small groups pursuing their own interests, rather than state-organized genocide.

The use of the penal code led to several serious jurisprudential problems when it came time to prosecute Nazi criminals. Two problems had profound influence over the prosecution of Nazi trials, including the Auschwitz trial. The first problem concerns the distinction between *Mord* and *Totschlag*. Section 211 StGB defined *Mord* as follows:

A murderer is anyone who kills a human being out of blood lust, in order to satisfy their sexual desire, out of greed or other base motives, maliciously (*grausam*) or treacherously (*heimtückisch*) or by means dangerous to the public at large or in order to enable or conceal another crime.⁴³

Section 212 StGB defined *Totschlag* more simply as anyone who kills another person without being a murderer under the above definition.⁴⁴

The relevance of this distinction is twofold. First, after *Totschlag* fell under the statute of limitations in 1960, prosecutors were required to demonstrate that any given Nazi crime met the criteria for *Mord* in order to bring an indictment. As a result, it became considerably more difficult to indict Nazi criminals after 1960, since it was no longer enough simply to demonstrate that they had killed another human being or even that they had killed thousands; the prosecutor also had to prove that it was a specific kind of killing.⁴⁵ While it is impossible to give the exact number of potential Nazi killers who could not be brought to trial as a consequence of this distinction, the former Director of the Central Office of the State Justice Ministries for the Investigation of National Socialist Crimes of Violence, Adalbert Ruckerl, estimates that it was “considerable.”⁴⁶

Second, it is important to note the precise definition of *Mord*

42. See ADALBERT RÜCKERL, NS-VERBRECHEN VOR GERICHT: VERSUCH EINER VERGANGENHEITSBEWÄLTIGUNG 123-28 (1984).

43. § 211 Strafgesetzbuch [StGB].

44. See § 212 StGB.

45. It should be remembered that there were very few Nazi prosecutions in general in the years between 1950 and 1960, so that the fact that *Totschlag* fell under the statute of limitations had less practical impact on rates of prosecution than it otherwise might have.

46. RÜCKERL, *supra* note 42, at 155.

under section 211.⁴⁷ There were three different sets of factors that could make an act of killing *Mord*: 1) the subjective motives of the perpetrator (blood lust, sexual desire, or other “base motives”); 2) the means used in the killing (malicious, treacherous, or dangerous to the public at large); and 3) the purpose of the killing (to enable or conceal another crime). Of the various motives listed in section 211, two typically came into question in Nazi prosecutions: “blood lust” and other “base motives.” Blood lust was defined by the German High Court of Appeals (*Bundesgerichtshof*—BGH) as follows: an act done “on the basis of an unnatural joy at the destruction of human life.”⁴⁸ The other relevant motive for *Mord* was the statutorily unspecified category of “base motives.” These were judged, again according to the BGH, as those “which according to healthy sensibilities are ethically particularly despicable.”⁴⁹ In these cases, the charge of *Mord* is based on motives that are, from the perspective of some presumed but unspecified norm, unnatural and reprehensible, i.e., not shared by the majority of (right-thinking) persons. In other words, the principal factors leading to a charge of *Mord* in German Nazi trials were the subjective motives of the accused.

As for the second category of factors that define *Mord*, while it would seem that almost all Nazi killings would qualify as “malicious” or “treacherous,” this was not generally held to be the case. The BGH held that malice and treachery are subjective categories as well.⁵⁰ As the jurist Jürgen Baumann put it: “It is interesting that, although malice seems to be an objective characteristic pertaining to the way in which a crime is carried out, it is almost universally agreed that only the addition of a ‘merciless, cold-blooded attitude’ qualifies as *Mord*.”⁵¹ Or as Schönke and Schröder defined it in their commentary on the StGB: “A killing is malicious, when it imposes particularly severe bodily or mental suffering via either the severity,

47. The German murder statute was changed in 1941, and the emphasis on subjective motivation was greatly increased in the new version; the prior version was much closer to its Anglo-American counterpart, with a primary emphasis on premeditation. See RÜCKERL, *supra* note 42, at 126. However, for the obvious reason that Auschwitz barely existed prior to the change in the legal statute, the defendants in the Auschwitz trial were primarily charged under the post-1941 definition, which is true for the vast majority of Nazi criminals more generally as well. See *Eröffnungsbeschuß*, Frankfurt Staatsanwaltschaft 4 Js 444/59, 4 Ks 2/63, vol. 88, 17,074-75.

48. 6 NEUE JURISTISCHE WOCHENSCHRIFT 1440 (1953) (citing BGH verdict of July 7, 1953).

49. ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHSt] 3, 132 (133). Cf. ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH: KOMMENTAR 865, 873 (11th ed., 1963) (Anm. § 211, 1.d.) (citing Oberlandesgericht [OLG] Kiel [trial court for selected criminal matters and court of appeals] SchlHA 1948, 129).

50. See BGHSt 3, 132 (133).

51. Jürgen Baumann, *Die strafrechtliche Problematik der nationalsozialistischen Gewaltverbrechen*, in REINHARD HENKYS, DIE NATIONALSOZIALISTISCHEN GEWALTVERBRECHEN: GESCHICHTE UND GERICHT 267, 292 (1964).

the duration, or the repetition of the pain inflicted and when it *furthermore* comes from a cold-blooded and merciless sensibility."⁵² Thus, in addition to the objective infliction of severe pain, it was necessary for the perpetrator to act on the basis of certain internal dispositions. Because Nazi killings were generally systematic and bureaucratically organized, German courts have typically found this "cold-blooded and merciless sensibility" to be missing.

Finally, the felony-murder rule, defining *Mord* as killing to enable or conceal another crime, has not generally been deployed in German Nazi trials.⁵³ While it was the policy in Auschwitz, for example, to periodically liquidate the largely Jewish *Sonderkommandos*, whose gruesome job it was to empty the gas chambers and cremate the corpses, the Frankfurt court chose not to emphasize that one purpose of such killings was to eliminate potential witnesses.⁵⁴ The reasons for the court's neglect of the felony-murder rule remain unclear. However, given that these killings were fully integrated into the larger genocidal apparatus at Auschwitz, it seems plausible to suppose that the court considered the cover-up function they served secondary because the victims were Jewish, and hence, slated to die anyway. In any event, German courts have almost never applied this criterion to Nazi crimes, further restricting the scope of *Mord* to the subjective dispositions of the perpetrators.

As a result, what is most crucial for the law in this arena is the psychological disposition of the perpetrator, his (or, rarely, her) motives for acting. This is equally true for the second jurisprudential distinction that has had a decisive impact on Nazi trials, that of perpetration (*Täterschaft*). German law distinguishes between perpetrators and co-perpetrators, on the one hand, and accomplices (*Gehilfe*) on the other.⁵⁵ This distinction is crucial from a legal point of view: Whereas perpetrators of *Mord* receive a mandatory life sentence, accomplices may receive a milder sentence if the judge finds that there are mitigating circumstances.⁵⁶ In Nazi trials, judges

52. SCHÖNKE & SCHRÖDER, *supra* note 49, at 874 (providing commentary on Anm. § 211, V 2.b) (emphasis added).

53. See RÜCKERL, *supra* note 42, at 126.

54. The court, for instance, convicted Wilhelm Boger of *Mord* in at least 100 instances for shooting inmates from the *Sonderkommando*, but not because such shootings were designed to eliminate witnesses. Rather, he was convicted because the killings were retribution for a failed uprising by the inmates. Whether they would still have constituted *Mord* if the executions had been part of the "ordinary" liquidation process is by no means clear. See 21 JUSTIZ UND NS-VERBRECHEN: SAMMLUNG DEUTSCHER STRAFURTEIL WEGEN NATIONALSOZIALISTISCHER TÖTUNGSVERBRECHEN 475-76 (C.F. Rüter et al. eds., 1968).

55. Compare § 47 StGB with § 49 StGB; see also RÜCKERL, *supra* note 42, at 274-81.

56. See § 211 StGB (*Mord* sentencing); §§ 44, 49 StGB (accomplice sentencing). The law pertaining to accomplices was changed in 1968 to mandate a reduction in their sentence unless it could not be demonstrated that the accomplice shared the base motives of the actual perpetrators. See § 50 StGB. This change had disastrous consequences for Nazi trials because it

have almost always taken advantage of this opportunity to reduce the sentences of Nazi killers convicted as accomplices.⁵⁷ The reasons for this are complex. On the one hand, courts have generally held that “equity” demanded that accomplices be treated less severely than perpetrators.⁵⁸ On the other hand, it cannot be ruled out that other, less noble motives—in particular a generalized judicial hostility to Nazi trials—played a role.⁵⁹ For present purposes, the most important feature of the distinction between perpetrator and accomplice is that it was again based upon the subjective disposition of the accused.⁶⁰

While there are several competing theories of how best to distinguish perpetrators from accomplices in the legal literature, the German High Court of Appeals has only applied the so-called “subjective theory.” This theory, as the name implies, again emphasizes the inner disposition of the accused as the crucial legal factor in determining whether someone was tried as a perpetrator or

meant that all cases in which the defendants could only be charged as accomplices fell under a shorter statute of limitations (since the statute of limitations is determined by the severity of the sentence, see § 66 StGB). The change was retroactive so that the statute of limitations had run on accomplice crimes as of 1960. This effectively precluded most prosecutions of so-called “desk killers,” those who organized but did not actually carry out the killing operations. See FRIEDRICH, *supra* note 35, at 436-38.

57. For sentencing statistics, see Falko Kruse, *NS-Prozesse und Restauration: Zur justitiellen Verfolgung von NS-Gewaltverbrechen in der Bundesrepublik*, in DER UNRECHTSSTAAT: RECHT UND JUSTIZ IM NATIONALSOZIALISMUS 164, 164-89 (Redaktion Kritische Justiz eds., 1983). See also the official statistics compiled in PRESSE- UND INFORMATIONSAMT DER BUNDESREGIERUNG, DIE VERFOLGUNG NATIONALSOZIALISTISCHER STRAFTATEN IN DER BUNDESREPUBLIK (1963) and BUNDESMINISTERIUM DER JUSTIZ, DIE VERFOLGUNG NATIONALSOZIALISTISCHER STRAFTATEN IM GEBIET DER BUNDESREPUBLIK DEUTSCHLAND SEIT 1945 (Bundestagsdrucksache IV/3124).

58. See FRIEDRICH, *supra* note 35, at 437.

59. See Wolfgang Schulze-Allen, *Die Praxis der Verhinderung von Verurteilungen und Strafverbüßungen*, in DIE JUSTIZ UND DIE NAZIS: ZUR STRAFVERFOLGUNG VON NAZISMUS UND NEONAZISMUS SEIT 1945, at 94, 94-98 (Michael Ratz et al. eds., 1979).

60. The category of *Täterschaft* is extremely controversial in the professional literature. The single most important work on the topic is Claus Roxin's magisterial account, *TÄTERSCHAFT UND TÄTHERRSCHAFT* (6th ed. 1994). See also Werner Hardweg, *Über den Begriff der Täterschaft: Zugleiche eine Besprechung der Habilitationsschrift von Claus Roxin "Täterschaft und Tatherrschaft,"* 21 JURISTEN ZEITUNG 667, 667-71 (1965); Jürgen Baumann, *Die Tatherrschaft in der Rechtsprechung des BGH*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 374 (1962); Jürgen Baumann, *Beihilfe bei eigenhändiger voller Tatbestandserfüllung*, 16 NEUE JURISTISCHE WOCHENSCHRIFT 561, 561-65 (1963); Hans-Joachim Korn, *Täterschaft oder Teilnahme bei staatlich organisierten Verbrechen*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 1206, 1206-10 (1965). For a discussion of the issue of *Täterschaft* with particular references to Nazi crimes, see also Baumann, *strafrechtliche Problematik*, *supra* note 51, at 305-17; Volker Ducklau, *Die Befehlsproblematik bei NS-Tötungsverbrechen: Eine Untersuchung anhand von 900 Urteilen deutscher Gerichte von 1945 bis 1965*, at 36-47 (1976) (unpublished Ph.D. dissertation, University of Freiburg) (on file with author) and Peter Noll, *Die NS-Verbrecherprozesse strafrechtsdogmatisch und gesetzgebungspolitisch betrachtet*, in RECHTLICHE UND POLITISCHE ASPEKTE DER NS-VERBRECHERPROZESSE: GEMEINSCHAFTSVORLESUNG DES STUDIUM GENERALE WINTERSEMESTER 1966/67, at 38, 38-49 (Peter Schneider & Herman J. Meyer eds., 1968) [hereinafter ASPEKTE DER NS-VERBRECHERPROZESSEN].

an accomplice. The central question was whether the accused acted by his own will or subordinated himself to the will of someone else.⁶¹ In the famous Staschinski ruling, the BGH stated: "An accomplice is, in cases of *Mord* as with all other crimes, anyone who does not undertake the act as his own but rather simply cooperates (*mitwirken*) as a tool or helper in a foreign act."⁶² This act of aiding and abetting was considered, however, not primarily in terms of the accused's objective contribution to the crime (although such aid must of course be present) but in terms of his subjective orientation toward the act.

Again, like the *Mord/Totschlag* distinction, the Staschinski decision meant that the psychological disposition of the accused became the key factor in determining whether he was a perpetrator or an accomplice. The question was whether or not he made the act his own, in the sense of adopting wholesale the criminal motives of others (in the case of Nazi crimes, generally his superiors) or whether he merely complied with their wishes on the basis of some other motive, such as a sense of duty. The determination of this issue, like the distinction between *Mord* and *Totschlag*, can usually be made only on the basis of indirect indicators, such as the manner in which the crime was committed (e.g., if the defendant exceeded his orders in killing his victims or inflicted undue suffering in the process). Such indirect indicators often take the form of objective indices for the defendant's subjective disposition. Furthermore, according to the legal principle *in dubio pro reo* (presumed innocence), in cases of doubt, the decision must fall in favor of the accused.

The most obvious and widely criticized consequence of the Staschinski decision was that it tended to benefit low-ranking Nazi criminals considerably because they were very often treated as accomplices rather than perpetrators and consequently received milder sentences.⁶³ In the Auschwitz trial for instance, while the prosecutor's office indicted all twenty-two defendants as perpetrators, the convening court decided that only eleven of the accused could be formally charged as perpetrators, while the other eleven were charged as accomplices.⁶⁴ As already indicated, of the twenty defendants still on the dock at the end of the trial, seven were convicted as perpetrators of *Mord* (six of them received the mandatory life sentence, while the seventh received a ten-year

61. See Ducklau, *supra* note 60, at 38-39.

62. BGHSt 18, 87 (89).

63. See, e.g., FRIEDRICH, *supra* note 35, at 350-59; GIORDANO, *supra* note 30, at 130-31.

64. See Eröffnungsbeschuß, Frankfurt Staatsanwaltschaft 4 Js 444/59, 4 Ks 2/63, vol. 88, 17069-103.

juvenile sentence because he was underage when he served in Auschwitz). Three other defendants were acquitted and the remainder, ten in all, were convicted of being accomplices. All of them received a milder sentence under section 49 StGB.⁶⁵

Both the *Mord/Totschlag* distinction and the perpetrator/accomplice distinction place an almost exclusive emphasis on the motivations of the accused. It is true that so-called crime-related (as opposed to defendant-related) evidence⁶⁶ is taken at the trial, but such evidence is used only as an objective indicator of the defendant's subjective disposition. This subjective inquiry takes the law into the realm of psychology, which is difficult to encompass within the formal categories of the penal code. In the process, the law makes certain psychological assumptions about the nature of human agency, the most central being that there is a direct and necessary causal link between a person's motives and actions. This link is conceptualized in terms of the criminal category of guilt, which is understood in precise ways under German law. To quote the BGH again:

Punishment presupposes guilt. Guilt is reproachability. With the negative judgment of guilt, the perpetrator is reproached in that he did not act legally, although he could have decided to obey the law. The inner foundation of guilt as a reproach lies in the fact that human beings are invested in free, responsible, ethical self-determination and are therefore capable of deciding for the law and against injustice.⁶⁷

In other words, based on an assumption of free will (and here the influence of Kant reveals itself⁶⁸) the German legal system assumes a causal nexus between motivation and action, which renders human behavior susceptible to moral, and hence legal, judgment. But it is precisely this assumption of a causal nexus between motivation and behavior that I would argue is problematic in the face of the complex historical reality of the Holocaust. The Holocaust directly challenges the assumption that motives equal causes, and it is the law's efforts to maintain this as a "necessary fiction" (if not as an ontological assumption) that explains in large part the paradoxical character of the public reaction to the Auschwitz trial and other Nazi trials.

Even when German jurists attempted to take account of the

65. See 21 JUSTIZ UND NS-VERBRECHEN, *supra* note 54, at 454-56, 464-65, 535-36, 548, 555-56, 619-20, 632-33, 664-65, 718-19, 727, 745-57.

66. In German, the terms are *Tatbezogen* and *Täterbezogen*.

67. BGHSt 2, 194 (200).

68. See Wolfgang Nauke, *Über den Einfluß Kants auf Theorie und Praxis des Strafrechts im 19. Jahrhundert*, in PHILOSOPHIE UND RECHTSWISSENSCHAFT: ZUM PROBLEM IHRER BEZIEHUNG IM 19. JAHRHUNDERT 27 (J. Blühdorn & J. Ritter eds., 1969).

complexity of the Holocaust in their legal thought, they tended to find themselves on the horns of a dilemma. For example, Fritz Bauer, the Hessian Attorney General and the driving force behind the Auschwitz trial, wrote an essay in the mid-1960s entitled *Kriminologie des Völkermordes* (*The Criminology of Genocide*). In this essay, Bauer provided a four-part typology of Nazi criminals: 1. True Believers (*Gläubige*): those who freely chose an exclusive world view, if often for unconscious reasons.⁶⁹ 2. Formalists: followers of a “formal ethic” who believed in “the fulfillment of duty for its own sake” regardless of the purpose.⁷⁰ 3. Opportunists: cynics who used ideology to their own personal advantage.⁷¹ 4. Tools: “Others are misused tools of the criminal undertaking. They share neither the beliefs nor convictions of the group nor do they seek personal advantage. They act against their better knowledge, conscience and own interests.”⁷² They are often terrorized by the first three groups. The human relationship between this group and the first three is, like that between perpetrators and their victims, purely objectified.⁷³

Bauer’s typology, which, *contra* Daniel Goldhagen’s argument that all Nazi perpetrators acted on the basis of the single motive of eliminationist anti-Semitism,⁷⁴ falls within the mainstream of historiography on Nazism and has at least four implications. First, it implicitly criticized the effort to subsume all Nazi perpetrators under a single legal understanding of criminality. Bauer effectively argued that the differences between these groups are substantial, both legally and factually, save in one important respect—namely, that all four groups made equally efficient killers. Consequently, any adequate legal framework for grasping Nazi criminality must account for the differences among these four groups without losing sight of the fact that all of them were in fact murderers.

Second, this typology highlights the ways in which, within the context of the Holocaust, perpetrators acted on the basis of diverse motives.⁷⁵ What matters most in this regard is that if Bauer’s

69. See Fritz Bauer, *Kriminologie des Völkermordes*, in ASPEKTE DER NS-VERBRECHERPROZESSEN, *supra* note 60, at 16, 22.

70. *Id.* at 23.

71. *See id.*

72. *Id.*

73. *See id.*

74. See DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 416-20 (1996).

75. Clearly the question as to the motives of Nazi perpetrators has been highly controversial in the historical literature, even prior to the publication of the Goldhagen book. However, since the question of perpetrator motivation is one of the central legal issues in Nazi crimes, it cannot be avoided in this context. For the historical literature on the topic, see GOLDHAGEN, *supra* note 74. Goldhagen’s thesis about the monadic anti-Semitic motivation of

typology was at all plausible, it indicated that not only did the diverse perpetrators of the Holocaust, operating on the basis of individually distinct motives, produce functionally identical results in the context of state-organized mass murder but also that, as a consequence, these perpetrators themselves became functionally interchangeable.⁷⁶ Or as the jurist Peter Noll put it: “The psychological and therefore, in light of the principle of guilt, the jurisprudential problem is that, in the case of organized mass crimes, every single participant can, quite properly, see himself as fully replaceable and, consequently, in the final analysis not responsible for his actions.”⁷⁷

The third significant aspect of Bauer’s typology is that it pointed to a tension within the German legal community between those who felt that existing legal practice was inadequate to render justice for Nazi crimes and those who felt that it could do so. In practice, this could be seen in the way that the term “ordinary” was deployed in relation to Nazi trials. There were, on the one hand, those legal scholars and prosecutors, like Bauer or Claus Roxin, who felt that existing legal practice was inadequate for dealing with the legacy of Nazism. For them, Nazi crimes were anything but ordinary. For

the German perpetrators has, of course, come under considerable scholarly fire from other quarters as well. *See, e.g.,* NORMAN G. FINKELSTEIN & RUTH BETTINA BIRN, *A NATION ON TRIAL: THE GOLDHAGEN THESIS AND HISTORICAL TRUTH* (1998); *see also* EIN VOLK VON MORDERN? *DIE DOKUMENTATION ZUR GOLDHAGEN KONTROVERSE UM DIE ROLLE DER DEUTSCHEN IM HOLOCAUST* (Julius Schoeps ed., 1996); *UNWILLING GERMANS? THE GOLDHAGEN DEBATE* (Robert R. Shandley ed., 1998). For alternative accounts of perpetrator motivation, see CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992); ISRAEL W. CHARNY with CHANAN RAPAPORT, *HOW CAN WE COMMIT THE UNTHINKABLE: GENOCIDE, THE HUMAN CANCER* (1982); ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986). In addition, see the empirical psychological studies by Stanley Milgram, which are concerned with the Holocaust in all but name. *See* STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1971).

76. As Ruth Bettina Birn has argued, it is important, when discussing the question of perpetrator motivation in the Holocaust, to keep in mind that there are actually two distinct questions involved, which need to be addressed separately. *See* FINKELSTEIN & BIRN, *supra* note 75, at 134. First, there is the question as to the origin of genocidal policy at the highest levels of the state apparatus. It is in this arena that many of the standard debates on the origin of the Holocaust take place, in particular the debate between “intentionalists” and “functionalists.” *See, e.g.,* CHRISTOPHER BROWNING, *Beyond “Intentionalism” and “Functionalism”: The Decision for the Final Solution Reconsidered*, in *THE PATH TO GENOCIDE: ESSAYS ON LAUNCHING THE FINAL SOLUTION* 86-121 (1992); Tim Mason, *Intention and Explanation: A Current Controversy about the Interpretation of National Socialism*, in *DER FÜHRERSTAAT: MYTHOS UND REALITÄT* 21-40 (Gerhard Hirschfeld & Lothar Kettenacker eds., 1981). For the most penetrating recent scholarship on these issues, see HENRY FRIEDLANDER, *THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION* (1995); SAUL FRIEDLÄNDER, *1 NAZI GERMANY AND THE JEWS* (1997).

Second, there is the question as to the motives of the actual executioners in the various extermination centers. This is a more challenging problem, both methodologically and in terms of the documentary sources, and has, consequently, received less historiographical treatment. *See* sources cited *supra*. In the present context, it is only necessary to address the second question, since the main policy-makers in the Holocaust were primarily tried, if at all, in Allied courts in the immediate aftermath of the war.

77. Noll, *supra* note 60, at 46.

instance, as already mentioned, there was considerable debate over whether the existing subjective theory of perpetratorship was capable of grasping the character of Nazi perpetrators. In 1963, Claus Roxin, one of the most prominent German scholars on the theory of perpetratorship, made an explicit argument that it was not, given the unique character of state-organized mass crimes. He claimed that it was necessary to reconceptualize perpetratorship in such cases to include what he called “mastery over the will by virtue of an organizational power apparatus.”⁷⁸ Such a concept of perpetratorship would allow for both high-ranking officials and their various subordinates to be viewed as exercising simultaneous mastery over the act of murder. The high-ranking officials, despite their absence from the scene, still controlled the action, by virtue of its organized character. The low-ranking executioners exercised mastery over the act through their direct involvement in the killing. “Such an organization, for instance, takes on a life of its own, independent of the changing composition of its membership. It functions without depending on the individual personality of those carrying out orders, essentially ‘autonomously.’”⁷⁹ The defining feature of this kind of mastery of the will was the “fungibility of the executioners.”⁸⁰

However, in the actual legal practice of the Federal Republic for most of the postwar era, voices such as Roxin’s or Bauer’s had little effect on legal practice. Far more influential were those who felt that Nazi crimes had to be treated as, or in fact were, “ordinary” crimes, not fundamentally different from others. For example, an attorney for the civil plaintiffs (*Nebenkläger*) in the Auschwitz trial, Henry Ormond, declared that the atrocities committed at Auschwitz did not represent some special kind of crime like political crimes or war crimes. They were “rather criminal offenses in the statutory sense, whereby the perpetrators exercised their functions according to a division of labor within a well-organized, factory-like apparatus of murder.”⁸¹ On this view, the criminal division of labor had no impact *per se* on the nature of the individual crime. It was simply the context

78. Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, in 1963 GOLTDAMMER’S ARCHIV FÜR STRAFRECHT 193, 200.

79. *Id.* at 200. Roxin argues that in general, there are three ways to control the actions of others: force, deception, or the willing interchangeability of the actors.

80. *Id.* It is worth noting that Roxin explicitly argued that such a form of perpetratorship by high-ranking officials did not preclude the culpability of their lower-ranking subordinates. In such cases “there is no lack of freedom and responsibility on the part of the immediate executioner, who is to be punished as a culpable perpetrator by his own hands.” *Id.* at 201.

81. Henry Ormond, *Zwischenbilanz im Auschwitz-Prozeß*, 3 TRIBÜNE 1188 (Nov. 1964). Ormond here contrasts *Verbrechen* with *Delikte*, where *Verbrechen* means crimes in the broadest sense and *Delikte* are confined to more specific, statutory offenses.

of the crime in the same way that a wife's affair might be the context of her murder by a jealous husband. In this regard, Ormond was in full accord with the findings of the Auschwitz trial court itself. In the oral verdict, the presiding judge, Hans Hofmeyer, also noted that the purpose of this trial was to determine individual criminal guilt in the strictest sense, and was not concerned with the political or historical context of that guilt any more than necessary. In other words, Hofmeyer effectively claimed that the historical and political context of Auschwitz was, at most, one more objective index for the subjective guilt of individual perpetrators.⁸²

Thus, the court—unavoidably, given the subjective character of German legal categories—saw the actions of the accused as criminal actions, pure and simple, rather than as a unique category of criminal actions, like war crimes or crimes against humanity. At the same time, the court had to acknowledge that these actions served as functional elements within a larger state apparatus that organized and directed them. As Hofmeyer put it in an essay written shortly after the Auschwitz trial, every effort must be made to

fit Nazi trials into the framework of [ordinary] criminal procedure—that is, so long as we do not view these trials as political trials but as murder trials in the sense of the criminal code, though admittedly ones in which the political situation which led the defendants to their actions cannot be lost from view but dare not become the centerpiece of the proceedings either.⁸³

For the Auschwitz trial court, as for most other Nazi trials in the period after 1950, Nazi crimes took place as part of a criminal division of labor but remained, despite that, ordinary crimes. They still had to be conceptualized as individual actions originating in the psychological disposition of individual perpetrators. Consequently, in order to secure a conviction, a defendant's motives had to be demonstrably his "own" and had to fall within the fairly narrow range of properly "base" motives.

In itself this is not necessarily contradictory. One need only think of the Mafia to imagine a criminal division of labor based on individual psychological dispositions (honor, greed, fear, etc.). However, the Holocaust differs from other organized criminal

82. See "Ein Strafprozeß gegen Mulka und andere": *Aus der mündlichen Begründung des Urteils im Auschwitz-Verfahren*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 20, 1965.

83. Hans Hofmeyer, *Prozessrechtliche Probleme und praktische Schwierigkeiten bei der Durchführung der Prozesse*, in 2 PROBLEME DER VERFOLGUNG UND AHNUNG VON NATIONALSOZIALISTISCHEN GEWALTVERBRECHEN: SONDERVERANSTALTUNG DES 46. DEUTSCHEN JURISTENTAGES IN ESSEN 38, 44 (Ständigen Deputation des deutschen Juristentages ed., 1967).

endeavors in at least two ways. First, the criminal apparatus in this instance also happens to be identical with the state apparatus. Second, murder—indeed extermination—was the sole purpose of this apparatus, rather than, as with the Mafia, merely a by-product of other (e.g., profit-oriented) activities. These differences were central to the arduous, convoluted debates over the concept of perpetratorship in Nazi crimes. Ordinary criminality, and the statutory law designed to define and proscribe it, is more often than not based on a principle of personal interest: One's own interests motivate one's actions, which is one reason why the subjective theory of perpetratorship has had such durability in the German legal system. It assumes that any meaningful evaluation of a criminal act would entail an analysis of the causal relationship between the personal motivations of the actor and the specific, individual actions involved in the crime.

But it is precisely this relationship between personal motivation and criminal action that state-sponsored, bureaucratic mass murder disrupts. This disruption is what both Roxin and Bauer were wrestling with. As Max Weber pointed out some eighty years ago, one of the central characteristics of bureaucracy is that it renders subjective motivation irrelevant to the accomplishment of a task.⁸⁴ The structural irrelevance of personal motives is no less characteristic of Nazi genocide than of any other type of formally rational bureaucratic activity; indeed, it might have been even more so. This irrelevance is the true significance behind the famous exchange in Primo Levi's memoir, *Survival in Auschwitz*, where the inmate Levi asked one of his guards the simple question, "Why?," to which the guard replied, "There is no why here."⁸⁵ It is not that the Holocaust did not have causes, both historical and psychological, but rather that at the level of the individual victim and the individual perpetrator, these causes were invisible and changed nothing. The victims died in millions despite the diverse motives of the perpetrators and regardless of the occasional acts of humanity by the occasional German. The point is not just that the motivation of the crime was irrelevant to the victim's suffering; this could be said of any crime. The point is that if the causal relation between motivation and action is seen as the foundation of guilt, then the disruption of

84. "Decisive is that this 'freely' creative administration (and possibly judicature) would not constitute a realm of *free*, arbitrary action and discretion, of *personally* motivated favor and valuation, such as we shall find to be the case among pre-bureaucratic forms." MAX WEBER, *ECONOMY AND SOCIETY* 979 (Guenther Roth & Claus Wittich trans., Univ. of California Press 1968) (1922).

85. PRIMO LEVI, *SURVIVAL IN AUSCHWITZ* 29 (Stuart Woolf trans., Collier Books 1960) (1958).

this relationship also disrupted any assignation of guilt. Hence, the question “why” can have no concrete answer at the level of individual perpetrators.

The fourth and, in this context, most revealing fact that emerges from Bauer’s typology of genocide perpetrators is that, despite his unease with existing legal practice in this arena, he was unable to completely free himself from the subjective orientation of German law. It is striking that Bauer’s typological distinctions were based entirely on the diverse motives of the four perpetrator groups. Thus, while Bauer, as well as Roxin, was aware that the Holocaust could not be adequately characterized by the legal presumption of an identity between motives and action, neither of them was able to conceptualize guilt in any terms except those provided by German law. And these were, as I have indicated, fundamentally subjective in character. It is true that in this arena, Bauer was far more radical than Roxin. Bauer denied the very existence of free will and consequently of guilt, as understood by German law:

The will is, in reality, not an independent, free-floating factor in the inner life of man, which could be in a position to overcome (*überspielen*) the constants in people (e.g., their character and their temperament), their drives, affects and neuroses, their bodily selves, the echo of prior experience, the temptations of the moment, their conscious and, above all, unconscious motivations.⁸⁶

Bauer drew from such considerations the conclusion that only a therapeutic, reform-oriented criminal law could truly be humane, and that any version of retributive punishment ran counter to the true essence of humanity.⁸⁷ But with regard to the Holocaust, such therapeutics could only be political, not juridical. And given that Bauer’s *métier* was the law, the scope of such a therapeutic jurisprudence in the context of Nazi trials was strictly limited. While it might be argued that Bauer conceptualized the Auschwitz trial largely in terms of political pedagogy, the lessons that emerged from the trial were hardly of the type to guarantee the social-psychological reorientation Bauer saw as the true function of criminal punishment.⁸⁸

The Holocaust was no “ordinary” crime in any sense of that term. “Normal” murder too can be committed for a wide variety of motives, but in German criminal law at least, these crimes will all be

86. Fritz Bauer, *Die Schuld im Strafrecht*, in *DIE HUMANITÄT DER RECHTSORDNUNG: AUSGEWÄHLTE SCHRIFTEN* 249, 266 (Joachim Perels & Irmtrud Wojak eds., 1998).

87. *See id.* at 249-50.

88. *See* FRITZ BAUER, *DAS VERBRECHEN UND DIE GESELLSCHAFT* (1957).

treated differently, and rightly so. The whole development of German criminal legal thought has been to increasingly individuate and specify criminality and criminals. But such distinctions can be misleading, if not perverse, when applied to the Holocaust because it is a crime that only makes sense in its totality. And as a totality, this crime presupposes diverse perpetrator motives, some of which may not even be “base” at all, except in their mode of application in Auschwitz. This is not to say that the Holocaust presupposes any specific set of diverse motives. Rather, like any large-scale public enterprise, it presupposes that one can achieve the relevant action coordination on the basis of diverse (perhaps even divergent), formally irrelevant motives. This assumption is the essence of strategic action coordination. But differentiating the perpetrators on the basis of presumed motivation, as called for by German criminal law, even under the reformulation advocated by Roxin or Bauer, necessarily means fragmenting the Holocaust into a series of distinct, often unconnected crimes, or half-crimes, none of which begin to add up to the whole crime of genocide. This fragmentation belies the true character of the Holocaust as a total social act, which, like war, is one that can only be fetishized or ideologized when it is not identified as such. This is why Nazi trials could sincerely strive for justice on one level—the level of criminal punishment—while simultaneously generating a kind of injustice on another level—the level of historical consciousness.

III. THE AUSCHWITZ TRIAL AND THE GERMAN PRESS

In what sense, though, can trials be said to generate historical consciousness at all? In other words, if I am correct in asserting that there were inherent ambiguities in prosecuting systematic, state-sponsored genocide under ordinary criminal law, what difference did this make for the public reaction to the Auschwitz trial? More specifically, by what mechanisms was this internal ambiguity transmitted to the public? However much trials are narrative genres in their own right, most people have little or no direct experience of them. Although the Auschwitz trial did attract an impressive twenty thousand spectators, from an aggregate statistical point of view, the number might as well have been zero. And as important as it is that trials are state-sponsored, “officially authorized” events, the state’s role alone hardly guarantees that they will have much impact on public attitudes.⁸⁹ Rather, trials impact public attitudes, conscious or

89. There are any number of state-sponsored committee meetings, for instance, whose concrete impact on the course of people’s daily lives is far greater than that of most trials. This does not mean that these committee meetings ever attract any public attention whatsoever.

unconscious, to the extent that the proceedings become *public* events; in Germany in the early 1960s, this means to the extent that they became *press* events.

The Auschwitz trial was clearly a press event *par excellence*. Not a trial session went by without substantial coverage in the major, and often in the minor, press. Altogether, there were 183 trial sessions between December 20, 1963, and August 20, 1965. As I indicated, there were 933 newspaper stories in the four major national papers during this period.⁹⁰ That works out to an average of slightly more than one story per newspaper per trial session. My own data on the regional press, statistically less complete, though far more extensive in scope, indicates that there were at least 434 articles concerning the trial in the forty-four regional newspapers in the sample.⁹¹ While this is a much lower density of coverage than in the national press, the fact that the regional press covered the Auschwitz trial at all is highly significant, given that in this period the regional press in Germany concentrated heavily on “local stories.”⁹² There can be no doubt, therefore, that the German press did everything in its power to focus public attention on the Auschwitz trial.

And yet one can hardly say that all this press coverage produced unambiguous public support for or interest in the trial. As I have already demonstrated, there is strong evidence that the public reaction to the Auschwitz trial diverged substantially from the published reaction to that trial. It is this divergence, as much as anything, that points to the necessity of understanding the public ambivalence towards the Auschwitz trial in terms of an internal account. It is my contention that much of the public antipathy towards the Auschwitz trial was itself generated by the published reaction to the trial, and that this fact in turn is a result of the peculiar disjuncture between the legal structure of the trial and the historical character of the Holocaust. In covering the trial, the press replicated the legal narrative of individual culpability, while simultaneously translating it into a variety of politicized, journalistic morality tales, which exacerbated the ambiguities and inadequacies already intrinsic to the legal narrative. In particular, the press reports

The exercise of state authority does not *per se* attract the spotlight of publicity even in the most open and democratic societies. Needless to say, in less democratic societies, the exercise of state power is often deliberately hidden from public view.

90. See WILKE ET AL., *supra* note 6, at 53.

91. These articles all come from the clipping file maintained by the *Bundespresse- und Informationsamt* (Bonn). As it is impossible to know how exhaustive this clipping file is, these figures must be taken as a representative minimum figure for press coverage of the trial rather than as a statistically complete sample.

92. See, e.g., GÜNTER BÖDDEKER, 20 MILLIONEN TÄGLICH: WER ODER WAS BEHERRSCHT DIE DEUTSCHE PRESSE? (1967).

shared, as reports, the legal emphasis on perpetrator motivation. Adding various distinct political tropes of their own, the press accounts of the Auschwitz trial perhaps unintentionally displaced attention from the Holocaust as a historical process with continued implications for German society onto Auschwitz as an infernal, largely incomprehensible netherworld, populated by “monsters,” “demons,” or “devils.”⁹³ This was no more relevant to German lives than Dante’s Renaissance visions. In this manner, the trial itself, by focusing on individual perpetrators as autonomous—and hence monstrous—actors, helped, via the mediation of the press, to generate its own inner resistance.

The press was not merely a passive *medium* in this process; as the term “mediation” itself implies, it actively shaped public perceptions of the trial. It is of course in the nature of newspaper reporting to cover what actually happens in a given event, in this case the course of the trial. This is one of the most obvious, and significant, ways in which the trial constrained the press coverage. Nevertheless, much of the press was sensitive to the moral demands raised in covering the story, particularly given the press’s predilection for painting unambiguous portraits of good and evil.⁹⁴ But as I have tried to articulate, the trial itself, by conceptualizing guilt at the level of individual psychology, was inadequate to certain moral dimensions of the Holocaust, specifically to its objective, systematic dimension. Thus, the press found itself in a difficult situation, trying to cope with the competing demands for a faithful narrative of the trial and an adequate moral representation of the evil of Auschwitz. The trial’s inadequacy in turn helps explain the difficulties that the press had in rendering coherent, morally adequate accounts of the proceedings; there was a tendency merely to replicate what Lawrence Langer has called, with reference to the Auschwitz trial, “a futile dispute between accusers and accused.”⁹⁵ Langer decries the anecdotal nature of the testimony, the lack of a clear narrative, and, above all, the agonistics of courtroom dispute, where the denials of the accused are given equal weight to the accusations of the victims. “Little in this bizarre courtroom drama,” remarks Langer, “leads to a unified

93. The use of Manichaeic religious terminology to describe the defendants in the course of the trial was enormously widespread in the press. To give but one example, numerous headlines reported the witness Magda Szabo’s claim that the camp pharmacist Viktor Capesius had introduced himself to her with the words, “In me you are meeting the devil.” See, e.g., “*Ich bin Capesius—der Teufel*,” FRANKFURTER RUNDSCHAU, Aug. 25, 1964; *Ihr werdet den Teufel kennenlernen*, NEUES DEUTSCHLAND, Aug. 26, 1964; Bernd Naumann, “*In mir werdet ihr den Teufel kennenlernen*,” FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 25, 1964.

94. See WALTER LIPPMANN, PUBLIC OPINION 165-66 (1922).

95. LAWRENCE L. LANGER, ADMITTING THE HOLOCAUST: COLLECTED ESSAYS 89 (1995).

vision of the place we call Auschwitz.”⁹⁶ The press found itself trapped between the need to take a moral stand and the constraints of reporting on a legal procedure that undermined any such moral stance.

In confronting this dilemma, the press resorted to a variety of rhetorical and representational strategies, which fall into two major categories: critical and conventional. The critical strategies implicitly or explicitly sought to call into question aspects of the trial in order to raise moral or political claims. In other words, what was perceived to be the moral was privileged over the legal. The conventional strategies, on the other hand, tended to assume that the trial structure was adequate as it stood, or at least that it was unalterable, and hence not worth calling into question. Such approaches tried to raise moral claims within the parameters established by the trial.

The exact rhetorical strategy selected tended to depend on the prior political orientation of the newspaper in question.⁹⁷ The press coverage of the Auschwitz trial broke down into four main political camps. Obviously, these camps are to a certain extent heuristic fictions. Particularly among the mainstream press, political orientations were generally subdued, and overtly political arguments retreated behind the veil of “objective” reporting much of the time. Nonetheless, it was apparent to contemporary observers that the German press in the 1960s formed a politicized and politicizing fourth estate.⁹⁸

The four political camps in the German press were: 1) a communist camp, most prominently represented by the official GDR newspaper *Neues Deutschland*, as well as by other East German papers and such minor West German fellow-traveler publications as the Düsseldorf magazine *Begegnung mit Polen*; 2) on the other extreme, a nationalist camp, most prominently represented by the *Deutsche National-Zeitung und Soldaten-Zeitung*; 3) a left-liberal camp including the *Frankfurter Rundschau*, the *Süddeutsche Zeitung*, and *Die Zeit*, among others; 4) a conservative camp represented, for example, by the Springer newspapers (*Die Welt*, *Bild*, etc.), the business paper *Handelsblatt*, and, more ambivalently, the *Frankfurter Allgemeine Zeitung*.

96. *Id.*

97. On the political rhetoric of the Federal Republic, see WOLFGANG BERGSDORF, *HERRSCHAFT UND SPRACHE: STUDIE ZUR POLITISCHEN TERMINOLOGIE DER BUNDESREPUBLIK DEUTSCHLAND* (1981).

98. For commentary by a contemporary observer, see KARL-HERMANN FLACH, *MACHT UND ELEND DER PRESSE* (1967). For more recent general discussions of the political situation of the press in postwar Germany, see Norbert Frei, *Die Presse, in DIE GESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND* 370 (Wolfgang Benz ed., 1989) and *PORTRÄTS DER DEUTSCHEN PRESSE: POLITIK UND PROFIT* (Michael Wolf Thomas ed., 1990).

A. The Extremist Press: Cynical Legalism and Historicism

Among the four political camps, the group that had perhaps the most difficult time in finding an adequate rhetorical strategy for representing the Auschwitz trial was, somewhat surprisingly, the communist camp. The Auschwitz trial represented a challenge to the claims upon which the GDR rested much of its legitimacy. The GDR asserted its foundation in a solid antifascist consensus, which had redeemed the untainted legacy of the German working class from the perversions of the Third Reich; the GDR was thus the only legitimate German state.⁹⁹ The propagation of this myth was a significant goal for East German foreign policy, and the communists consequently put considerable propagandistic effort into it.¹⁰⁰ Pointing out the failures of the Federal Republic's efforts to deal with Nazi criminals was an important component of this effort. For example, the so-called *Braunbuch*, which was published in East Berlin, published an extensive list of all the Nazi jurists still in office in West Germany.¹⁰¹ The very fact that West Germans were putting Nazis on trial, and prominently so, thus jeopardized one of the central founding myths of the GDR. Under these circumstances, it is hardly surprising that the East Germans and their sympathizers reacted critically to the Auschwitz trial. However, since the success of this antifascist myth depended, like all myths, on its continuing status as an unquestioned background assumption, the Auschwitz trial could hardly be attacked directly. After all, what kind of antifascist would oppose putting Nazis on trial? The communist press was left, then, with a rhetorical strategy that I call cynical historicism.

Communist critics argued, accurately enough, that the Auschwitz trial paid inadequate attention to the historical context of Auschwitz. But this critique was highly cynical in that it promulgated a selective, one-sided understanding of history: namely, that the prominent chemical firm I.G. Farben was almost solely responsible for Auschwitz and the crimes committed there.¹⁰² Thus, the criticisms of

99. For a very useful comparison of the strategies of remembrance in the two Germanys, see JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANYS* (1997).

100. See CHRISTOPH KLEBMANN, *ZWEI STAATEN, EINE NATION: DEUTSCHE GESCHICHTE, 1955-1970*, at 458-62 (1988).

101. See NATIONALRAT DER NATIONALEN FRONT DES DEMOKRATISCHEN DEUTSCHLAND, *BRAUNBUCH: KRIEGS- UND NAZIVERBRECHER IN DER BUNDESREPUBLIK UND IN WESTBERLIN* (1968). See also Klaus Bästlein, "Nazi-Blutrichter als Stützen des Adenauer-Regimes": *Die DDR-Kampagnen gegen NS-Richter und -Staatsanwälte, die Reaktionen der bundesdeutschen Justiz und ihre gescheiterte "Selbstreinigung" 1957-1968*, in *DIE NORMALITÄT DES VERBRECHENS: BILANZ UND PERSPEKTIVEN DER FORSCHUNG ZU DEN NATIONALSOZIALISTISCHEN GEWALTVERBRECHEN* 408 (Helga Grabitz et al. eds., 1994).

102. See, e.g., *IG-Farben im Auschwitzprozeß erneut schwer belastet*, NEUES DEUTSCHLAND, Oct. 31, 1964; Otto Frank, *Und dennoch . . . Impressionen vom Auschwitzprozeß (III)*, NEUES DEUTSCHLAND, Apr. 7, 1964; Otto Frank, *Verhandlungsalltag:*

the Frankfurt trial centered almost exclusively on the absence of members of I.G. Farben's board of directors in the dock and the "failure" to highlight evidence incriminating German monopoly capitalism. *Neues Deutschland* proclaimed after the opening day that I.G. Farben saw in "Nazi Military Field Judge (*Nazifeldkriegsgerichtsrat*) Hofmeyer" the "proper man not to go digging in the trial for as yet unknown misdeeds by leading corporate officers."¹⁰³ The East German lawyer and counsel for civil plaintiffs, Friedrich Kaul, who was the quasi-official representative of the Politburo in the trial, took great pains to make similar points during the trial. These were presumably for the consumption of the Western media, since he could hardly have been under the illusion that they would have any real impact on the verdict.¹⁰⁴ The Committee of Antifascist Resistance Fighters in the GDR also published a document during the trial detailing the crimes of I.G. Farben, which mirrored the conclusions of the East German historian and expert witness in the trial, Jürgen Kuczynski (delivered in court on March 19, 1964, and disallowed the same afternoon at the request of a group of defense attorneys).¹⁰⁵

More generally, the communists portrayed the failure to try the directors of I.G. Farben as part of a systemic failure on the part of the West German system to overcome its own fascistic, imperialist elements. At the end of the trial, the East German Liberal Democratic Party (LDP) affiliated paper, *Der Morgen*, commented, "The Auschwitz trial is over. But the guilt of Auschwitz remains unatoned. The system that gave birth to this guilt was not

Impressionen vom Auschwitzprozeß (XIII), NEUES DEUTSCHLAND, Aug. 8, 1964; Friedrich Kaul, *Keine Weste ist so rein . . . : Die IG-Farben im Auschwitzprozeß*, NEUES DEUTSCHLAND, Apr. 23, 1965; Dr. K [presumably Friedrich Kaul], *Das Urteil von Frankfurt*, NEUES DEUTSCHLAND, Aug. 20, 1965.

103. *Prozeß gegen SS-Henker von Auschwitz*, NEUES DEUTSCHLAND, Dec. 21, 1963. The paper notes that Hofmeyer was in American custody from 1945 to 1947. *See id.*

104. See, for instance, his closing argument, published as: FRIEDRICH KAUL, SCHLUBVORTRAG DES PROF. DR. FRIEDRICH KARL KAUL, PROZESSVERTRETER DER IN DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK ANSÄSSIGEN NEBENKLÄGER IM STRAFVERFAHREN GEGEN MULKA U.A. VOR DEM SCHWURGERICHT BEIM LANDGERICHT FRANKFURT AM MAIN (Arbeitsgruppe der ehemalige Häftlinge des Konzentrationslagers Auschwitz beim Komitee der Antifaschistischen Widerstandskämpfer in der Deutschen Demokratischen Republik und dem Nationalrat der Nationalen Front des demokratischen Deutschland ed., 1965).

105. 1 I.G. FARBEN, AUSCHWITZ, MASENMORD: ÜBER DIE BLUTSCHULD DER I.G. FARBEN: DOKUMENTATION ZUM AUSCHWITZ PROZESS (Arbeitsgruppe der ehemaligen Häftlinge des Konzentrationslagers Auschwitz beim Komitee der Antifaschistischen Widerstandskämpfer in der Deutschen Demokratischen Republik und dem Nationalrat der Nationalen Front des demokratischen Deutschland ed., 1964); Jürgen Kuczynski, *Die Verflechtung von sicherheitspolizeilichen und wirtschaftlichen Interessen bei der Einrichtung und im Betrieb des KZ Auschwitz und seiner Nebenlager*, in 16 DOKUMENTATION DER ZEIT: INFORMATIONS-ARCHIV (1964). For the court's decision to disallow Kuczynski's testimony, see Kurt Ermenputsch, *Ost-Berliner Gutachter als befangen abgelehnt*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 20, 1964.

condemned. The foundations of this system remain untouched because they are also the foundations of Bonn."¹⁰⁶ Above all, according to the communists, the Auschwitz trial pointed to the continuity between the Federal Republic and the Third Reich, rather than to any serious or legitimate effort by West Germany to wrestle with the legacy of the Nazi regime.

The public effectiveness of such communist efforts to redirect attention away from the trial that actually took place to the trial that they alleged ought to be taking place is difficult to judge. These efforts demonstrably failed to have any impact on the juridical outcome of the trial itself; however, Kaul was a master at upstaging the proceedings for his own purposes, and he became something of a press *bête noir* in the West German press.¹⁰⁷ That the East Germans were thus able to make their case, not only in their own state-controlled press, but also in the West German press, is clear. It is similarly clear that East German publications like the *Braunbuch* served as strong motivators for some in the emerging Extra-Parliamentary Opposition in the Federal Republic.¹⁰⁸ What remains unclear is whether this effort was very successful in swaying domestic political opinion in favor of the Socialist Unity Party (SED) regime at home in the GDR.

The Auschwitz trial was an even more direct challenge to the political pretensions of the nationalists, who were emerging in the new *Nationaldemokratischen Partei Deutschlands* (NDP) and clustering around the *National-Zeitung*. The nationalists felt the Auschwitz trial was just one more example of what they called "National Masochism,"¹⁰⁹ and they claimed to speak for the mass of Germans who had been demoralized by a postwar history that deprived them of their proper national sentiments. As one of the NDP leaders (and former Nazi party functionary) Otto Heß put it in an interview with *Der Spiegel*: "Our program is oriented towards the current political-psychological situation of the population, with their particular desire for self-respect, poise (*Haltung*), common sense (*Besinnung*), and self-awareness."¹¹⁰ A key ingredient in this effort by the radical right to regenerate nationalist sentiments was generally to

106. Carlheinz v. Brück, *Schuld und Sühne*, DER MORGEN, Aug. 21, 1965.

107. See, e.g., Dieter Strothmann, *Das Tribunal der Advokaten. Die Starjuristen im Auschwitz-Prozeß: Kaul und Laternser*, DIE ZEIT, May 8, 1964.

108. See Michael Kohlstruck, *Das zweite Ende der Nachkriegszeit: Zur Veränderung der politischen Kultur um 1960*, in VERGANGENHEITSBEWÄLTIGUNG: MODELLE DER POLITISCHEN UND SOZIALEN INTEGRATION IN DER BUNDESDEUTSCHEN NACHKRIEGSGESCHICHTE 113 (Gary S. Schaal & Andreas Wöll eds., 1997).

109. Herbert Cysarz, *National-'Masochismus'?* DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Sept. 18, 1964.

110. KLEBMANN, *supra* note 100, at 210 (quoting Otto Heß).

relativize and trivialize Nazi crimes. For instance, the *National-Zeitung* helped sponsor the 1964 German visit of the American revisionist historian David Hogan, whose book *Der erzwungene Krieg (The Forced War)*¹¹¹ became something of a *cause-célèbre* among German nationalists.¹¹² Trials like the Auschwitz trial, by highlighting and juridically acknowledging Nazi crimes, obviously posed serious problems for such efforts.

In a certain sense, though, the nationalists had an easier time with their critique of Nazi trials than the communists, since it was not necessary for them to defend such trials, even in principle. A central element in their effort to minimize Nazi crimes was to call for a general amnesty for all “war crimes,” including those of the Allies, claiming that this was a long-established tradition at the end of a war and the only way to establish an enduring peace.¹¹³ Of course it was also a not-so-subtle form of the so-called *tu quoque* argument that claimed that alleged Allied war crimes were no different from the German crimes, and implicitly or explicitly excused them. Thus, while they pretended to favor trials for *all* war crimes, including those of the Allies (their favorite example being the Allied air war against Germany), in reality, this was simply a pretense to demand a general amnesty for *German* war crimes.

Naturally, this total opposition to what they insistently referred to as “war crimes trials” also formed a central theme in the nationalists’ coverage of the Auschwitz trial. In terms of this coverage, the nationalist camp had a slightly larger palate of rhetorical strategies than their communist counterparts. They deployed two specific strategies in reporting on this trial: trivialization and, paralleling the cynical historicism of the communists, a cynical legalism. Trivialization here meant the effort to relativize or minimize the crimes committed in Auschwitz. One of the main modes was to cast

111. DAVID L. HOGAN, *DER ERZWUNGENE KRIEG: DIE URSACHEN UND URHEBER DES 2. WELTKRIEGS* (1961). For the first English edition, published by a notorious revisionist press, see DAVID L. HOGAN, *THE FORCED WAR: WHEN PEACEFUL REVISION FAILED* (Institute for Historical Review 1989).

112. See, e.g., *Einfach Schön and Spiegel-Gespräch: David Hogan*, 20 *DER SPIEGEL* 28-48 (1964); see also H.E. Barnes, *Deutsche Kriegsschuld—eine Lüge*, *DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG*, Nov. 27, 1964.

113. See, e.g., *Deutschland braucht eine Generalamnestie: Die ungestühnten Kriegsverbrechen der Alliierten*, *DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG*, Oct. 11, 1963; *Jetzt kommen die Alliierten dran*, *DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG*, Mar. 29, 1963; Hans-Joachim Göhring, *Politische Justiz mit rechtsstaatlichem Denken nicht vereinbar: Beobachtungen und Gedanken zu den NS-Verbrecherprozessen*, *DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG*, Jan. 1, 1965. This last article is the final installment of an extensive four-part series on Nazi trials and the “rule of law” (as that term was understood by the *National-Zeitung*’s editorial staff). Taken together, these articles present as coherent a version of the nationalist critique of Nazi trials as possible. For more of this nationalist position, see the *DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG* from Nov. 13, 1964, Dec. 4, 1964, and Dec. 11, 1964.

doubt on the number of Nazi victims. Thus the *National-Zeitung* opined on more than one occasion that “the claim that more than 6 million Jews were murdered by Germans is untrue.”¹¹⁴ While stopping short of explicit Holocaust denial, in part no doubt because of the risk of legal action by the Federal Government, such efforts to minimize the number of victims, to deny the existence of any deliberate policy of genocide, and in general to deny German responsibility, were part of a deliberate strategy to eliminate the Holocaust from the German historical imagination.¹¹⁵ The nationalists were far more radical than any other group in German society in their total rejection of Nazi trials in large part because they rejected the seriousness of Nazi crimes altogether.

On the other hand, the cynical legalism of the nationalists paralleled the cynical historicism of the communists in that it made use of certain common norms—in this case the legal protections of the rule of law—to cast doubt on the validity of the trial. For example, one of the nationalists’ favorite tactics was to call into question the accuracy of witness testimony. Following the lead of many of the defense attorneys in the Auschwitz trial, the *National-Zeitung* would regularly point out contradictions that arose in the testimony of prosecution witnesses, claiming that the only point of such testimony was “to place on us Germans as a whole the shame of crimes committed by individuals.”¹¹⁶ The *National-Zeitung* claimed regularly that anti-German “hatred” alone motivated trial witnesses and hinted at dark communist conspiracies designed to influence witnesses to make untrue allegations against the defendants.¹¹⁷ Even more disturbing was the occasional effort at outright libel against witnesses, bordering on the grotesque. For instance, a semi-

114. Dr. Gerhard Frey, *Die Wahrheit über die Judenmorde: Wie lange noch soll das deutsche Volk für Auschwitz büßen*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Mar. 13, 1964.

115. Prior to the statutory reform of 1985, which was designed to make such cases easier to prosecute, Holocaust deniers could be prosecuted under § 185 StGB (“Insult”) or, from 1960, under §§ 130 or 131 StGB (“Attacks on Human Dignity” or “Inciting Race Hatred”). See Eric Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies,”* 85 MICH. L. REV. 277 (1986); Sebastian Cobler, *Das Gesetz gegen die “Auschwitz-Lüge”: Anmerkungen zu einem rechtspolitischen Ablaßhandel*, 85 KRITISCHE JUSTIZ 159-70 (1985).

116. *Im Auschwitz-Prozeß notiert: Die widersprechende Zeugenaussagen*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Apr. 24, 1964.

117. See, e.g., Regina Dahl, *So werden wir erpreßt: Die Wahrheit über den Auschwitz-Prozeß*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, July 2, 1965; *Dr. Sehn kam - sah - konspirierte und - kassierte: Der Auschwitz-Prozeß wie ihn die Bundesbürger nicht kennen*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Aug. 6, 1965; *Identifizierung eine Farce*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, June 25, 1965; *Nur Belastungszeugen durften kommen: Seltsamkeiten im Auschwitzprozeß um die polnischen Zeugen*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, June 25, 1965.

anonymous article (signed simply E.K.) in February 1964 charged that a purported witness in the Auschwitz trial, one "Herr Aranyi," had arrived in the author's office in Munich peddling "office supplies" in an effort to extort money from Germans on the basis of their feelings of guilt regarding the Nazi past.¹¹⁸ The unnamed author, aside from engaging in some egregious anti-Semitic stereotyping regarding the wealth and greed of the Jews, took the opportunity to state, as an aside, that "as long as power takes precedence over law, concepts like 'collective guilt' or 'war crimes' have no meaning for me."¹¹⁹

Similarly, the *National-Zeitung* excused any seeming contradictions or errors in the testimony of defendants or defense witnesses on the basis that after so much time, anyone's memory would become a little vague:

Therefore, when a judge says during the interrogation of a defendant, "Well, you claim to not be able to remember anymore," as if remembering were simply a matter of will-power, this shows *inter alia* not simply a lack of understanding or even a lack of good will, but also the difficulties inherent in trying to establish facts in such cases.¹²⁰

In other words, the vagaries of memory that revealed malice on the part of prosecution witness indicated innocence on the part of defendants.

Just as Kaul represented the communist position within the trial itself, the nationalists found a zealous representative in defense attorney Hans Laternser, who, like Kaul, became a favorite figure in the press reports. While not all the defense attorneys were as zealous, ruthless, or, at times, crude as Laternser, his arguments—both legal and rhetorical—were indicative of the defense strategy in the trial. In his closing argument, Laternser made the rather startling claim that the infamous "selections," where new arrivals at Auschwitz were sorted into one group to be gassed immediately and another much smaller group to be admitted to the camp and slowly worked to death, really led to the minimization of the mandated extermination.¹²¹ In other words, according to Laternser, selections equaled a form of life-saving. While this claim generated a certain

118. E.K., *Auschwitz—"Zeuge" auf Betteltour*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Feb. 7, 1964. In point of fact, no witness named Aranyi or any similar name was called in the Auschwitz trial.

119. *Id.*

120. Hans-Joachim Göhring, *Politische Justiz mit rechtsstaatlichem Denken nicht vereinbar*, DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, Dec. 11, 1964.

121. See HANS LATERNSER, DIE ANDERE SEITE IM AUSCHWITZ-PROZESS, 1963/65, at 186 (1966).

amount of outrage in the mainstream press at the time,¹²² it was cited approvingly and extensively in the nationalist press. Indeed, Laternser's closing argument, which spanned several days, was excerpted extensively in the nationalist press.¹²³

In addition to his bizarre claims regarding the selections, Laternser criticized the prosecution sharply. This kind of trial was basically impossible, he claimed, because it could not achieve the kind of precision and objectivity needed to serve justice. "A trial of this magnitude cannot be carried out with the requisite precision and conscientiousness when it is concerned with such serious charges."¹²⁴ This is a classic example of what I mean by cynical legalism. Here Laternser uses the logic of the law against itself. The law claims, ideologically perhaps, to seek the truth. Since such "truth" is difficult to ascertain in this instance, purportedly more so than in "ordinary" cases, Laternser claims that the law itself must abdicate all jurisdiction over these crimes. Thus, the ideology of truth determination inherent in continental legal procedure is here used to undermine the other great claim of the law, that of justice, by demanding acquittal for the perpetrators of the greatest crime in human history. The situation in Auschwitz was so complex, according to Laternser, that one could never get at the whole truth; therefore, it would be better not to conduct the trial at all. On this basis, he pleaded for "'letting the curtain fall' on the past."¹²⁵

In general, the most striking feature of these two extreme camps is the degree to which their rhetorical strategies in dealing with the Auschwitz trial are explicitly political. For both groups, the trial is evaluated not so much in its own terms, or in terms of the demands of law itself, as through the prism of extra-legal political interests. As I will show, such political interests are also present in the two more "moderate" camps, but much less explicitly so. The other striking

122. See, e.g., *Grundsatzkritik am Auschwitz-Prozeß: "Ein Verfahren dieses Umfangs ist nicht mit der nötigen Genauigkeit durchführbar,"* SÜDDEUTSCHE ZEITUNG, June 11, 1965; Bernd Naumann, "Der Auschwitz-Prozeß überschreitet die menschlichen Fähigkeiten." *Das Plädoyer des Verteidigers Dr. Laternser: Die Selkturen verkleinerten das Verbrechen,* FRANKFURTER ALLGEMEINE ZEITUNG, June 11, 1965; Uwe-Jens Petersen, *Laternser verlangt "Schlußstrich,"* FRANKFURTER RUNDSCHAU, June 11, 1965.

123. The *National-Zeitung* published extensive excerpts from Laternser's closing argument over the course of two weeks. See "Ein gerechtes Urteil einfach nicht möglich": *Aufsehenerregends Plädoyer von Rechtsanwalt Dr. Laternser im Auschwitz-Prozeß,* DEUTSCHE NATIONAL-ZEITUNG UND SOLDATEN-ZEITUNG, June 18, 1965; *Identifizierung eine Farce,* *supra* note 117; *Nur Belastungszeugen durften kommen: Seltsamkeiten im Auschwitzprozeß um die polnischen Zeugen,* *supra* note 117. In addition, see the coverage in the smaller right-wing paper, the *Deutsche Nachrichten: Dr. Laternser im Gegenangriff: II. Präparierte Sowjetzeugen/Nürnberger Unrechtsprozeß,* DEUTSCHE NACHRICHTEN, June 25, 1965; *Dr. Laternser in Gegenangriff: III. Die Nürnberger Unrechtsstatute ist im Auschwitz-Prozeß nicht verwendbar,* DEUTSCHE NACHRICHTEN, July 2, 1965.

124. *Grundsatzkritik am Auschwitz-Prozeß,* *supra* note 122.

125. Petersen, *supra* note 122.

feature of the extreme positions on the Auschwitz trial is that they confronted the paradoxes of dealing with Nazi crimes in a juridical context largely by rejecting the law entirely. Thus, if the law is, as I have argued, incapable of grasping the motivational interchangeability of perpetrators, the communists and the nationalists alike saw this incapacity as grounds for rejecting the law's claim to judge such perpetrators at all.

This is the real point of both cynical historicism and cynical legalism. The former claims that "bourgeois" law, itself a tool of monopoly capitalism, will never be able to get at the historical reality of Auschwitz. What is required is an "anti-fascist" justice that has freed itself from the mere formalism of the bourgeois rule of law so that it can finally and truly overcome the burden of the Nazi past. The communist position recognizes that the motives of the individual perpetrators were not the "cause" of Auschwitz, but rather than grasping this point in its true complexity, it merely substitutes the greed of I.G. Farben as the monolithic (and, according to the East Germans, still extant) factor responsible for Nazism, the Holocaust, and, by extension, the "Western Imperialism" of the Federal Republic. Thus, a direct, if polemical, line is drawn from Auschwitz to Adenauer. The only adequate way to address such a problem, according to the communist position, would be through the radical socialist transformation of society, à la the GDR.

Cynical legalism equally rejects the law as a means for dealing with Auschwitz, but it does so in the name of law itself. Like cynical historicism, it also recognizes the diversity of perpetrator motives, and indeed, it thrives on such diversity. In addition, it emphasizes the difficulties in weighing evidence, assessing testimonial accuracy, and so forth, concluding that the legal "rights" of the accused demand his release from judgment altogether. The cynicism of this position can hardly be doubted, given the manifest one-sidedness of the nationalists' legalism. It takes the exculpatory tendencies of the law beyond their logical extreme, to the point where the perpetrators are presumed "innocent" in the face of all evidence, and the revitalization of a Nationalist Germany could proceed without having to answer the terrible questions posed by Auschwitz. Thus for both the extreme camps, the limitations of the law in dealing with the historical reality of the Holocaust provide an excuse (and it is just an excuse) to reject the law altogether in the name of some other, "higher" political goal.

B. The Mainstream Press: Didactic Moralism and the Rule of Law

In some ways, precisely because the German political mainstream

supported the trial, it faced a much more serious challenge in reacting to it. Both liberals and conservatives shared two fundamental political presuppositions that profoundly influenced their reaction to the trial. First, both agreed that the *Rechtsstaat*, the rule of law, was the only guarantor of a free society. Second, both groups formed part of the foundational anti-Nazi consensus of the Federal Republic (anti-Nazi here meaning *not* opposition to the social reintegration of individual Nazis but only to public expression of openly Nazi sentiments).¹²⁶ Norbert Frei has argued that the early history of the Federal Republic can be understood in terms of two parallel practices, a reintegration of most former Nazis into society, on the one hand, and a “political and judicial drawing of boundaries vis-à-vis the ideological remnants of National Socialism” on the other.¹²⁷ I argue that, in the form of Nazi trials, this process of boundary-drawing continued into the mid-1960s. By identifying and prosecuting the “worst” Nazi perpetrators, the Federal Republic indicated the boundaries of what was considered politically and morally acceptable without overly jeopardizing the political loyalty of millions of former Nazis by placing them at risk of either judicial prosecution or symbolic condemnation. Taken together, the defense of the rule of law and the delimitation of an anti-Nazi consensus defined the political agenda of the West German mainstream with regard to Nazi trials.

There is no inherent contradiction between these two aspects of the political mainstream, *Rechtsstaatlichkeit* and the delimitation of anti-Nazism via prosecution of (some) Nazi criminals. Indeed, it might seem as if the rule of law demanded the prosecution of more Nazis than would have been politically comfortable, given the general commitment to the reintegration of former Nazis. In practice, however, the defense of the rule of law tended to take the form of a narrow legalism that made the prosecution of Nazi crimes more difficult. In particular, the insistence that the prohibition on ex post facto laws precluded the application of statutes for crimes against humanity to Nazi crimes meant that only “ordinary” criminal

126. There is an emerging literature that seeks to defend the process of *Vergangenheitsbewältigung* (mastering the past) in the Federal Republic quite generally. It argues that the oft-noted “silence” regarding the Nazi past in the early postwar period was an essential prerequisite for founding a stable, democratic society. One of the first and most influential proponents of this position is Hermann Lübbe. See Hermann Lübbe, *Der Nationalsozialismus im deutschen Nachkriegsbewußtsein*, 236 *HISTORISCHE ZEITSCHRIFT* 579-99 (1983); see also MANFRED KITTEL, *DIE LEGENDE VON DER “ZWEITEN SCHULD”*: VERGANGENHEITSBEWÄLTIGUNG IN DER ÄRA ADENAUER (1993); Christa Hoffmann, *Die justitielle “Vergangenheitsbewältigung” in der Bundesrepublik Deutschland: Tatsachen und Legenden*, in *DIE SCHATTEN DER VERGANGENHEIT: IMPULSE ZUR HISTORISIERUNG DES NATIONALSOZIALISMUS* (Uwe Backes et al. eds., 1992).

127. FREI, *supra* note 20, at 14.

law could be used, with all the attendant jurisprudential problems.

The challenge for the broad anti-Nazi middle, then, was to find a way to reconcile these two fundamental positions: the defense of the *Rechtsstaat* and the prosecution of Nazi criminals. This challenge manifested itself in many respects, but none more significant, I argue, than in seeking an adequate vocabulary for representing Nazi trials. Peter Graf Kielmansegg has argued that this challenge was resolved by means of a public/private split.¹²⁸ There was an official, public rejection of Nazism, most prominently in Nazi trials, which, through its “protective abstraction,” allowed German citizens to privately repress all memory of the Third Reich. In effect, the government did the work of *Vergangenheitsbewältigung* (mastering the past) for its citizens.

Such a public/private split would to some extent explain what I have called the paradoxical character of the public reaction to the Auschwitz trial—widespread press interest and considerable disinterest or hostility among the population at large. But it is not fully adequate. For one thing, there was nothing abstract about the Auschwitz trial. On the contrary, the trial suffered from a surfeit of specificity, a mass of anecdotal details aimed at illuminating the individual activity of specific defendants on precise occasions against identifiable victims. Such testimony could hardly afford the public an opportunity to hide beneath a comforting blanket of generalization. Contrary to Kielmansegg’s assertion, it is precisely the abstract, “public” side of the Holocaust that is ultimately repressed in trials like the Auschwitz trial in favor of an individuated, “private” vision of the solitary Nazi criminal. In addition, the trial clearly provided at least an ephemeral opportunity for private reflection on the horrors of Nazism, as well as public condemnation. The real question, as Kuby and others argued at the time, was whether people would take advantage of this opportunity. So, Kielmansegg’s claim that Nazi trials fell solidly within an official, abstracting version of Holocaust remembrance that functioned as an alibi for private citizens is only partially accurate at best.

I would argue instead that for the West German political mainstream, the effort to reconcile the competing demands of the rule of law and the delimitation of anti-Nazi boundaries found its most serious challenge in trials like the Auschwitz trial, and never satisfactorily resolved the dilemma. In other words, the Auschwitz trial and others like it represent crucial moments in the creation and delimitation of West German democracy. The central difference

128. See PETER GRAF KIELMANSEGG, *LANGE SCHATTEN: VOM UMGANG DER DEUTSCHEN MIT DER NATIONALSOZIALISTISCHEN VERGANGENHEIT* 67-72 (1989).

within the political mainstream, then, revolves not just around whether one adopted critical or conventional rhetorical strategies in confronting the Auschwitz trial, because the trial found both critics and supporters across the mainstream spectrum, even if liberals did tend to be slightly more critical than conservatives. Rather, the difference centers on which aspect of the parallel postwar consensus each group emphasized. As a rule, the liberals (in this context meaning particularly the German Social Democratic Party (SPD)) were more interested in delimiting anti-Nazism, while the conservatives (and here I would definitely include the Free Democratic Party (FDP), as well as the Christian Democratic Union/Christian Social Union (CDU/CSU)) emphasized the inviolability of the *Rechtsstaat*. These emphases, more than anything, determined the rhetorical strategies adopted in confronting the motivational interchangeability of Nazi perpetrators.¹²⁹

The liberals and the conservatives each had their own specific rhetorical approach to dealing with the trial. The liberals adopted a critical strategy that might be called “didactic moralism.” This method tended to emphasize the moral lessons of the trial over the judicial outcome, without necessarily calling the judicial proceedings as such into question. As a consequence, it tended to share with the law an obsession with the motives of the perpetrators, while recasting these motives at a social rather than an individual level. For instance, the *Tagesspiegel* noted that the motives of the perpetrators were neither sadistic nor perverse but rather consisted primarily of an excessive sense of duty. As they drove the victims into the gas chambers, the perpetrators “‘bravely’ suppressed those feelings of pity which were not, they plausibly insist, unknown to them.”¹³⁰ Such an emphasis on the sense of duty as the principle motive among the perpetrators was quite widespread in the mainstream press. Often enough it was posited as an archetypically German characteristic, though generally without any explanation beyond the stereotypical. The emphasis on a sense of duty was an effort to escape the paradoxes of subjective motivation. As the *Hamburger Abendecho* put it at the end of the trial:

Just as there can be no mitigating understanding for the guilty parties of Auschwitz, there can never be a definitive explanation for their former willingness to commit crimes of such

129. The boundaries between these two camps were by no means clear or impermeable. Indeed, it is not uncommon to find a mix of rhetorical strategies deployed by different authors writing for the same paper, and sometimes even within the reports by the same author writing at different times or, indeed, within the same report. The rhetorical strategies I identify in this Article are thus intended as ideal types, and not as rigid categories.

130. *Der Auschwitz Trial*, DER TAGESSPIEGEL, Dec. 20, 1963.

magnitude. Nothing more than an anonymous order converted the innocent into mass murderers. And nothing but a compliant obedience gave the impetus for their unparalleled crimes.¹³¹

The problem is that even such a non-explanatory explanation still assumes a direct causal link between motive and act and cannot account for the fact that not all of the perpetrators necessarily had such a developed sense of obedience.

In the face of this dilemma, another dimension of the strategy of didactic moralism was simply to sidestep the issue of perpetrator motivation as best as possible by emphasizing that the accused themselves were less significant than the moral and historical lessons of the trial. The *Frankfurter Neue Presse* noted:

The higher meaning of this trial will be to not identify the events of Auschwitz with the accused, to not rest content with the legal verdict, as if, finally after months of trial (which does make certain amends) the chapter was closed because everything conceivable and possible had been done to satisfy the demands of justice.¹³²

The fate of the accused is here seen as unimportant compared with the didactic purpose of the trial. The trial must serve as a memorial for future generations, teaching them to respect others and to resist demagoguery. Thus, didactic moralism tried to avoid the problem of motivational interchangeability, first, by emphasizing the social character of perpetrator motives, and, second, by downplaying the significance of the perpetrators themselves in favor of broad political lessons. In the end, this particular strategy ends up duplicating the very abstraction that Kielmansegg blamed for the German public's failure to privately confront the Holocaust. One can see that the "lessons" the *Frankfurter Neue Presse* draws from the Auschwitz trial are extremely vague, to the point of being little more than platitudes. The *Frankfurter Neue Presse* here demonstrated one mechanism through which press coverage helped generate the "inner resistance" to the trial it should have been breaking down.

For their part, the conservatives also adopted a conventional rhetorical strategy, one that suited their political orientation toward order, stability, and tradition.¹³³ They repeatedly emphasized the inviolate nature of the *Rechtsstaat*. This strategy took two principle forms. First, it involved an explicit defense of the demands of the rule of law against the impositions of the public sphere. For example,

131. Erwin Fischer, *Auschwitz*, HAMBURGER ABENDECHO, May 22, 1965.

132. Friedrich Herzog, *Vor Gericht*, FRANKFURTER NEUE PRESSE, Dec. 20, 1963.

133. See JERRY Z. MULLER, THE OTHER GOD THAT FAILED: HANS FREYER AND THE DERADICALIZATION OF GERMAN CONSERVATISM 330-39 (1987).

the *Frankfurter Allgemeine Zeitung* remarked in a pretrial commentary that, while the scope and duration of the trial alone guaranteed that it would be more than a “normal” criminal trial, “extraordinary precautions” should be taken to ensure that the trial did not turn into a “stage,” “because that would not serve the working through of this piece of the National Socialist past.”¹³⁴ The article praised the court’s decision to proceed with the trial before Christmas, despite the fact that the intended location in the Gallus Haus, which would have had more room for spectators, was not yet available. While the decision might be disadvantageous for the public, it was only fair to the accused, many of whom had already been in custody for too long and deserved a speedy trial. “This [decision] is to be praised, no matter how justified efforts on behalf of the expected public interest might be. Nonetheless, the criminal proceedings alone stand in the foreground. Everything must be staked on the speediest possible completion of the trial.”¹³⁵

Above all, the conservatives argued that the trial had to be protected from any contamination by “political” considerations, such as those that marred the Nuremberg trials.¹³⁶ That such apoliticism was itself highly political was never acknowledged. Therefore, the denunciation of the “politicization” of the trial by representatives of the two extreme camps formed the other defense of the *Rechtsstaat* in the conservative press. For example, the CDU-oriented *Ruhr-Nachrichten*, reporting on the opening day of the trial, noted:

The 120 domestic and foreign journalists sense what is in the air this morning, as they crowd into the Frankfurt city council chambers in the venerable “Römer” for the opening of the trial, intending to rip aside the “veil of the past.” It is a short, thickset man who stands in the concentrated fire of the flash-bulbs long before the court convenes. The first target of the camera men was not the large posters showing maps of the camp or the model of the crematoria. Instead they concentrated on this little man. His name? Professor Dr. F.K. Kaul, star attorney for the East Zone.¹³⁷

The article went on to note that only the nationalist defense attorney Hans Laternser seemed unsurprised by Kaul’s presence, thus establishing a theme that would become a leitmotif in the press coverage: the on-going battle between Kaul and Laternser to

134. *Der Auschwitz-Verfahren*, FRANKFURTER ALLGEMEINE ZEITUNG, Oct. 16, 1963.

135. *Id.*

136. See Rainer Klose, *Bestraft wird lediglich die Tat*, MÜNCHNER MERKUR, Aug. 20, 1965.

137. Max Karl Freiden, *Einer der 21 Angeklagten im Auschwitz Trial ist noch Stolz auf seine niedrige SS-Nummer*, RUHR-NACHRICHTEN, Dec. 21, 1963.

appropriate the public agenda of the trial. (This battle, by the way, produced far more smoke than fire, since neither of them was particularly successful in their efforts). The *Ruhr-Nachrichten* continued by describing in some detail the initial skirmish between Kaul and Laternser, concerning the former's request to be admitted as counsel for some civil plaintiffs in the trial.¹³⁸ "Thus the trial was swept up from the very start in a highly political current."¹³⁹ The article concluded by noting that Kaul was again, as he was in the Eichmann trial, less a representative of Auschwitz survivors than of the GDR.¹⁴⁰ The assertion that Kaul did not belong in the courtroom hardly needed to be added.

The conservative defense of the *Rechtsstaat* for its own sake thus sought to cloak itself in the very mantle of political neutrality and objectivity that is a defining feature of the *Rechtsstaat*. In other words, the conservatives claimed that to defend the rule of law is no more political than the rule of law itself. Like the penal code, this rhetorical strategy tended to unravel in the face of the motivational interchangeability of perpetrators in the Holocaust. It propagated an emphasis on individual motivation, which I have argued distorted the historical image of the Holocaust. One can take the following witness statement, reported in the *Frankfurter Allgemeine Zeitung*, as indicative of this focus: "Klehr [one of the defendants] could kill a few hundred or thousand people just like a cobbler ripping a decrepit sole from a shoe. He stalked and killed for the sheer joy of hunting (*aus Jagdleidenschaft*), going from infirmary ward to infirmary ward in the process."¹⁴¹

Furthermore, by denigrating the public function of the trial, this focus on *Rechtsstaatlichkeit* contributed to an atmosphere of public uninvolvement. If the trial was completely "ordinary," then there was no reason why anyone ought to pay more attention to it than they would to any other trial.

In addition to these two more or less exclusive strategies, the liberals and the conservatives shared two further rhetorical strategies: atrocity stories and the use of irony/sarcasm. The former falls into the general category I am calling conventional, while the latter is critical. These were two of the most common rhetorical strategies in the press coverage of the Auschwitz trial, at least in part

138. Laternser claimed that Kaul was not allowed to practice law in the Federal Republic because he had been banned by the government from West Berlin. The court rejected Laternser's motion but also declined to admit Kaul as a civil plaintiff until he provided the right paperwork (which he subsequently did). *See id.*

139. *Id.*

140. *See id.*

141. Bernd Naumann, "Er hat getötet aus Jagdleidenschaft": Klehr der Teilnahme bei Vergasungen beschuldigt, *FRANKFURTER ALLGEMEINE ZEITUNG*, Sept. 19, 1964.

because they were deployed in the “objective” reports, rather than in editorials, where the exclusive strategies (didactic moralism and *Rechtsstaatlichkeit*) were more common. Indeed, atrocity stories tended to dominate the press coverage of the eyewitness testimony in the trial simply because the eyewitness testimony was full of atrocities. Yet these two strategies were also the most directly informed by the effort to define an anti-Nazi consensus while defending the principles of the *Rechtsstaat*. Consequently, they were quite clearly responses to the limits of law in dealing with the Final Solution, as defined by the problem of perpetrator motivation in Auschwitz.

I have already discussed Martin Walser’s critique of the prevalence of atrocity stories in the press coverage of the Auschwitz trial, a critique that itself exemplified the didactic moralism of the liberal reaction to the trial.¹⁴² Walser, however, missed the way in which such atrocity stories were linked with the problem of perpetrator motivation. To give but one example: On May 15, 1964, the witness Josef Kral described his torture by the defendant Wilhelm Boger of the infamous *Politische Abteilung* (the camp Gestapo). Kurt Ernenputsch reported on Kral’s testimony for the *Frankfurter Allgemeine Zeitung*. After being taken to the *Politische Abteilung* in Block 11, Kral was forced by Boger to eat large quantities of salted herring. Like all Auschwitz inmates, Kral was nearly at the point of starvation and his depleted body was incapable of digesting the herring, and as a result he vomited. Boger then made Kral eat his own vomit. After that Boger, together with several other SS men, began to beat Kral. After he lost consciousness, Kral reported, he was apparently dragged out into the hallway where he awoke some time later:

I tried to stand up but I couldn’t. Boger kicked me a few times. After a while I tried to stand up. As I managed to reach the wall, blood poured off me; on my clothes, the wall, the floor, everywhere was blood. I felt that it hurt. My head was broken, my jaw, my nose. They must have beaten me while I was unconscious.¹⁴³

The article ends with the following exchange between presiding judge Hofmeyer and Boger:

“Mr. Boger! Do you believe that this statement by the witness was dishonest?”

142. See *supra* text accompanying notes 8-10.

143. Kurt Ernenputsch, *Versalzene Heringe als Dreingabe zur Folter*, FRANKFURTER ALLGEMEINE ZEITUNG, May 16, 1964.

“Distorted and not completely accurate in all respects.”¹⁴⁴

What is most striking about this story, and countless others like it, is the visceral reaction it provokes in the reader, a sense of horror and revulsion that is palpable and overpowering. And it is the very strength of the emotional reaction that links it to the problem of perpetrator motivation. Few people could encounter this story without immediately asking themselves what kind of person could do such things. What motivates a person to do this to another? This, of course, was precisely the question that the court itself was asking as well. Did Boger do it on the basis of his own will or his superiors'? Were these actions those of a perpetrator or an accomplice? And here we find ourselves on troubling ground. In asking why Wilhelm Boger, as an individual agent, did these terrible, almost unimaginable things, several questions are forgotten: Why did his government order him to do so, why did the majority of Germans support such a government, what social structures disabled his ethical sensibilities in order to enable such behavior? Such stories are so striking in their emotional impact that they also threaten to drive from consciousness the fact that the central purpose of Auschwitz was more horrifying than any individual torture, though less viscerally spectacular—to murder every last Jewish man, woman, and child in Europe. The central purpose of Auschwitz was not torture; it was genocide. Torture was only a means to that end. But the description of torture makes for such arresting reading that it threatens to disguise this fact.

The emphasis on motivation, here implicit rather than explicit, is also problematic because it unwittingly lends credibility to the denials of the accused. The sheer brutality of Boger's actions leaves little doubt as to his sadistic character, making him in fact untypical of many Nazi perpetrators. It also radically alienates him from most of the German public, who could hardly imagine themselves acting the same way. The accused Dr. Franz Lucas, who was able to produce numerous witnesses to testify to his humane and decent treatment of inmates in Auschwitz, is in this regard far more typical. Lucas was charged with “selecting on the ramp,” that is, with separating out those among the new arrivals who appeared capable of work, leaving those who were too old, ill, or feeble to work, or who simply happened to be women with children, to be gassed immediately. The process of selecting was, therefore, one of the central activities in the genocidal killing process. Because of the number of good character witnesses testifying on his behalf, Lucas

144. *Id.*

was able to deny any participation in selections for much of the trial. It was only after his fellow defendant Stefan Baretzki broke ranks (in one of the few such instances during the trial) and incriminated him that Lucas admitted to selecting “three or four times.”¹⁴⁵ In the end, Lucas was convicted as an accomplice and sentenced to three and a half years.¹⁴⁶ Boger, by contrast, was convicted as a perpetrator of *Mord* for his role in executions and tortures resulting in death, receiving 114 concurrent life sentences. For his own role as an accomplice to selections, Boger received two concurrent sentences of four years and three and a half years.¹⁴⁷

What the two cases reveal, above all, is that the efficient functioning of the apparatus of murder in Auschwitz did not centrally depend on sadists like Boger. It could function equally well with the help of “good Germans” like Lucas. But the striking disparity in their sentences, unavoidable given the German law of perpetratorship, obscures this fact. Boger’s sadism is privileged, both by the court and the press, over Lucas’s reluctant compliance, even though both were functionally interchangeable for the killing apparatus. The very plausibility of Lucas’s initial denials and, even more, his complete denial of any criminal motives, would enable Germans to doubt the truth of other, more “objective” charges against the accused. If Lucas was truly so decent, how could Boger really be that bad? The defense was certainly aware of this fact and tried to use it to their advantage.¹⁴⁸ This is one central mechanism by which the law’s emphasis on perpetrator motivation worked its way into the press coverage and then helped to generate, or at least sustain, the very “inner resistance” that such trials should have helped overcome. If what matters is a defendant’s motives and his status as a “good German,” then it makes very little sense to put a man like Lucas on trial, no matter what his objective actions may

145. Bernd Naumann, *Überraschendes Geständnis im Auschwitz-Prozeß. Dr. Lucas: Dreibus viermal an Selektionen teilgenommen—Der Angeklagte Baretzki: Er hat die ganze Ungarn-Aktion mitgemacht*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 12, 1965.

146. See 21 JUSTIZ UND NS-VERBRECHEN, *supra* note 54, at 619-20. Lucas’s conviction was subsequently overturned on appeal, the only verdict to be changed in the appeals process.

147. See *id.* at 485-92.

148. For instance, defense attorney Steinacker, in his closing arguments for the defendants Dylewski and Broad, argued that merely being present on the ramp during a selection was not the same thing as having “actively participated” in that selection. A defendant could only be convicted, he argued, if a “causal connection” could be proven between the defendant’s actions and a given criminal outcome. See Steinacker Plädoyer, June 11 & 14, 1965, Fritz Bauer Institut, Sammlung Auschwitz-Prozeß, FAP 1/V4, 247-48. Clearly, this argument relies in part on the precedent set by Lucas in claiming, first, not to have selected, and second, to have done so without the requisite criminal motives. As it happened, neither Dylewski nor Broad had the supporting testimony to render their denials of “active participation” fully plausible, but nonetheless, the defense tried to cast many of the defendants accused of selecting in the same light as Lucas.

have been.

The second common rhetorical strategy in the mainstream press was the use of irony. Irony functioned critically, addressing some of the key problems posed by the trial structure itself. One of the problems lies in the agonistic structure of trials, which always grants defendants a certain credibility. The legal principle *in dubio pro reo* means that the accused's protestations of innocence, no matter how implausible, must be treated seriously at the juridical level. In the previously cited exchange between Hofmeyer and Boger, for instance, the judge stopped short of calling Boger a liar, although he very likely was one.¹⁴⁹ To maintain the rule of law, the evasions, omissions, and outright lies by the defendants in the Auschwitz trial had to be accorded the same juridical weight as any other testimony. But in the face of the enormity of the crimes on trial, this legal fair play strikes a dissonant chord. The question arises as to how to respect both the legal right of the defendants to a presumption of innocence and the gravity of the crimes on trial. Judge Hofmeyer, as the lead investigator in the trial, confronted this dilemma most acutely.

The same problem also infiltrated the press coverage of the trial. How to report, for instance, the initial claim by lead defendant Robert Mulka that at the time of his posting he "didn't know what Auschwitz was"?¹⁵⁰ Many reporters, certainly the more sensitive ones, were well aware of the infectious character of the defendant's denials, of the risk that, by dint of sheer repetition, some readers might be inclined to actually believe the accused. However, the ethic of "objective" reporting generally precluded them from explicitly calling the defendants liars. Interestingly enough, many reporters adopted the same strategy in confronting this dilemma that Hofmeyer himself used, namely, a tone of skeptical irony vis-à-vis the accused. Terms like "supposedly" make a frequent appearance, as did the subjunctive mood.

None of the trial reporters was more masterful at this strategy than the *Frankfurter Allgemeine's* Bernd Naumann in his justly famous coverage of the trial.¹⁵¹ One of his favorite techniques was to

149. See *supra* text accompanying note 144.

150. Hans-Jürgen Hoyer, "Ich wußte nicht, was Auschwitz ist," FRANKFURTER RUNDSCHAU, Dec. 21, 1963.

151. A somewhat abridged version of these reports was initially published as a book in 1965, shortly after the conclusion of the trial. See BERND NAUMANN, AUSCHWITZ: BERICHT ÜBER DIE STRAFSACHE GEGEN MULKA UND ANDERE VOR DEM SCHWURGERICHT FRANKFURT (Athenäum 1965). An English translation of this edition, further abridged and with an interesting forward by Hannah Arendt, was published the following year. See BERND NAUMANN, AUSCHWITZ: A REPORT ON THE PROCEEDINGS AGAINST ROBERT KARL LUDWIG MULKA AND OTHERS BEFORE THE COURT AT FRANKFURT (Jean Steinberg trans., Frederick A. Praeger 1966). Finally, a greatly abridged paperback version was published in

extensively quote one of the defendants before stepping temporarily out of his guise as an objective reporter to comment almost sarcastically on the plausibility of these statements, but without ever explicitly refuting them. Take for example Naumann's reaction to Mulka's claim never to have set foot inside Auschwitz itself. Mulka said that he could only describe what he had seen from his office window in the camp headquarters, itself outside the camp proper. Mulka drew schematics of what he had seen for the court's benefit. Naumann writes: "Mulka had drawn everything: 'I have done this according to my best recollection, in order to give the High Court an overview.' Overview of what? How the camp looked is well known; how people lived and died there must also be largely known. But what were the activities of this defendant, the deputy camp commander?"¹⁵²

This example reveals both the strengths and weaknesses of irony as a rhetorical strategy. On the one hand, it leaves little doubt as to Mulka's fundamental dishonesty about his activities in Auschwitz, without breaking with the tenets of either judicial or journalistic fair play, nor does it leave the reader in the dark as to the moral dimension of the charges (through the reference to life and death in the camp). On the other hand, due to the limitations of the source material, it cannot escape an emphasis on individual action and, by implication, motivation. The *real question* on Naumann's account is the personal activity of Robert Mulka, as an individual. This, of course, was the real question in the court's mind as well. But such a journalistic approach means that the activities of the accused become not just the most important legal question but almost the only question to be posed at all. Despite its skeptical tone, journalistic irony does little more than replicate the juridical concern with individual guilt. Furthermore, this example is revealing in what it assumes: namely, that knowledge about the nature of life and death in Auschwitz is widespread and that the only real issue is Mulka's personal role in the process. But in light of the polling data cited previously, it seems doubtful that such knowledge was really so widely known or believed. Indeed, it might reasonably be assumed that one purpose of the trial was to overcome the public's ignorance. That was certainly what the didactic moralists thought.

1968. See BERND NAUMANN, AUSCHWITZ: BERICHT ÜBER DIE STRAFSACHE GEGEN MULKA UND ANDERE VOR DEM SCHWURGERICHT FRANKFURT (Fischer Bücherei 1968). Since all three published versions were abridged, I will continue to quote here from the original newspapers.

152. Bernd Naumann, *Der ehemalige KZ-Adjutant: Für Häftlinge nicht verantwortlich*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 10, 1964.

CONCLUSION

How do we account for the paradoxical nature of the public reaction to the Auschwitz trial, for the fundamental ambivalence evinced by much of the German public in the face of the trial's considerable publicity? I have pointed to several factors that help to account for the trial's unpopularity. The first of these is that the trial encountered a degree of pre-existing hostility on the part of Germans who were unable or unwilling to confront their past. To the extent that the public in 1965 had an agenda for dealing with Nazism, it was largely to forget about it. To their credit, certain judicial actors (Hessian Attorney General Fritz Bauer, above all) did not allow that to happen. But, in imposing an agenda on the public, the law did so in ways that repressed certain vital historical and psychological "truths" about the Holocaust, so that they continued to resurface as the "return of the repressed," rather than being integrated consciously into the political culture of the Federal Republic. More recently, the controversies surrounding the recent exhibition on the crimes of the Wehrmacht are a clear reenactment of this dynamic.¹⁵³ At the same time, I have also tried to point out some of the inadequacies of an account that relies solely on pre-existing hostility or resistance to the trial.

More important, I have argued, is an internal account of the public ambivalence towards the Auschwitz trial, an explanation of how certain aspects of the trial itself, and the rhetorical strategies adopted by the press in reaction to it, not only exacerbated existing hostility, but actually helped to generate an "inner resistance" themselves. The trial's own narrative of individual, subjectively-defined guilt effaced much of the objective, systematic character of the Holocaust, leaving in its place a series of isolated, decontextualized morality tales. The press took up this theme, in part because it was simply what happened at the trial, in part because it was congenial to the political needs of the mainstream press. If the extremist press of both the left and the right simply rejected the Auschwitz trial outright (making clear their contribution to an atmosphere of hostility), the mainstream press danced carefully around the issues of motivation and guilt, atrocity and genocide. In trying to square the political

153. This traveling exhibit, organized by the Hamburg Institut für Sozialforschung, showed documents and photographs pertaining to war crimes and Holocaust-related crimes committed by the German regular army. The exhibit did not really make any startling revelations that had not been long known in the historiography of the German military. Yet when it reached Munich, the exhibit provoked a storm of protest, mainly from veterans' organizations, who felt that their honor had been impugned, and from young German nationalists, who rejected the culture of remembrance outright. See Rudolf Augstein, *Anschlag auf die "Ehre" des deutschen Soldaten?*, 53 DER SPIEGEL 92 (1997); Theo Sommer, *Münchner Lektionen: Die Rolle der Wehrmacht läßt sich nicht beschönigen*, DIE ZEIT, Feb. 28, 1997.

circle of punishing some Nazis under the rule of law while also reintegrating the remainder into West German society in the context of an anti-Nazi ideological consensus, the mainstream press alienated at least as many readers from Nazi trials as it fascinated. Indeed, their tales of horror and misery might have both alienated and enthralled the same readers.

The liberal press, through a strategy of didactic moralism, sought to generalize the lessons of the Auschwitz trial, but in ways that abstracted the crimes from their context, effectively decoupling them from the individual defendants, as well as from postwar Germans in general. The conservative press, by clinging to a narrow understanding of the rule of law, inverted that paradigm. They denigrated the public dimension of the trial and the Holocaust itself, and thereby provided their audience with no reason to pay any more attention to this trial than to any other “ordinary” criminal case. In addition, both camps deployed rhetorical strategies—specifically atrocity stories and irony—that further intensified the focus on individual defendants and their subjective motivations.

These press representations had three effects. First, the focus on individual motives gave unintended credibility to those defendants like Lucas who particularly denied any criminal motives and therefore most resembled the self-image of many Germans, as themselves victims of Hitler. Obviously, it is difficult to support a trial where the defendants are themselves “victims.” Second, the trial’s and the media’s focus on individual perpetrator motives also tended to privilege atrocity over genocide—in large part because torturers were considered perpetrators, whereas those who selected victims for the gas chambers were merely accomplices. Because most Germans were not—and certainly did not perceive themselves to be—sadistic torturers, Walser was correct to argue that “shrill headlines” could only have a limited, temporary impact on the public imagination. Third, and more importantly, by focusing not just on the inhumane but on the almost literally inhuman aspects of Auschwitz, this approach rendered it “infernal” in the strict sense, a living hell that had no connection to human experience or society. No court can plausibly claim the capacity to judge hell, and no audience can reasonably be expected to comprehend, much less applaud, such an effort.

Could the press or the trial have done more? Given the contexts of German penal law and the political culture of postwar Germany, it is hard to see how they could have. A more adequate legal framework for dealing with state-organized mass murder would have required a fundamental reimagining of the doctrine of individual responsibility in collective contexts, not just in terms of the German legal system

but even, arguably, in terms of the chief alternative to “ordinary” criminal prosecutions of Nazi crimes, the Nuremberg precedent.¹⁵⁴ The difficulties involved in such a reimagining can be inferred from the fact that even jurists such as Fritz Bauer or Claus Roxin, who perceived the limitations of the German legal system, were unable to completely escape its subjectivizing categories. As for the press, not only were they constrained to cover the trial as it actually took place and therefore to incorporate many of its internal ambiguities into their reports, but their own political commitments and antipathies also made it unlikely that they could have constructed a more coherent, historically and morally adequate account of Auschwitz and the Holocaust. The mainstream press’s commitment to the rule of existing law and to an anti-Nazi consensus not especially opposed to particular Nazis prevented them from seeing beyond individuals to the social context that enabled and mandated their crimes. And to the extent that in some cases they did see beyond individual perpetrators, it was in such abstract terms that contemporary Germans could still feel themselves absolved from any engagement with the Holocaust or the trial. As for the extremist press, both camps were committed, if in divergent ways, to fundamentally anti-democratic programs that made them even less likely to engage seriously with the Holocaust as a total social act.

And yet despite all this, it must not be forgotten that the Auschwitz trial was enormously “popular” as well, that the public reaction to it was ambivalent, not universally hostile. The sheer scope of the trial, the volume of eyewitness testimony, and the thoroughness of the prosecutorial preparation made it impossible to ignore completely. In however fragmentary and narrowly delimited a manner, a public portrait of Auschwitz did emerge. However reluctant some of them may (or may not) have been, twenty thousand spectators did attend. For all its limitations, the press covered the trial to an unprecedented degree. Under the leadership of Fritz Bauer, the prosecution made tremendous efforts—not always successful, unfortunately—to overcome the limitations of the law and to use the trial for didactic purposes.¹⁵⁵ Arguably, at least

154. For a first step towards such a reimagining, see David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 53-92 (Carla Hesse & Robert Post eds., 1999).

155. In this respect, the written indictment is actually much more interesting and illuminating than the trial itself, and it is unfortunate that it could not receive more attention in the press. Although not a public document, it is clear from various press accounts that reporters were at least briefed on some of its key findings—though primarily those relating to the specific charges against the defendants, rather than the historical context of Auschwitz. In accordance with German privacy laws, the indictment has remained unpublished to this day. See *Anklageschrift*, Frankfurt Staatsanwaltschaft, 4 Js 444/59, 4 Ks 2/63, Vol. 78-80, Bl. 1-698.

some of the iconic status of “Auschwitz” as a symbol of human evil—albeit one largely denuded of any concrete social context—can be attributed to the long-term impact of the Auschwitz trial. Although it is probably overly optimistic to claim, as one historian has, that through Nazi trials, “Germans constructed a new identity based on a fresh start [and] a clean break with the past,” clearly the Auschwitz trial stands astride the legal and cultural history of postwar Germany like a colossus.¹⁵⁶

If there is a broader lesson to be drawn from the Frankfurt Auschwitz trial, it is that the law is at best a limited tool for rendering justice and speaking truth in the wake of mass atrocity and genocide, but not an entirely useless one. From a prosecutorial standpoint, what is needed is a fundamental reevaluation of the doctrine of individual responsibility in the context of collectively organized criminality, one that takes account of the motivational interchangeability of perpetrators in such cases without absolving them of responsibility. From a didactic point of view, trials can only ever be one part of a more comprehensive project of coming to terms with the past, which mobilizes a much wider array of cultural resources of signification. Only by deploying many different forms and media can we hope to situate the present in relation to a past that is neither expected to fade completely nor to weigh perpetually on the present like a nightmare. In doing so, we might finally make it possible to learn some of the lessons of Auschwitz.

156. Claudia Koonz, *Between Memory and Oblivion: German Concentration Camps in German Memory*, cited in OSIEL, *supra* note 2, at 193.