

Transitional Justice in Divided Germany After 1945

**David Cohen
U.C. Berkeley
War Crimes Studies Center**

Transitional Justice in Divided Germany after 1945

The confrontation with the past in divided Germany after 1945 presents one of the most complex cases of transitional justice in the postwar period. There is first the fact that, at least until 1951, the reckoning with past injustice was for the most part imposed, guided, or supervised by outside conquering powers rather than by internal forces which had overthrown the previous regime. Second, the occupying powers exercised their authority in four separate occupation zones, each with its own administration and political goals, as well as its own approach to coming to terms with the Nazi era. To further complicate matters the judicial dimension of holding Nazi Germany to account was also pursued, more or less simultaneously, on a number of different tracks:

1. Through co-operative prosecution by the four occupying powers in the International Military Tribunal at Nuremberg.
2. Through national military war crimes tribunals of all four occupying powers under Control Council Law. No. 10 and national war crimes legislation..
3. Through a variety of domestic German criminal courts operating under Allied supervision, and, later, independently.

Apart from the prosecution of war criminals, the occupying powers also sought to purge Germany of its Nazi legacy and prepare the ground for new forms of government through a series of executive, administrative, quasi-judicial, and criminal measures involving automatic arrest, internment, loss of employment, denazification, and punishment for membership in a criminal organization.¹ Some of these measures were carried out with the participation of German personnel or institutions, others were not. In addition, the form of all of these measures shifted repeatedly over the course of the occupation period. Indeed, the advent of the Cold War produced fundamental changes in the goals of the Occupying Powers, changes which had a profound impact upon the quest for justice and the creation of a new political order.

Any of these topics might be (and indeed has been) examined in a book-length study. My more modest purpose here is to survey all of these aspects of coming to terms with the past in an attempt to identify key features of relevance to problems of transitional justice in our contemporary world. As complicated and unique as the German case may be, it nonetheless displays characteristics that have much in common with dilemmas that more recent transitional regimes have also faced. I will organize the analysis around four aspects of the German experience: 1. Allied attempts to punish German war criminals in national and international military tribunals. 2. Denazification programs and other measures designed to isolate or neutralize dangerous elements in the four zones, and the German reaction to them. 3. German attempts to achieve justice for Nazi criminality. 4. In a brief concluding section I will consider other aspects of the political context of transitional justice in Germany. This includes the ostensible failure of denazification and the paradox of the success of the Bundesrepublik's (BRD) *Rechtstaat* in the face of the apparent "re-nazification" of BRD institutions. The discussion will for the most part focus on the period 1945-1950. A full history of the attempts to confront past injustice in postwar Germany would not only lead long past anything which might be meaningfully regarded as a transitional period, but also would in a sense be nothing less than a full history of the modern Bundesrepublik to the present day.

I. Allied Trials

The best known of all the Allied measures to deal with Nazi criminality was the trial of top ranking German leaders before the International Military Tribunal at Nuremberg (IMT). The trial is well known, but a few salient features deserve to be highlighted. The first of these is that there was a trial of Nazi leaders at all. There were intense debates within British and American policy circles about the desirability of trials as opposed to other forms of executive measures. The British wound up opposing a trial of leading Nazis and argued instead for their summary execution. In America, for a time, the Morgenthau Plan, based upon a theory of collective guilt, aimed to punish the entire German people and reduce them to a rudimentary agricultural existence. In the end, the American advisors favoring a trial prevailed and the United States persuaded the British to go along.² Whatever Stalin may have earlier said about summary executions, the Soviet Union also weighed in in favor of a trial. This decision meant, of course, that in place of executive action, that would have been seen as pure revenge, a judicial framework would be used to deal with the criminality of the Nazi regime.³ The participants were well aware that beyond the guilt or innocence of these individuals, the Allies were making history in choosing this course. This was what Justice Jackson was referring to in his opening address as the American Chief Prosecutor before the IMT when he said that because of the decision to “stay the hand of vengeance” the trial represented “one of the most significant tributes that Power has ever paid to reason.”⁴ Despite subsequent jurisprudential objections about the legitimacy of the trial, none of the goals that it did achieve could have been realized by summary executions, the only viable alternative course of action.

The goals of those who established the IMT were multiple. In the first instance, the trial aimed at punishment and retribution. As Jackson argued in his Report to the President, because of the impossibility of apprehending and punishing the actual perpetrators of all the Nazi atrocities, only by proceeding against the “top officials... can there be just retribution for many of the most brutal acts.”⁵ This idea of achieving symbolic justice for all victims by prosecuting and punishing a relatively small number of members of the leadership echelon is one which today is often used to defend the very limited scope of tribunals like those for Bosnia (ICTY) and Cambodia. Although the IMT aimed at establishing the guilt of the defendants and punishing them as war criminals, this was only its narrowest, albeit vitally legitimating, purpose.⁶ In fact, the trial was to represent the indictment not just of a group of individuals but of the entire German State and the principal institutions which supported it. Defendants were carefully picked so as to represent central governmental and administrative institutions, the branches of the Armed Forces and the General Staff, the administration of the occupied territories of the Reich, the Nazi Party, the propaganda apparatus, the SS, the administration of the war economy, private industry, etc.⁷ It was for this reason that relatively minor figures like Hans Fritzsche were included. Goebbels was dead and the propaganda apparatus required a representative.⁸ The centrality of the notion of indicting a system of government and the regime that personified it is brought out perhaps most forcefully in the decision to prosecute six institutions as criminal organizations, three of which were convicted.⁹

In contrast to retribution, the other goals of the IMT were forward looking political goals. To some extent they existed in tension with the legalist principles which the trial was designed to vindicate and provide an example of. This tension is implicitly acknowledged by the Tribunal itself when, in the IMT judgment they state that the Charter was an exercise of the “sovereign legislative power” of the victorious Allies but was also expressive of existing international law.¹⁰ The “sovereign legislative power” of the Allies rested, of course, not upon any legitimate institutional authority, but upon the brute fact of their victory and their ability to impose an unconditional surrender upon Germany and Japan.¹¹ Apart from deterring future aggressors, it was thought important to indict the Nazi State as a whole so as to discredit

fully its institutions (as opposed to a handful of its leaders) and thus pave the way for a new, democratic Germany.¹²

Beyond removal of the leadership echelon and the organizations upon which it depended, the IMT aimed to educate the German people as to the crimes that had been committed in their name, through institutions in which many, if not most, of them had participated. It also intended to provide a kind of education in the meaning of the rule of law. While German lawyers and legal scholars attacked the ex post facto quality of the indictment for Crimes against Peace, very few questioned the fundamental fairness of the proceedings or the fact that the war crimes charged had been committed. Paradoxically, in attacking the retroactive nature of some of the charges in the name of principles like *nulla poena sine lege*, it put the German legal community in the paradoxical position of defending the rule of law and the very principles of legality which had been shattered in the Nazi period. In this way too, Nuremberg may have contributed to the foundation of the *Rechtsstaat*.¹³

The organizers of the IMT also aimed to educate the world community, as well as to provide a lasting record for posterity not only of Nazi criminality, but also that justice had been done at Nuremberg. For this reason, Justice Jackson insisted upon a strategy of proving the Nazi regime's crimes not from the mouths of witnesses (whom some might consider unreliable) but from their own documents.¹⁴ As the French Chief Prosecutor, Champetier de Ribes, succinctly put it, "[T]he chief concern of this trial is above all that of historical truth."¹⁵ For the Nuremberg prosecutors truth and justice were inseparable. Only through the judicial process could the "historical truth" be known, for that historical truth embodied not just the horrific facts of the atrocities but also the responsibility of the individuals and institutions who planned, ordered, and perpetrated them- a responsibility expressed through the unequivocal voice of a judicial judgment from which there was no right of appeal. It is significant that the documents collected for the prosecution of the Nazi leaders provided the foundation for the next half-century of historical research on the Nazi regime and its crimes. In this very real sense the IMT was an indispensable vehicle for "historical truth" and fulfilled its "educational" purpose beyond the expectations of the participants. Without Nuremberg the millions of pages of German documents collected by the Allied prosecutors and their investigative teams would likely have been lost. In light of the Nuremberg experience, in response to contemporary debates about truth and reconciliation as opposed to justice, one might well ask what kind of "truth" it is that is possible without the judicial process of trial and judgment?

Beyond Nuremberg, the Occupying Powers pursued their own national war crimes programs against German defendants either under the framework they had set up in Control Council Law No. 10 or in conjunction with their own national enabling legislation. These trials began in 1945 and, in the case of the French, went on well into the 1950's. American military tribunals convicted 1814 German war criminals (450 received death sentences), British tribunals 1085 (240 death sentences), French 2107 (104 death sentences). About half of the death sentences were commuted (on which, see below). On some accounts, the Soviet Union tried and convicted as many as 45,000 Germans for war crimes¹⁶, though some other figures are lower and caution is required until the trial documents themselves have been thoroughly studied (see below).

These trials also pursued a variety of goals, both within and between the national war crimes programs. As at the IMT, the United States had the most resources and the most ambitious program. Its centerpiece was the "Trials before the American Military Tribunals at Nuremberg." These 12 "follow-on" trials, or "subsequent proceedings" as they are often known, prosecuted 177 German military and civilian officials, many of whom were drawn from the echelon just below the defendants at the IMT.¹⁷ Again the goal was not to punish all of the offenders from the upper bureaucratic echelons (a list of 5000 potential defendants had been drawn up), but rather representatives of the Nazi state and its most iniquitous organizations. Thus, a group of high level diplomats and officials from the Foreign Ministry, the Interior Ministry and so on were put on trial together in the "Ministries Case." Two groups of the highest ranking generals were likewise tried in the High Command, Hostage, and Milch Cases. The Nazi system of the administration of justice

was prosecuted in the Justice Case under the prosecution theory, accepted by the Tribunal, that the justice system in Germany had itself become a criminal organization whose purpose was to destroy the rule of law and justify a regime of arbitrary terror. Key bureaucratic elements of the machinery of destruction and slave labor of the concentration camp system were prosecuted in the RSHA, WVHA, RuSHA and Medical Cases.¹⁸ As representatives of German industry, a group of leading German industrialists were tried for their use of slave labor and other crimes in the Flick, Krupp, and I.G. Farben Cases. These cases were prosecuted like “mini-IMT” s”, with American civilian judges, massive investigative and prosecutorial efforts, and a mountain of evidence provided by captured German documents. As such they represent a continuation of most of the goals discussed above for the IMT.

Below this very high level judicial effort, the United States conducted a series of 489 trials against lower level German war criminals. Within this program the goals varied considerably. Most of the American trials were held at Dachau (an obvious symbolic statement in itself) where of the 1672 defendants tried, 1416 were convicted.¹⁹ A major portion of American prosecutorial resources were devoted to hunting down and punishing those responsible for war crimes against American military personnel. The most famous of these cases was the controversial group trial of 74 of those German soldiers responsible for the Malmedy Massacre during the Battle of the Bulge.²⁰ These types of prosecution were largely aimed primarily (or solely) at retribution. Beyond this, however, the United States also conducted a series of major trials against large groups of defendants who had been involved in running concentration camps like Dachau, Nordhausen, Mauthausen, and Buchenwald.²¹ These cases used a theory of collective responsibility of participation in a system of organized criminality to connect every member of the camp staff from the lowliest guard and functionary to the camp commander to all of the crimes committed in the camp. These cases, of course, did not focus upon American victims, and, like the American prosecutions of those involved in the euthanasia program, aimed at exposing the crimes of the German regime.²² The Americans hoped through such trials to erase any doubt in the minds of ordinary Germans about the criminality of Hitler’ s government.

To a significant degree the British war crimes program (370 cases) also followed the dual goals of retribution for those responsible for the death or mistreatment of British POW’ s and exposing to the German public and the international community the iniquity of Nazi Germany, its leaders, and its institutions. In the latter category, for example, the British prosecuted concentration camp staff (Belsen, Neuengamme, Ravensbruck), high ranking generals, and officials from the I.G. Farben corporation who had been involved in producing and selling Zyklon B gas for Auschwitz. On the other hand, the British devoted the bulk of their more limited investigative and prosecutorial resources to punishing as many cases as possible of war crimes against individual British personnel.

This decision about priorities vividly illustrate one of the fundamental problems in any war crimes program, whether in WWII or Rwanda, about where to direct limited prosecutorial and judicial assets. In the case of the British and Americans this became even more acute as enthusiasm waned for the trials at higher governmental levels and resources (funding and personnel) were cut back. On the one hand there was clearly a desire to confront the larger scale crimes representing the criminal policies and institutions of the Nazi regime. These trials, as I have indicated, pursued a variety of political goals beyond simple retribution. On the other hand, the very strong emotions aroused by Nazi mistreatment of downed flyers, for example, ensured that prosecution of such individuals would absorb most of the resources.

Given unlimited time, money, and political will the British and American war crimes programs could have accomplished both goals. War crimes programs, as the new tribunals for Rwanda, Sierra Leone, and the like vividly illustrate, never enjoy this luxury. They must act decisively while the public interest and political will that created them still is strong and set priorities which will help to maintain that support. In case of the British and American programs, because of the way in which priorities were set very large numbers of high level German war criminals, connected to mass murder, but who had not been involved in atrocities against Allied British or American personnel, escaped

prosecution while the lowliest perpetrators who participated in beating, mistreating, or executing even a single POW were relentlessly pursued.²³ This may have satisfied public opinion at the time, but the public soon lost interest in most of the trials anyway. In retrospect, their decision, especially because for political reasons the trials ended sooner than prosecutors had anticipated, seems parochial and shortsighted. This depends, of course, on one's sense of how justice is best served and the political realities that prosecutors must always face. That such dilemmas are still with us is vividly illustrated by the way in which the first defendant tried by the ICTY was a low level thug who had never occupied a position of political or military responsibility. Prosecutors feared that without bringing someone to trial they might jeopardize their funding and political support, and the Tadic Case was the first they could prepare for trial. They were willing to spend millions of dollars, thousands of hours, and years of judicial activity to obtain this single conviction of an insignificant perpetrator. The cost of symbolic justice has become very steep in the era of new international tribunals.

The French and Soviet approaches to postwar trials were largely shaped by the bitter experience of occupation. Although France tried a far larger number of collaborators than war criminals, the more than 2000 Germans convicted by French military tribunals goes beyond the results of any other western country. In the prosecution of the industrialist Roehling, and of members of the concentration camp staffs of Natweiler and Ravensbruck, the French also aimed at exposing the criminal policies of the German regime and the institutions which supported it, though principally as exemplified in the suffering of French citizens in such institutions. Most of the prosecutions, however, aimed at punishment for those guilty of individual offences against French citizens. The French will to prosecute outlived that of either the Americans or British. While the latter wound up their war crimes programs in 1948-49, French trials lasted until well into the 1950's. It was not until 1953, for example, that perpetrators of the massacre at Oradour-Sur-Glane were convicted.

What are the explanations for this French persistence? One factor is certainly that the desire for retribution was stronger because it was fueled by the humiliation of defeat and the terror of the German occupation. Another is certainly the political uses to which such prosecutions could be put. Apart from other more specific political issues²⁴, they provided a continuing way to support the postwar myth of the unity of the French nation in its victimization by and resistance against the Nazi oppressor. After the immediate wave of spontaneous violence and prosecutions against collaborators it was not until the 1990's that the French government was willing through new prosecutions to face the complicity of high Vichy officials in the Nazi's worst crimes. Whereas, as will be discussed below, the Cold War led the British and American governments to turn their efforts from prosecution of Germans to clemency and early release, the French had political reasons to persist far longer. One need only consider how powerful a symbol Oradour-Sur-Glane has become to realize the role that such prosecutions must have played in shaping public consciousness about the war experience.²⁵ The political dimensions of such trials are amply illustrated by the irony of the discovery by the French public at the time of the trial that many of the perpetrators at Oradour were Alsatian. Not only did these defendants receive lighter sentences, but, following public sentiment in their favor, officials soon pardoned them, though not their German co-perpetrators.

The Russian trials of German war criminals were even more dominated by retribution for the brutality of the war and occupation on the Eastern Front. The Russians had, however, earlier than the other Allies realized the political uses to which war crimes trials could be put. The first Allied war crimes trial was conducted by the Soviet Union in Kharkov on 15 December, 1943.²⁶ Widely publicized in Russia, the transcript was also published in English. This trial, like the Stalinist show trials on which it was modeled, appears to have been political in the fullest sense, for the defendants were used to admit their crimes and serve in the Russian denunciation of the brutality and criminality of the German occupation. Further such trials followed in Krasnodar, Minsk, Riga, and elsewhere. In many POW camps more than 13,000 German soldiers were also put on trial and convicted without attendant publicity.²⁷ These trials continued through 1949.²⁸ After the end of the war, the Soviet Union also conducted war crimes trials in the Soviet Occupation

Zone in Germany (SBZ). According to one important early study of the occupation, 14, 820 Germans were tried as war criminals in the SBZ. Of these 13, 198 were convicted, 138 sentenced to death.²⁹ These numbers, of course, dwarf the figures of all of the war crimes programs of the other occupying powers and point to the intensity of the Soviet desire for retribution and to lay the political foundation for what was to become the DDR. The NKVD and the Communist Party Central Committee were centrally involved in the preparation of these trials. While the focus of the Russians was on the suffering of the Soviet people and retribution for the iniquity of the Nazi regime, the trials served a number of larger purposes consistent with the ideology of the victory of the Stalinist regime in the Great Patriotic War. In the SBZ they aimed, among other things, at political consolidation of a new elite (to be considered further below).

II. Denazification

Denazification shared a number of goals with the Allied war crimes programs. Not least of these was the most immediate objective of removing the Nazi leadership not only from power but also from the public arena where they might influence the course of the occupation. Also like the trials, denazification had punitive aims, though only as one element in a complex set of policies and practices. The complexity of denazification is heightened by the fact that it operated with significantly different means and objectives in the four occupation zones. It cannot be emphasized enough that there was no single experience of denazification and that it varied not only among the zones but also changed radically during the course of the first four years of occupation.³⁰

Denazification, as the term implies, aimed at a purging of Germany of Nazism. But what was Nazism for this purpose and how wide a swath of the German population should the program include? There was little unanimity among the Allies in this regard beyond their conviction the governmental and party leadership echelons should be removed and rendered harmless, and that the economic, cultural, and educational spheres should be freed from the constraints of Nazi ideology. But what about the more than 6,500,000 members of the NSDAP or the countless Germans who, while not party functionaries or even members, had denounced neighbors, participated in or profited from persecution or exploitation in one way or another, or simply lent their enthusiastic support to the regime?³¹ In response to such questions, in the western occupation zones British, French, and American authorities devised a series of measures and policies targeting different groups and different areas of social, economic, and political life. In what follows I will leave aside the important and complex dimension of re-education, involving educating the German populace in democratic values, reforming of the school system, and the like, and concentrate on the political and judicial features of denazification in its central sense of identifying and removing “harmful” or “dangerous” Nazi elements from German institutions.

Before examining differences in the goals and methods of the different denazification programs it may be useful focus first on the measures that they had in common. In the initial phase of the occupation denazification was intimately linked to concerns about security and the establishment of full Allied control. Security concerns focussed above all on the anticipated armed resistance of underground organizations and on neutralizing the ability of Nazi leaders to organize popular support against the occupiers.³² On the American side, for example, Eisenhower’s staff initially prepared the Handbook for the Military Government in Germany. This document’s categories encompassed the automatic arrest of individuals who, because of the level of their status in Nazi party organizations, were felt to be certain security risks.³³ Mandatory automatic arrest also applied to all members of certain security and police formations, for example the

Gestapo, SD, SA, and SS.³⁴ In all, something like 250,000 individuals fell into these categories. Automatic arrest and ensuing internment without trial were practiced by all the Allies. In addition, of course, the Allies were actively seeking individual war crimes suspects, who were also arrested upon identification as potential defendants for the trials discussed in section I above.³⁵ Their arrest, of course, was predicated upon suspicion of individual responsibility for particular war crimes rather than, as was the case with automatic arrest/internment, their status and affiliation within certain specified organizations. The difference between these two programs is succinctly captured in the statement of objectives in Control Council Law No. 38, promulgated in October 1946, to provide a uniform policy in Germany concerning:³⁶

- a) The punishment of war criminals ...
- b) The complete and lasting destruction of Nazism and Militarism by imprisoning and restricting the activities of important participants or adherents to these creeds.
- c) The internment of Germans, who, though not guilty of specific crimes are considered to be dangerous to Allied purposes... (my emphasis)

Internment was thus conceptualized as a preventative security measure rather than as punishment, but the conditions in many of the camps, particularly through the winter of 1945/46 made it seem punitive both to those interned and to many of the German public.³⁷

The numbers of those interned as of 1 January 1947 were as follows:³⁸

	American Zone	British Zone	Soviet Zone	French Zone
Interned	51,006	34,500	59,965	10,923
Released	44,244	34,000	7,214	8040
Total	95,250	68,500	67,179	18,963

As can be easily seen, the Allies were quite serious about the potential security risk and acted decisively in carrying out their goal of removing and neutralizing those who were most likely to oppose their policies.³⁹ One can also see an important difference in the internment politics of the western powers as opposed to the Soviet Union. The former, in response to a wide variety of circumstances, relatively quickly began releasing large numbers of internees. By the end of 1948, for example, in the American Zone only a few hundred remained interned. The British Zone also moved relatively quickly towards emptying its camps. In the SBZ, however, fewer of those who entered the internment process were relatively soon filtered back out again and a significant number were deported for slave labor to the Soviet Union. Those detained also seem to have included a larger percentage of individuals whose internment appears to have been unrelated to Nazi stigma (*Belastung*).⁴⁰ This again points to the different goals that the Occupying Powers sought to achieve through their denazification programs.⁴¹ The mortality rates in the Soviet internment camps were also extremely high. According to Soviet figures more than a third of those interned died (43,000 of 122,671), compared with less than 1% in the British camps.⁴² For the Soviet Union internment and retribution seem to have gone hand in hand.

In the western zones the automatic arrest and internment policies created a number of new problems. First, the political goals of removal and neutralization increasingly clashed with the economic necessities of maintaining and rebuilding even a rudimentary system of public services.⁴³ Thus, many exemptions had to be made for officials,

technicians, businessmen, and workers whose services were deemed essential. Policies varied widely here between zones in the initial period, with the British placing a higher priority on reconstruction than the Americans. The French and Soviets, as will be seen, followed an altogether different line. Second, there was a growing recognition that the “big fish” had not been caught in this net: Many of those arrested or who had lost their jobs were of relatively low status and the upper echelons had gotten away by going into hiding, changing identity, or leaving the country.⁴⁴ By the end of 1945 it was becoming clear in American and British policy circles that a different approach was needed as German approval of denazification measures was steadily falling as their arbitrary and unfair aspects became increasingly apparent.

Apart from automatic arrest and internment, a second prong of the policy of removal and neutralization involved trials for membership in criminal organizations. Here the punitive aspects of the removal and neutralization policy became fully explicit. As mentioned in Section I above, 6 German organizations had been prosecuted at the IMT as criminal. Three of them were “convicted.” The idea behind this went beyond mere symbolism. A fundamental concern of the British and American war crimes program planners had been how to cope with the vast number of potential war criminals, estimated to number in the hundreds of thousands. There was a very strong conviction that the “symbolic justice” of the IMT was not enough. Nor was that provided by the national military tribunals which, inevitably, would not be able to try all those who had participated in the crimes associated with the SS, Gestapo, SD, and so on. Control Council Law No. 10 (20 December 1945) provided that “Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal” was a crime punishable by death, imprisonment, fine, forfeiture of property, or loss of civil rights.⁴⁵ The original idea had been to make possible summary trials in which only the identity of the person and their membership in the particular organization would need to be established. The IMT rejected this strategy of collective responsibility by holding “that criminal guilt is personal and that mass punishments should be avoided.” They did not completely reject the notion of “group criminality” , however, but rather excluded those who were members of criminal organizations but “had no knowledge of the criminal purposes or acts of the organization or those who were drafted by the State for membership, unless they were personally implicated ...”

Although American officials like General Lucius Clay, had initially been very keen on such trials, they eventually collapsed this category of organizational criminality into the general denazification proceedings under Control Directive No. 38. Only the British Zone pursued a systematic policy of criminal proceedings for membership in a criminal organization. They did this by creating German tribunals (*Spruchgerichte*) which operated in the internment camps. By October 1949 these tribunals had tried 24,154 members of the leadership corps (*Fuehrerkorps*) of the Nazi Party (NSDAP), the Gestapo and SD, and the SS (*Allgemeine and Waffen SS*). Of these 15,724 were convicted. 5614 received a penalty of imprisonment, the rest were fined. These trials generated great public interest in Germany, but the consequences were rather anti-climactic. The vast majority of those sentenced to a prison term were eligible for immediate release because their internment time counted against their relatively shorter sentences. Only 900 had to spend any additional time in custody and most of these were released after a few months. In July 1950 only 43 remained in custody in the British camp at Esterwegen.⁴⁶ This, as will be seen below, largely had to do with the shift in the political climate in Europe and the consequent changes in Allied occupation policy. It must also have been clear to British officials that whatever need there had been to remove and neutralize potential opponents of Allied policy had by this time been accomplished to the extent that it would ever be.

In the other zones membership in a criminal organization was treated under the purview of Control Council Directive No. 38, as part of the general process of denazification. This meant that it had in actuality lost any practical significance as an independent category of criminality and was simply subsumed within the general purge of denazification that would have, in any event, taken the significance of such membership into account. According to official statistics, the Americans in particular tried and convicted large numbers of individuals under this provision:⁴⁷

Persons Tried as Members of Nazi Organization under Control Council Directive No. 38

	US Zone	French Zone	Soviet Zone
Tried	169,282	17,353	18,328
Convicted	144,139	17,033	18,061

As these numbers make abundantly clear, there was widespread divergence among the Allies in their conceptions of the goals and appropriate methods of denazification. The great discrepancy between the American figures and the others seems to indicate how much more seriously the Americans took the task of purging those who had belonged to key Nazi organizations from German public life. The Allies did all agree on the principle of removing and neutralizing the Nazi elite (however difficult it might be to identify them in practice). What they could not agree on was how to proceed with the actual practice of denazification, or what larger goals it should serve. It is therefore necessary to examine each of the four occupation zones individually before drawing any conclusions about denazification and what it did or did not accomplish. It is appropriate to begin with the American program, which, as indicated above, was by far the most ambitious in its scope. I will examine the American efforts in some detail and in subsequent sections briefly highlight the different goals and methods adopted in the other three zones.

The American Zone

The scope and moral fervor of the American ambition is perhaps best indicated by Dwight Eisenhower's explanation that, "Reduced to its fundamentals, the United States entered this war as a foe of Nazism; victory is not complete until we have eliminated from positions of responsibility and, in appropriate cases properly punished, every active adherent of the Nazi party."⁴⁸ (my emphasis) More concretely, in 1952 an official American report on denazification identified the three major goals that had informed the program at its inception. The first involved the transfer of power to non-Nazis so that a stable, democratic, and peaceful Germany could emerge. This was conceived of as a "revolution by decree." The second goal was to punish the guilty in such a way that the German public would recognize that they had, "violated basic standards of a just society." This would, it was hoped, bring about a change in German values. Finally, and in important ways limiting the previous two goals, denazification was to be accomplished in such a way that it did not produce "social instability."⁴⁹

The translation of these not necessarily compatible goals into practice was not an easy process. Driven to a significant degree by public opinion in the United States, the American authorities initially pursued broad denazification with great energy. In connection with the Military Government Law No. 8, which restricted employment for those with certain kinds of Nazi affiliations, a questionnaire system was introduced to determine whether an individual fell into particular categories. By 1 June, 1946, the American Public Safety Officers had received 1,613,000 such questionnaires as the net was cast increasingly more widely.⁵⁰ At the same time, an attempt was made to co-ordinate such measures throughout Germany with the passage of Control Council Law No. 24 (12 January 1946), which provided for the removal of Nazis from positions of responsibility under 99 categories. By the end of June, 1946 107,440 Germans

in the American Zone had lost their jobs or been banned from employment under this measure. The result of all this was increasing German dissatisfaction with perceived and real inequities in the system (especially its reliance upon mechanical criteria) and a growing American realization that they lacked both the resources to do the job quickly and the necessary knowledge of German society and Nazi institutions to do it well.⁵¹ The result was a decisive shift in policy, resulting in a dramatic change in the direction and effects of denazification.

What the American authorities decided to do was to turn the denazification process over to the Germans. The vehicle by which this was accomplished was the “Law for the Liberation from National Socialism and Militarism (known in Germany as the *Befreiungsgesetz*), enacted in March 1946. One of the fundamental difficulties confronting the Americans in charge of denazification before mid-1946 had been the problem of identifying those outside of the higher echelons of the party and government who should be brought within its scope. This difficulty arose in part from the sheer number of individuals who had participated in Nazi organizations of various kinds or who had not participated but had nonetheless actively supported the regime. Beyond mere numbers, it also had to do with the lack of American understanding of the German society in general and the complex of organizations that the NSDAP had established in particular. Having adopted the strategy of screening through questionnaires (*Fragebogen*), the American administration found itself faced with the task of how to evaluate the more than 12,000,000 documents expected. In the first half of 1946 the administrative apparatus saw itself devoting more resources to this task than to any other, and, consequently, neglecting matters that were increasingly seen as of greater moment.⁵² According to a contemporary observer of American denazification efforts, “the more systematic the procedure, the more irresistible became the conclusion that the original idea of removing anyone who had in some way been associated with the Nazi party or another Nazi organization was incapable of execution.”⁵³

The result of this recognition that the effort was bogging down and doomed to failure by virtue of its unrealistic ambitions was a new policy based upon three insights. First, in order to be effective, denazification procedures would have to distinguish the “real” Nazis, the active supporters of the regime, from those whose participation had only been “nominal”. Second, this process could only be accomplished by transferring it to the Germans. Finally, some officials who had been active supporters would have to remain in their positions to further the work of reconstruction that was becoming an increasingly central American goal.⁵⁴

The decision to hand over denazification to the Germans was as controversial as it was inevitable once its scope had become so vast. In the end, the “Law for the Liberation from National Socialism” might be regarded as in fact a “Law for Liberation from Denazification.” A vast apparatus of 545 German tribunals with a staff of 22,000 was set up.⁵⁵ They were to decide which cases to bring to a hearing and to classify individuals according to five categories: major offenders (who could be punished by up to ten years imprisonment, property confiscation, loss of some civic rights), offenders (imprisonment or fine), lesser offenders (fine only), followers, and non-offenders or exonerated by trial. By February 1947 the German tribunals (*Spruchkammern*) had processed only slightly more than half of the 11,674,152 completed questionnaires. Of these 6,000,000 individuals, only 168,696 had been brought before a tribunal (less than 3%). Of these only 339 had been classified as major offenders, 3612 as offenders, 13,708 as lesser offenders. A total of 2018 had been sentenced to a period of internment. There was considerable scandal over the meager results of this massive screening effort and the exoneration of various individuals whose past activities were highly questionable.⁵⁶

After vainly threatening the Germans about the obvious whitewashing, American officials aimed to get what had become an embarrassment over as quickly as possible. As a result of successive amnesties of various categories of individuals, the group subject to review was made ever smaller.⁵⁷ By the time the entire operation was wound up, altogether 13,410,000 persons had been examined. Of these, 3,660,000 had belonged to the NSDAP or some other Nazi organization. Of this group subject to the classification schema of the Liberation Law, only 1,549 major offenders

had been identified and a total of 9600 persons sentenced to some term of imprisonment. 475,000 were branded as “followers” (Mitläufer).⁵⁸ Already in 1949 only 300 of those sentenced to imprisonment were still incarcerated.⁵⁹ The former Chief Historian for the U.S. High Commissioner in Germany summarized these results of this massive effort: “When one contemplates the enormous amount of energy expended by American military government, the serious interference occasioned in other major programs, the loss of prestige and respect which the United States suffered among Germans in its and other zones, and various other factors, the achievement seems small indeed.”⁶⁰

What of course doomed the German administration of denazification was the inverse of what produced the American failure. The Americans (initially at least) had the political will to make denazification effective, but lacked the knowledge to do so. The German tribunals were far more capable of discerning which defendants were in fact truly “belastet” by their Nazi past, but lacked the political will to apply the scheme with its intended rigor. Even more serious was the fact that a decision had been made to proceed with the easier cases first and save the more serious for the end. Since, for reasons relating to wider political developments in Europe, the American and, consequently, German will to pursue denazification steadily ebbed, many of the most serious offenders escaped punishment, while most of those who were punished were only small fry.⁶¹ While the American effort failed to achieve its goals, in other, unintended, ways it may have been a considerable success.

The most influential scholar of the American denazification effort has argued that from the standpoint of practical consequences the tribunals really represented a procedure for social and political rehabilitation of those with a Nazi past.⁶² Lutz Niethammer argued that the tribunals undermined the political purge (Säuberung) of denazification by a strategy of “juridification.” By insisting that only the strict standards of proof of the criminal law could justly establish individual responsibility for those accused of being offenders, it was possible to downgrade all but the most egregious cases to the category of “follower” , or “Mitläufer.” The tribunals, on his view, thus functioned as a “Mitläuferfabrik” , literally, “a factory to produce ‘followers’ .” The judgment of the tribunal that one had merely been a “follower” relieved one of the stigma of Nazi activity and enabled social and economic re-integration. Such judgments thus functioned as a “Persilschein” (after a German brand of laundry detergent) whereby one’ s past was wiped clean.

As one might expect, in a society which had been characterized by mass support for the Nazi regime, the status of merely having been a “follower” was unlikely to be seen as a just basis for exclusion or punishment. This was even more so the case as time began to pass and other preoccupations took the foreground. Indeed, some of the Nazi’ s most vehement critics, like Eugen Kogon, had argued eloquently for the injustice of punishing such individuals who had only made an innocent “political mistake” in following Hitler and participating in Nazi institutions.⁶³ The American effort to remove and stigmatize those with a Nazi past thus produced a procedure that enabled all but a handful of them rather to reintegrate themselves into the mainstream of German society.⁶⁴ The gradual turn towards economic prosperity, along with other factors, ensured that this mainstream moved united (on the whole) in its collective sense of guilt and united in its repression of the past towards a democratic culture which the United States had hoped to promote through very different means.

The British Zone

Commentators often note that the British denazification program oriented itself to a significant degree on the policies and goals articulated by the Americans.⁶⁵ While there is significant truth to this claim there were also important differences which reveal a distinct underlying attitude towards denazification. While the British military government in

Germany clearly saw denazification as an important goal they pursued it more selectively and with greater moderation. In the first place the British did not follow the American lead in early on shifting primary responsibility for denazification to the Germans. They did engage German tribunals in the process but only at a much later stage (after mid-1947). Second, and not unrelated, they resisted the temptation to extend the denazification purge to the entire adult population of their zone. In general, they also adopted a more pragmatic attitude towards balancing the goals of denazification with those of reconstruction.⁶⁶ Improving economic efficiency was given a high priority so as to reduce the reconstruction costs that the British government would have to bear. Large categories of professional activity were excluded from denazification for this purpose. It was also easier for the British to pursue a pragmatic policy because they did not have to contend with the kind of overheated public opinion that existed in America. As the former Chief Historian for the US High Commissioner for Germany noted, “Though their people had suffered far more grievously than Americans ... there was never in Britain the wildfire of revenge which was kindled in the United States.”⁶⁷ In our own recent history we have seen how public concern over massive human rights violations in one country can drive an international response when in another country equally serious atrocities are met with international indifference. Likewise, the political will to respond may immediately wane when public attention is distracted. Such external political factors in the US, France, Britain, and the Soviet Union were no less important in shaping the role of denazification in post-1945 transitional justice in Germany.

After the initial phase of automatic arrest and internment (described above), the British also proceeded, under the framework of Control Council Directive No. 38, with a system of classifying individuals who fell into one of 99 categories of Nazi affiliation. Although the British employed the same 5 part classification (major offenders, followers, etc.) there were a number of important practical differences in their approach. First, because the system of registration was not universal they screened a far smaller number of questionnaires (by November, 1947 only 2.1 million from a population of 22 million).⁶⁸ Second, because (as noted above) the British more carefully distinguished between denazification screening and criminal proceedings (prosecution for membership in a criminal organization or for war crimes) the first two groups, major offenders and offenders, had already been dealt with. Those accused of war crimes were tried before British military tribunals, those accused of membership before the special criminal tribunals (Spruchgerichte) set up for that purpose in the internment camps. This meant that the German panels who advised the denazification officials of the British military government only dealt with individuals who fell into one of the lesser 3 categories (lesser offenders, followers, and non-offenders).⁶⁹ If it turned out that one of these individuals appeared to have committed war crimes or crimes against humanity they were turned over to appropriate tribunals.⁷⁰

The British thus maintained a more consistent distinction between the political process of denazification in the form of an administrative purge and the judicial process of criminal prosecution as a form of punishment and retribution.⁷¹ Paradoxically the advantages of this consistency seem to have been largely lost on the German public who widely perceived the British practice as arbitrary and unfair. By the middle of 1947, partly as a result of the British public’s sympathy with German complaints about the denazification program, partly because of a general loss of interest in retribution for the losses of the war, the British military government largely turned the process over to the Germans.⁷² Whereas the American program had aimed at punishing both the Nazi elite and the mass of those that had worked for or supported the regime, the British effort followed a somewhat different course. The real punitive teeth of the program were reserved for those thought to be the most serious offenders, who were segregated into a separate group and subjected to purely criminal proceedings. A more modest selective procedure was aimed at a smaller spectrum of mass supporters. In the end it appears that the British scheme was at least as (if not more) effective as the American in identifying serious offenders, without the enormous costs generated by the huge apparatus required by American ambitions. It remains an open question, however, as to whether identifying a few hundred thousand “followers” brought

the British closer to the accomplishment of their goals except perhaps in the unintended way suggested by Niethammer in his study of the American “Mitlaeuferfabrik” . It may be that an administrative system of classification of those who actively politically supported a totalitarian government is always doomed to fail in circumstances where the general public sees little difference between those supporters and their own acquiescence or participation in the same regime.

The French Zone

As seen above, the French government pursued the largest and longest war crimes trial program of the western Allies. Interestingly, denazification was clearly accorded a far lower priority, largely, it would seem, because it was seen as having little political utility. Most commentators seem to agree that the French military administration was less prepared and less interested in pursuing denazification systematically than was the case in any of the other zones. Their main goals were to secure as many German resources as possible for French reconstruction and to enhance their own power while weakening Germany, so as to ensure that it could never again become a dangerous neighbor.⁷³ The most careful study of the French denazification program concludes that any approach to denazification that conflicted with these goals had no chance of being adopted.⁷⁴

With no systematic policy in place, the initial phase of denazification appears to have been largely improvised. Perhaps because they were so ill prepared the French placed significant responsibilities in German hands early on and proceeded in a decentralized manner. There were numerous shifts of policy and a good deal of bitterness on the German side at the seemingly arbitrary manner of proceeding. Most scholars accept that bribery of French officers enabled many who were subject to economic disqualification to maintain their positions.⁷⁵ In the first six months of 1946 the French military government reviewed 77,924 persons who, according to the criteria of Control Council Directive No. 24, should have been automatically fired or subjected to particularly careful scrutiny. Of these individuals, primarily civil servants, 45,015, or 58%, remained in their positions, only about one third were removed. The results of the purge of the economic sector were even more meager. Of 11,304 persons who met the same criteria, two thirds (7343) were retained.⁷⁶

The important exception to the chaotic state of denazification in the French zone was Wuerttemberg-Hohenzollern. Here the provisional German SPD regime in place since October 1945 persuaded the French to adopt their denazification model. This resulted in the promulgation in May, 1946 of the “Rechtsanordnung zur politischen Sauberung.” Most German scholars of denazification agree that this was the most effective program devised in any of the occupation zones. Its distinguishing characteristics were that, in the first place, it eschewed the formal, mechanical criteria used by the American and British programs. Instead, it focussed on a substantive assessment of the individual’s past activities and on his current position in the civil service. Second, it employed a purely political administrative procedure, with no judicial trappings, and no right of appeal. That is, the decision was seen as a purely political measure, not as a judicial sanction based upon a finding of individual responsibility. Finally, its effectiveness was driven by the Staatskommissar fuer die politische Saueberung (State Commissioner for Political Cleansing) Otto Kunzel (SPD), who enjoyed the authority to decide all cases, subject to confirmation by the French authorities. In the 13 months of its operation this program reviewed 7% of the population. 42% of those in the civil administration received sanctions ranging from dismissal without pay, loss of voting rights, bar from holding public office for a specified time, and cuts in pay. From the perspective of German scholars the absolutely crucial factors for its success were that it resulted from a German initiative, was carried out by a German administration, and that it conceptualized denazification as a purely

political, as opposed to a legal, problem.⁷⁷

The success of the Wuerttemberg-Hohnezollern experiment was, however, short-lived. The French regime, largely out of a desire to avoid the image of being soft on denazification in the eyes of the other Allies, made an abrupt change of course and adopted throughout the zone the Spruchkammerverfahren favored by the Americans under the "Liberation Law". The results were predictable. When the tribunals began hearing cases they first revisited earlier condemnations that could now be adjudicated under the new procedure. The result was overwhelmingly rehabilitation of the individual and vacating of the previous decision. The "Mitlaeufersfabrik" phenomenon produced by the Spruchkammern in the American Zone appeared here as well. Apart from the effects of various amnesties, the French Zone Spruchkammern heard a total of 669,068 cases. Only 13 individuals were found to be major offenders, 938 offenders. 16,826 (2.5%) were classified as lesser offenders and 298,789 as followers (about only 15 percent of whom received some fine or other minor penalty). 52.2% of the proceedings were simply terminated.⁷⁸

The Soviet Zone

In comparison with the other zones the Soviet denazification effort was perhaps the most consistent in defining itself in political terms. German scholars often portray the Soviet program as unique in its attempts to use the purge as an instrument to restructure society.⁷⁹ This desire to restructure society according to a particular ideological orientation in itself hardly seems to distinguish the Soviet aims from those of the other Allies. The Americans, as noted above, tirelessly reiterated their desire to re-educate the Germans, instill in them democratic values, erase German militaristic values, and so on. What does seem to distinguish the Soviet Zone (SBZ), however, was that these attempts were also guided by a program to substitute a selected new elite for those who were removed. Further, as noted already, the Soviet program was carried out in a far more consistent manner with other goals like retribution, reconstruction, and the like clearly subordinated to the main political aim.

From very early on the Soviet Military Administration (SMAD) worked closely together with the Ulbricht Group of Communist Party (KPD) functionaries. This, of course, distinguished it from the other zones where Germans only began to play a systematic role much later. By July 1945 SMAD had already set up new state and provincial administrations and placed reliable individuals in office concerned with police, education, and personnel.⁸⁰ At this time political parties had also already been permitted to form, far earlier than in the other zones. Like their western counterparts the SBZ began a purge of the civil service, schools, and so on. These proceeded with differing degrees of rigor in different regions of the SBZ but were in general of greater intensity than in the west. The Soviets, however, also had to make concessions to economic and administrative necessity as they, like the Americans, realized that the goal of removing all Nazis whose participation was more than nominal was unrealizable.⁸¹ Still, by the end of 1946 large numbers of individuals had been purged from their jobs, although not significantly more than in the American Zone.⁸² Already in 1946, however, they had begun to move to rehabilitate the "nominal" Nazis and to rehabilitate them politically. The political strategy was to promise them work and a return of political status if they demonstrated that they had "innerly broken with Nazism."⁸³ In mid-1947 SMAD began to wind down its denazification program. The political goal of a thorough purge of "unreliable" elements in the civil administration and other important institutions had been largely achieved and further efforts would have merely reduced the pace of economic reconstruction and reparations to the Soviet Union.⁸⁴ This reintegration of the "small fry" posed a challenge, in the escalating Cold War climate, to the Americans and British in particular, who responded with attempts to move more quickly to wrap up their programs in response. In the end, "the difference

to denazification in the western zones lay not in the number of those removed from their positions, but rather in the rehabilitation policies.”⁸⁵ As denazification relaxed, in the west the functionaries who had been removed as NSDAP members returned to their positions. In the SBZ they remained largely excluded (with important exceptions) from public service and were replaced with a new elite from significantly different social groups.

From this perspective the Soviet denazification policy was quite successful in achieving its political goals, though not necessarily in removing former Nazi supporters. A new leadership and higher functionary echelon was put in place to anchor the new political order and the mass of NSDAP members and supporters were effectively politically reintegrated.⁸⁶ In the west, on the other hand, the old administrative civil service elite eventually returned to their positions (now shorn of its higher political leaders) as the Spruchkammern distributed their Persilscheine and amnesties were put in place. In the western zones too much time had been lost in setting up the cumbersome apparatus of questionnaires and then shifting to the Spruchkammern of the Liberation Law.

The American authorities in particular did not appreciate that in such transitional situations time is of the essence. After the initial 6 months of occupation had passed German support for denazification steadily waned, the process bogged down under its own excessive weight and American inability to identify the “real” Nazi’ s in the German population at large. At the same time, external political parameters shifted, and the American will to pursue their original goals gradually faded. Contemporary British and American commentators argued that a quick, decisive program focusing on denazifying the political elites would have had far greater prospects for success.⁸⁷ On the other hand the British and American programs were, as pointed out above, successful in spite of themselves. Apart from inhibiting the kind of spontaneous violence seen in other countries (and to some extent in the SBZ), they succeeded in keeping large numbers of individuals out of circulation for 2-4 years, either through internment, criminal conviction, or denazification. By the time they emerged from camps, came out of hiding, received clemency from Allied authorities, or were whitewashed by Spruchkammern they proved adaptable enough to integrate themselves into the process that would culminate in the new order of the Adenauer era and the Wirtschaftswunder. Just how “new” that order was will be taken up briefly in Section IV.

III. German Trials

Though one often hears that German trials of Nazi war crimes and crimes against humanity begin with in the early 1960’ s with the Auschwitz trials (or with the Ulm Einsatzgruppen trial in 1958), the full story is more complicated. German trials actually begin in 1946 and have gone on, more or less continuously, albeit in a variety of forms, until today. Control Council Law No. 10 (December 10, 1945), which provided the legal framework for the trial of Nazi war criminals in occupied Germany, also delegated to each of the occupying powers the right to establish German tribunals. The British, French, and Soviets made more use of this than the Americans. The jurisdiction of such tribunals was limited to crimes committed by Germans against other Germans. All other cases were within the jurisdiction of the tribunals described in Section I, above. By 1950, German courts in the western zones operating under this rubric had convicted 5,228 persons.⁸⁸ Although most of the sentences were very light and relatively few trials prosecuted the most serious crimes, it is worth remembering that this is about as many convictions as the British, French, and American military tribunals combined. Since most of the German war criminals convicted by Allied tribunals never served most of their sentences anyway, the difference severity is in end effect diminished. It is also striking, however, that the total number

sentenced by German courts up to 1992 is only 6487.⁸⁹ In other words, in the first five years after the war German courts convicted 4 times more defendants than they did in the next four decades. Some of the reasons for this will be sketched below.

Of the 5228 successful prosecutions, however, only 228 involved capital offences. For a variety of reasons the post-1950 cases typically involved far more serious crimes. Here German prosecutors for the first time tried systematically to come to terms with the machinery of death of the extermination centers, the Einsatzgruppen, etc.⁹⁰ The reason usually given for the failure to deal more fully with the Nazi system of mass murder is the limitation on jurisdiction noted above. Recent research has shown, however, that although Control Council Law No. 10 formally barred prosecution for crimes committed against non-Germans, the Allies did not in fact enforce this rule. Thus, out of a total of 260 Nazi murder trials before German courts in the period 1945-50, 61 involved the murder of non-German nationals.⁹¹ That there were not more is perhaps not surprising since there was of course little incentive to focus on such cases while the massive Allied war crimes programs were going on. By 1950, however, it was clear that these trials had only scratched the surface in terms of the perhaps 100,000 perpetrators who manned what Raul Hilberg calls “the machine of destruction.” Why, then were only 1259 convictions obtained in the next 40 years?

The number of prosecutions slowed dramatically after 1950 for several reasons. The first is that in 1950 the statute of limitations passed on the lesser crimes punishable by imprisonment for no more than 5 years. This was the first of a series of such events which hampered prosecution as the years went by. Further, the political climate in Germany, and Europe in general, had changed. The British, French and American authorities had now begun systematic reductions in sentences and early release for even the most serious convicted war criminals. This was hardly an encouragement to German judicial institutions to begin the inevitably painful process of identifying the murderers in their midst. In 1951 a German law permitting the reinstatement of most of those who had been removed from office under denazification proceedings further aided this trend.⁹² This is especially true for the judiciary, which, as is well known, remain largely unchanged and in any event unwilling to convict its own.⁹³ As Adalbert Rueckerl summarizes the situation, all of these measures, as well as the re-establishment of German armed forces, “created the impression in the public that the goal of ‘coming to terms with the past’ had now been reached. The opinion prevailed in wide sections of the population that those responsible for Nazi war crimes who had survived the war and not succeeded in disappearing abroad had now been tracked down and called to account...”⁹⁴ As one of those interviewed by Marcel Ophuls in *The Memory of Justice* succinctly put it, for most Germans intent on looking to the future it was much more pleasant to think that the few major Nazi criminals still at large were cowering in fear in some South American jungle rather than recognizing that they were living next door, quietly collecting their pension.

The period from 1950-55 thus saw a dramatic slowing down of German prosecutions of Nazi crimes, but not the total cessation which is sometimes described. In this 5 year period there were still 638 convictions, though most of them occurred in the first half of that period.⁹⁵ What, among other things, dramatically changed the situation was the arrest in 1956 and subsequent prosecution of Bernhard Fischer-Schweder. Fischer-Schweder had been involved in a labor dispute, the reporting of which led to his recognition as having been involved in mass murder in Lithuania, where he had been a police director. Thanks to the initiative of the prosecutor Erwin Schuele, the investigation was expanded, and the ensuing trial in Ulm in 1958 included Hans Joachim Boehme and members of his Einsatzkommando which had operated in Lithuania. The trial galvanized public opinion and led to the creation, under the directorship of Schuele, of the *Zentrale Stelle der Landesjustizverwaltung zur Aufklaerung nationalsozialistischer Verbrechen*.

The creation of this centralized authority for the investigation and prosecution of war crimes in one sense utterly transformed the situation. As Helge Grabitz puts it, “Wie ein Paukenschlag wirkte es daher, als man bei der Durchfuehrung des sogenannten Ulmer Einsatzgruppen-Prozesses erkennen musste, dass man im Gegenteil ganz am

Anfang einer strafrechtlichen Aufarbeitung war.”⁹⁶ It led, for example, to the series of major extermination center trials (Auschwitzprozesse, Majdanekprozess, etc.) in the 1960’ s and beyond. These trials, like the Ulm trial a few years before, again sensationally prodded the German public to yet again “rediscover” their past (the American TV show Holocaust and the film Schindler’ s List were yet to come…). On the other hand, as important as the creation of the Zentrale Stelle was, 95% of the investigations it opened in the next 30 years never came to trial.⁹⁷ In fact, the 611 convictions after 1955 were fewer than the number in the first five years of that decade. The notoriously light sentences, interrupted proceedings, and mysterious acquittals which characterized many of the cases which did come to trial are well known and, in any event, take us too far beyond the post war transitional context into the long history of postwar Vergangenheit sbewaeltigung.

What the West German trials do show, however, is the immense difficulty of judicial pursuit even of the most serious war criminals after the process of political reintegration has begun. If the western Allies were unwilling to prosecute the thousands of German war criminals whose cases had already been investigated, and, moreover, were prepared to quickly release many of those who had been convicted of mass murder from prison, how reasonable was it to expect the German judiciary (largely staffed by the same officials who held office under Hitler) to carry on the task the Allies had abandoned? If it was true for the Allies that a reckoning with Nazi criminality had to come quickly if it was to come at all, this is no less true for the Germans themselves. This is in no way to excuse the deplorable way in which so many of those (particularly the Schreibtischtäter) responsible for mass murder, deportations, slave labor, and the devastation of occupied countries, escaped justice.⁹⁸ On the other hand, if, as the Allied attempts to deal with war criminals and denazification show, only sufficient political will can bring attempts to do justice to fruition, there were even fewer causes to generate that political will in a revived and ever more prosperous West Germany than there had been on the part of the Allies. The economic and political success of the postwar Bundesrepublik was thus in part a cause of the process of rehabilitation and reintegration and in part an effect. On the other side of the balance, over against the many failures of the postwar German judiciary, Dick De Mildt has rightly pointed out that perhaps the greatest success of the German prosecutions was their contribution to knowledge of the understanding of Nazi criminality.

Those who believe that truth is more important than justice will perhaps be able to find sufficient solace in this insight.⁹⁹ Those who do not may ponder the explanation offered by Grabitz of the inadequacy of any attempts at retribution in such cases. In response to the astonishing fact that the average penalty imposed by German postwar tribunals for participation in mass murder was “3 minutes imprisonment per murder” , she asks what penalty would have been appropriate for those who participated in the killing of tens or hundreds of thousands of victims? Her answer is: “Die Strafjustiz ist mit dieser Frage schlicht ueberfordert.”¹⁰⁰ Before dismissing this obviously unsatisfying conclusion as mere German apologetics, one should first look carefully at some of the shockingly light sentences being handed down today by the ICTY. Her claim demands to be taken seriously, but only as a challenge, by those convinced that “justice” , in the retributive sense, is being done in The Hague.

The trials of Nazis in the DDR began soon after the end of the war. Although much more research is required before a comprehensive assessment is possible, it seems clear that the prosecutions were conceptualized as part of a political program. Nearly all of the 12,861 who were convicted by East German courts had been tried by 1950. It is often pointed out that these trials aimed principally at punishing those who were seen as Facists or who had committed crimes against the Soviet Union during the German occupation, rather than those who had participated in the Final Solution. On the other hand, it must be remembered that West German courts did not aim at such offenders either during this initial period (1945-50).¹⁰¹ The question is thus rather why East Germany never renewed its pursuit of Nazi mass murderers as happened (though with the ambiguous results noted above) in the West. The answer seems to have to do with the political nature of the whole process. This may be seen, for example, in what was really the final showpiece of

the East German trial program: the Waldheim trials. When the Soviet Union closed its internment camps at Buchenwald, Sachsenhausen, and Bautzen, 3385 of the 18,000 internees were prosecuted. Denied even the most basic due process rights, 3308 of them were convicted in trials that lasted 15-30 minutes. The pace of further prosecutions dramatically slowed after this, and by the mid-fifties the official position was that no further prosecutions were necessary because the purge of Nazis in the DDR was complete. The Waldheim trials were a means of underscoring that point. This claim, though largely unfounded, could serve as the basis of continuing criticism of West Germany for its laxity in regard to Nazi war criminals.

IV. Conclusion

In March 1950 High Commissioner John McCloy appointed an Advisory Board on Clemency for War Criminals to study the petitions concerning the high ranking Nazi war criminals imprisoned by the Americans in Landsberg. McCloy himself announced his decisions in regard to the Board's recommendations at the end of January, 1951. Of 89 prisoners still in Landsberg who had been convicted in the 12 American trials at Nuremberg (see above, section I) 78 received a significant reduction in sentence. For 31 of them this amounted to time served and they were immediately set free.¹⁰² They included Alfried Krupp, high ranking SS officers, generals, ministers, and judges. Writing in *The Nation*, Telford Taylor, US Chief Prosecutor at these trials, slammed McCloy's clemency decision as, "the embodiment of political expediency, distorted by a thoroughly unsound approach to the law and the facts ... Mr. McCloy paints his action as an effort to iron out discrepancies in severity and to consider individual circumstances justifying clemency. Analysis shows, however, that what has done approximates a blanket commutation of sentences."¹⁰³

Although the American and British war crimes programs had ended in 1948 and clemency and parole proceedings had been underway for some time, McCloy's decision marked a watershed. In 1950 a total of 663 German war criminals were imprisoned in Landsberg. By mid- 1955 there were only 50.¹⁰⁴ Before the end of the decade almost all of the thousands of convicted German war criminals had been released. There is little doubt that on the whole, Taylor's assessment of the motivations underlying the clemency movement was correct. Some scholars have indeed shown that before 1951 the clemency review process was in part motivated by concerns about the fairness of sentences or convictions.¹⁰⁵ All agree, however, that political developments like the Cold War were the driving force behind the emptying of the prisons in 1951-55. As American interest in strengthening and rearming Germany as a Cold War ally increased, the Adenauer government was increasingly successful in making the release of war criminals a condition of German co-operation.¹⁰⁶ This was to a significant degree motivated by the desire to project the image of a new Germany, which had put its past behind it, and for which those imprisoned were an uncomfortable reminder and an embarrassment. Adenauer's aims were supported by a widespread German campaign, including by the Evangelical Church, to obtain mass release for those imprisoned. The hypocrisy and futility of having invested vast resources in prosecuting and trying Nazi war criminals only to grant them clemency and release them a few years later was not lost on many contemporary observers.

This convergence of political forces produced a parallel development in German institutions. As noted above, the numbers of prosecutions of Nazi criminality by German tribunals also fell drastically in the years 1951-1955. At the same time, the "Kalte Amnestie"¹⁰⁷ brought about the return to public service of many of those functionaries, judges, bureaucrats, and the like who had been removed through denazification. Due to changes in German law, from July 1951 to March 1953, 39,000 excluded individuals were able to return to positions in the higher civil service.¹⁰⁸ This was in addition to those who had already previously been reinstated after having been "washed clean" as mere "followers", after receiving their *Persilschein* from the *Mitlauferfabrik* (described above in Section II). Critically minded Germans

were not slow to point at that “renazification” was at work as the ministries and other state institutions were taken over by “the men of yesterday.”

Does all this mean that transitional justice failed in Germany? This depends on what kind of justice one has in mind. As preceding sections have shown, Allied attempts to purge Germany were from the very beginning characterized by a tension between political goals and a desire for retributive justice, between political/administrative and juridical solutions. That is, political goals were from the very beginning at the core of the Allied program to eliminate the legacy of Nazism and create a new political order in Germany. Trials and legal punishment were merely one of the elements of that program. It should come as no surprise that the German institutional response after the re-establishment of sovereignty was also to trade the possibility for retributive justice for political goals as well. As political priorities shifted in light of wider German, European, and global developments, as they inevitably would given the long span of time which the Allies took to implement their goals, so the commitment to particular programs and measures shifted too.

From this perspective (however unsatisfying for those committed to retribution as an indispensable element of transitional justice), the Allied decision to release Germans convicted for their contribution to mass murder does not mean that the trials and denazification did not serve important purposes. They did, from stigmatization of the NS regime and its highest servants, education of the German public as to what had been done in their name, criminal condemnation of thousands of perpetrators, and removal and neutralization of a large group of individuals during a critical period, to serving the discovery of historical truth and providing rehabilitative, integrative, and unifying mechanisms by which Germans could come to terms (however imperfectly and in whatever different ways) with their past and get on with the work of reconstruction. The irony of the failure of denazification and of the “renazification” of the early 1950’ s was that they seem to have served the creation, for the first time in German history, of a stable democratic *Rechtstaat* built, above all, upon Germany’ s successful re-emergence as a major world economic power. From this standpoint the Allied program for Germany was an undoubted success (even if in part due to unintended consequences). But at what cost, and whether the ends of justice were sufficiently served in the process, is another question. Anyone contemplating the “symbolic” justice of the ICTR and ICTY in comparison with the difficulties of reconstruction, reintegration, and judicial reckoning in Rwanda and Bosnia (to say nothing of Cambodia) will realize how much this dilemma and this challenge was not unique to Germany after 1945.

David Cohen
Chancellor’ s Professor
Departments of Rhetoric and Classics
University of California, Berkeley

(Endnotes)

¹ Other measures aimed at “re-education” and administrative, educational, and governmental reforms. These aspects, important though they are for a full appreciation for the foundation of the Bundesrepublik, are beyond the scope of this paper.

² The story of the British-American deliberations has most recently been recounted by Bass (2000: Chapter 5), who also cites much of the earlier scholarship.

³ In his Report of Robert H. Jackson to the President (7 August 1945), Jackson recapitulated the case against summary execution and argued that a trial was the only legitimate course for the United States to pursue. Section III.1.

⁴ The sentiment was echoed by the Soviet Chief Prosecutor at the end of the trial, when in his closing address he stated that, “For the first time in the history of mankind, criminals against humanity are being held responsible for their crimes before an International Tribunal.” (29 July 1946)

⁵ Section I.3.

⁶ The London Agreement of August 8, 1945 establishing Charter of the IMT bore the title: “Agreement ... for the prosecution and punishment of the major war criminals of the European Axis.”

⁷ The representative of Germany industry was to be Alfred Krupp. The American prosecution staff mistakenly indicted the elderly, bedridden Gustav Krupp, who was declared unfit to stand trial.

⁸ In terms of the Nazi hierarchy Fritzsche and Julius Streicher (editor of *Der Stürmer*, a rabidly anti-semitic publication) were far beneath the other defendants.

⁹ The other reasons for this will be dealt with below. The organizations included the leadership echelon of the Nazi Party, the SS and SD, the Gestapo, the SA, the Cabinet, and the General Staff and High Command.

¹⁰ This tension was made even more painfully obvious in the IMTFE in Tokyo, when the Allies decided not to prosecute Emperor Hirohito because they believed he would be more useful as their puppet. The internal memoranda and high level diplomatic correspondence of the British and American governments are brutally frank about this, making it obvious that they saw the trial as, in part, a political tool. Australia and other countries violently and repeatedly objected to the decision and, contrary to widespread belief, the discussions about whether or not to indict Hirohito continued through 1946, subsided somewhat, and briefly flared again in 1948.

¹¹ It is worth noting that the Articles of Surrender expressly provided that Germany and Japan would submit to the jurisdiction of Allied war crimes tribunals.

¹² In his Report to the President, Jackson makes the case for deterrence as a major goal of the IMT (III.5).

¹³ See Shklar (1964: 168-70).

¹⁴ According to many participants and observers this made for an exceedingly dull and monotonous trial, as thousands of documents were introduced into evidence, but Jackson's eyes were set on a wider audience.

¹⁵ De Ribes, Closing Address, 29 July 1946.

¹⁶ Teschke (1999: 242).

¹⁷ Of these, 142 were convicted.

¹⁸ The RSHA (SS Main Office for Reich Security) included the Gestapo, SD, and other security and police formations and was directly involved in the activities of the Einsatzgruppen, and the administration of the deportation and extermination process. Its chief, Ernst Kaltenbrunner, had been hanged by the IMT. The WVHA (SS Main Office for Economy and Administration) was the purely administrative (finance, supply, construction, maintenance, audits, etc.) division of the SS and its far flung activities. These included the concentration camps. The Medical Case charged the public health officials and concentration camp doctors who had planned and conducted the program of medical experiments at the camps. The RuSHA (SS Race and Settlement Main Office) was involved in Aryan racial programs.

¹⁹ Final Report of Buscher (1989: 31).

²⁰ On the controversy, which resulted in a Congressional Investigation on account of allegations of torture and other irregularities in producing confessions, see Weingartner (1979).

²¹ For an overview of these cases, see Siegel, *Im Interesse der Gerechtigkeit* (1992: 40-112).

²² For example in the Hadamar Case. On these cases see Siegel (1992) and Cohen (1999).

²³ A further irony, is that on the whole the level of treatment of British and American POW's was very high (mortality rate of approximately 3.5%) compare with either the fate of Allied POW's in Japanese camps (approximately 30% mortality) or Russians in German hands (approximately 65% mortality).

²⁴ See, e.g., Teschke (1999:228).

²⁵ The Russians also widely publicized the Khabarovsk Trial of Japanese involved in the Unit 731 bacteriological and chemical warfare experiments which murdered thousands of victims. Part of their motivation was to embarrass the Americans who had prevented these perpetrators from being prosecuted before the Tokyo Tribunal (IMTFE).

²⁶ Rueckerl (1982: 100).

²⁷ In comparison with the figure of more than 45,000 which is often cited (e.g., by Teschke (1992:242, who also claims that more than 10,000 were executed), a recent search of Russian archives commissioned by the International Documentation Center for War Crimes Trials found the following statistics for war crimes trials in the USSR (not counting those in the SBZ): 16572 Germans tried for war crimes, 12807 convicted, 118 sentenced to death. Future research will have to clarify the discrepancy between these figures.

²⁸ Friedman (1947:332).

²⁹ Recent studies of individual cities or areas have shown how it could also vary considerably within zones. Important as this point is, my general assessment will necessarily have to forgo analysis at this level of detail. For examples of studies of individual cities or variation in zones, see, e.g., Ertle (1985), Henke (1981), Welsh (1989), Woller (1986).

³⁰ The Allies had captured the NSDAP membership list. In addition to the 6,542,261 members on 1 May 1945, there were members of other related organizations as well as those who had applied but whose membership had not yet been officially approved. General Lucius Clay later estimated that some 12,000,000 or more Germans were identified with Nazi activities. (1950:67).

³¹ See Wember (1992: 23), who cites the following British definition of internment: “Die Neutralisierung der Aktivitaeten von potentiell gefaehrlichen Personen.”

³² American intelligence teams arrested individuals based on the categories developed in the SHAEF Arrest Categories Handbook (April 1945).

³³ Kormann (1952: 24).

³⁴ Such individuals were sought on the basis of lists like the CROWCASS (Central Registry of War Criminals and Security Suspects) list circulated by the United Nations War Crimes Commission.

³⁵ The text of Control Council Law No. 38, and many of the other documents referred to here is conveniently available in Rhum von Oppen, Documents on Germany Under Occupation (1955).

³⁶ Conditions in general in Germany were very bad at this time. Despite the undoubted suffering of many internees, the mortality rates were very low, less than 1%.

³⁷ Badstuebner (1999: 234). See also Friedmann (1947:332).

³⁸ Not all of those interned had been subject to the summary arrest procedures, but most were. See, e.g. Wember (1992:7). Suspected war criminals were also interned, usually separately.

³⁹ Niethammer (1999: 274-75).

⁴⁰ Vollnhals (1991: 54-5) points out the Soviets also interned many persons not because they had been members of the Gestapo, SD, NSDAP leadership, and so on, but because they were potential opponents of Soviet occupation policies. In the west those interned could in principle include anyone who was regarded as a security risk or dangerous. Exactly how different these policies were in practice would require more careful study of their implementation.

⁴¹ Vollnhals (1991: 54-5) notes that these Soviet numbers are much lower than West German estimates, but that the latter (estimating 160-260,000 interned) may well be inflated.

⁴² Military Government Law No. 8 provided sweeping exclusions from employment other than ordinary labor for Nazi Party members.

⁴³ Peterson (1978:146). According to some estimates approximately 100,000 went into hiding (Wember 1992: 27). Even though they were not interned, being forced into hiding also effectively prevented their participation in public and political life.

⁴⁴ Article II, 1(d) and 3(a-f).

⁴⁵ This account is drawn from the excellent study by Wember, *Umerziehung im Lager*. The statistics are found on 318-43.

⁴⁶ These official figures are given by Friedmann (1947:332).

⁴⁷ OMGUS, Weekly Information Bulletin, 9 (September 22, 1945).

⁴⁸ Kormann (1952) 44-46.

⁴⁹ Fuerstenau (1969: 38). Clay gives the number as 1,650,000 (1950: 69).

⁵⁰ As tacitly acknowledged even by Clay (1950: 70-1). In 1946 57% of Germans polled expressed satisfaction with denazification, in 1948 32%, in 1949 17%. (Peterson 1978: 153)

⁵¹ Zink (1957: 159). Zink notes that many thousands of officials would have had to be trained to carry out this program adequately.

⁵² Friedmann (1947: 114).

⁵³ Friedmann (1947: 114)

⁵⁴ Zink (1957: 162).

⁵⁵ “The press was filled with reports of denazification ‘atrocities’ . A day did not pass when an incident involving a too lenient sentence, or a denazified SS assaulting a former concentration camp inmate, was not recorded. The American

newspapers were eager dispatchers of these tidings.” Kormann (1952: 126).

⁵⁶ On the various amnesties (the first, announced on July 8, 1946, excluded those born before January 1, 1919) see, e.g., Kormann (1952: Chapter 7).

⁵⁷ Clay (1950: 260). Hilberg (1985: 1085) gives slightly different numbers.

⁵⁸ Hilberg (1985: 1085) summarizes the American Zone results as of mid-1949 statistically:

Registrants [Fragebogen]	13,199,800
Charged	3,445,100
Amnestied without trial	2,480,700
Fines	569,600
Employment restrictions	124,400
Ineligibility for public office	23,100
Property confiscation	25,900
Special labor without imprisonment	30,500
Assignments to labor camps	9,600
Assignees still serving sentence	300

As he dryly notes, “In a sense, the most significant figure in this tabulation is the last one.”

⁵⁹ Zink (1957: 164).

⁶⁰ See, e.g., Badstuebner (1999: 246).

⁶¹ L. Niethammer, *Die Mitlaeuferfabrik* (Berlin 1982).

⁶² Kogon (1947)

⁶³ See also Vollnhals (1991: 23): “In dem langwierigen Entnazifizierungsprozess hatte sich das Personal der NS-Diktatur mehr oder weniger in nichts aufgelöst.”

⁶⁴ See, e.g., Vollnhals (1991: 24).

⁶⁵ In the economic sphere, they also first applied a policy of compulsory removal to employees in the public and private sector against who fell into certain categories of status or affiliation in Nazi organizations. As in the American Zone this led to significant economic and administrative problems. In the second phase of their efforts, under the framework of Control Council Directive No. 24, they concentrated their efforts primarily upon civil servants and only selectively upon employees in the private sector.

⁶⁶ Zink (1957: 167).

⁶⁷ Vollnhals (1991: 28).

⁶⁸ Fuerstenau (1969: 104-06).

⁶⁹ *Ibid*, 106.

⁷⁰ Thus, those convicted of membership in a criminal organization were, upon release from internment, subject to the regular denazification review and classification as a lesser offender, follower, or non-offender.

⁷¹ Under the German program some 2,041,000 individuals were reviewed, of whom 27,177 were classified as lesser offenders, 222,028 as followers. (Vollnhals 1991: 32-3).

⁷² See Vollnhals (1991: 35-7), Fuerstenau (1969: 134-5), Henke (1981: 8-19).

⁷³ Henke (1981: 18).

⁷⁴ See, e.g., Vollnhals (1991: 35-6).

⁷⁵ Vollnhals (1991: 38).

⁷⁶ The account in this paragraph is based upon Henke (1981) and Vollnhals (1991: 34-42). See also Fuerstenau (1969: 134-47).

⁷⁷ Vollnhals (1991: 42).

⁷⁸ So Vollnhals, who says that the program was “ein Instrument zur stukturellen Umwaelzung der Gesellschaft.” (1991: 43).

⁷⁹ Vollnhals (1991: 43).

⁸⁰ Bagstuebner (1999: 251).

⁸¹ Vollnhals (1991: 48): 390, 478 in the SBZ, 337,000 in the AZ.

⁸² Badstuebner (1999: 252).

⁸³ See Badstuebner (1999: 253) for statistics on the low percentage of former NSDAP members in higher civil service and public offices.

⁸⁴ Vollnhals (1991: 53), my translation.

⁸⁵ See Badstuebner (1999: 257).

⁸⁶ Friedmann (1947: 125), Zink (1957: 164).

⁸⁷ Rueckerl (1980: 39).

⁸⁸ De Mildt (1996: 20).

⁸⁹ On the few prosecutions that did occur, see Rueckerl (1982: 121-3).

⁹⁰ De Mildt (1996: 22); Rueter and De Mildt (1997: X-XI).

⁹¹ Rueckerl (1980: 44-5).

⁹² See Friederich (1983), Stolleis (1998: Chapters 11 and 12), Mueller (1991).

⁹³ Ibid 45-6.

⁹⁴ Ibid. 46.

⁹⁵ Grabitz (1998: 153). A rough translation of the passage would be: “The criminal law is simply incapable of dealing with this question.”

⁹⁶ See Grabitz (1998: 157-60) for a brief overview of the difficulties.

⁹⁷ On the difficulties of prosecuting the Schreibtschtaeter under German criminal law see the excellent analysis of De Mildt (1996: 33-35).

⁹⁸ De Mildt (1996: 39-40). The quotation he cites from Martin Broszat may serve as an example of the sentiment that the historical truth uncovered by the investigations “’ was perhaps of greater importance than the individual punishments the courts did not impose.’” (40)

⁹⁹ Grabitz (1998: 160).

¹⁰⁰ In the period 1951-89 734 persons were convicted. (Grabitz 1998: 164).

¹⁰¹ Taylor, *The Nation*, February 24, 1951.

¹⁰² Ibid..

¹⁰³ Buscher (1989: 174).

¹⁰⁴ E.g., Buscher (1989: Chapters 2-3). For the more critical view of Allied motives see, e.g., Bower (1995).

¹⁰⁵ Buscher (1989: 70-72).

¹⁰⁶ Friederich (1985).

¹⁰⁷ Vollnhals (1991: 62).