and when it was no longer feasible to repatriate them. Establishing definitively that Kretschmann and Welcker knew transport to Hadamar meant a death sentence for the forced laborers proved difficult, and the proceedings foundered.\textsuperscript{76} They were never prosecuted. And what of Fritz Bernotat, whose direct orders had occasioned the murder of the “Eastern workers” and whose ruthless energy and ambition had shaped Hadamar into a killing center which claimed 15,000 lives? Bernotat slipped into obscurity, living under an assumed name until his death in 1951. He died in his sleep.

\textsuperscript{76} Hamann, “Die Morde an polnischen und sowjetischen Zwangarbeitern in deutschen Anstalten,” 176.

\section*{Punishing the Excess}

\textit{Sadism, Bureaucratized Atrocity, and the U.S. Army Concentration Camp Trials, 1945–1947}

\textsc{Michael S. Bryant}

Other sinnes onley speake;
Murther shrieikes out.

\textit{John Webster,}

“\textit{The Duchess of Malii}”

In one of his earliest anti-Semitic writings, a 1919 letter to his commander while still an army private in Munich, the thirty-year-old Adolf Hitler cautioned that the “anti-Semitism of pure emotion” would never progress beyond sporadic pogroms. \textit{To curb the noxious influence of the Jews, a different kind of anti-Semitism was required – the \textit{“anti-Semitism of reason,\textquotedblright} which alone would form a legal basis for the systematic deprivation of Jewish \textit{“privileges\textquotedblright} and, ultimately, their total \textit{“removal\textquotedblright} (\textit{Entfernung}).} An uncanny sensation steals over us as we read Hitler’s distinction, articulated a full two decades before the outbreak of World War II, between the two varieties of anti-Semitic perpetration: the one excited by passion, vented locally by individuals or small groups, and destined to subside with little impact; the other grounded in a sober “recognition of facts,” committed to the step-by-step process of first restricting, then eliminating the Jews through the instrumentality of a “government of national power.” The first, subjective and short-lived, would quickly burn itself out; the second, objective and enduring, promised a racially pure community.\textsuperscript{1}

The sense of uncanniness evoked by Hitler’s words may reside in their prescient anticipation not only of the Nazis’ war on the Jews between 1933

\textsuperscript{1} Adolf Hitler, “Brief an Adolf Gemlich,” September 16, 1919, letter 61 of \textit{Hitler, Sämtliche Aufzeichnungen 1915–1924}, ed. Eberhard Jäckel (Stuttgart, 1980), 88–90. I am indebted to Raul Hilberg for directing my attention to this extraordinary datum from Hitler’s early career.
The trials prosecuted four separate categories of cases: (1) main (or “parent”) concentration camp offenses; (2) subsidiary (or “subcamp”) concentration camp offenses; (3) attacks on downed American fliers, typically by German civilians; and (4) a miscellaneous catchall that included the Malmedy massacre and the murders of Eastern European workers at the Hadamar mental hospital. The Dachau trials of concentration camp crimes included the main camps of Dachau, Buchenwald, Flossenburg, Mauthausen, Nordhausen, and Mühldorf, as well as the sprawling network of subsidiary camps attached to each. Juries were not impaneled for these trials; rather, a commission of no fewer than five officers and a “law member,” the latter a senior officer with extensive experience in military law, were the fact finders. In all the Dachau trials, only offenses against Allied nationals would be tried, leaving to the German court system the prosecution of crimes committed by Germans on other Germans. U.S. policymakers considered diversity of citizenship between victims and defendants essential to sustain a prosecution for war crimes. By the time the military court had permanently adjourned in December 1947, it had tried 1,200 defendants for war crimes in German concentration camps, achieving a conviction rate of approximately 73 percent. For the most part, the defendants were the hoi polloi among Nazi perpetrators: lower-ranking camp guards (interspersed with an occasional commander of a main camp or subcamp), inmates and capos, block elders, and sometimes civilian contractors provided with labor drafts of camp inmates. A typical case from the Buchenwald trial complex is illustrative: the defendants, tried in aggregate, were a bank employee, a locksmith, a mechanic, a tailor, and a glasscutter. From time to time, SS doctors were hauled into the dock for giving phenol and gasoline injections or performing lethal experiments on camp inmates, particularly at Dachau, Buchenwald, and Mauthausen. In the main, however, the defendants hailed from working-class or lower-middle-class backgrounds.

Unlike the indictment of the twenty-four major war criminals by the IMT at Nuremberg, which charged them with four substantive offenses


3 Due to space limitations, I will restrict my discussion to U.S. Army prosecution of the leading camps: Dachau, Buchenwald, and Mauthausen. The basis for this essay is the Reviews & Recommendations [bemærket “R&R”] of the Theater Judge Advocate for War Crimes, which reviewed the findings and sentences of the U.S. Army concentration camp trials for their legal propriety. Each review includes a comprehensive summary of the facts of the case, assessments of the court’s findings, and the confirming authority’s recommendations as to upholding, commuting, or reducing the sentence given. The R&Rs were intended for the U.S. military governor for the American zone of occupation.

(war crimes, crimes against humanity, crimes against peace, and conspiracy to commit each of these acts), the U.S. Army’s charges against concentration camp personnel adhered to a single model based on “violation of the Laws and Usages of War.” Numerous charges could be alleged against individual defendants under this heading. Whether the case related to a main camp or one of its subcamps, defendants were usually accused of “wrongfully” participating in a “common plan” to commit war crimes through beatings, assaults, killings, tortures, starvation, abuses, cruelties, and mistreatment of camp prisoners. In the parent Dachau case, the indictment refers to the victims as either “civilian nationals of nations then at war with the then German Reich” or as “members of the armed forces of nations then at war with the then German Reich,” whose identities were “unknown” but numbered in the “many thousands.” This language from the Dachau charge sheet is often reprinted in other concentration camp cases, indicating that many of the victims were anonymous and their numbers legion. The enormity of the crimes—in the Dachau parent case, forty defendants were charged with killing, torturing, and beating thousands of inmates—imparts a chilling, surreal touch to the proceedings, a quality that would later prompt Konrad Adenauer in 1952 to identify Nazi criminality with these “true criminals,” the “asocials” who filled the ranks of the SA and concentration camp staffs.5

It is tempting, of course, to agree with Adenauer that many of the defendants tried by Army courts were sadists who gave free rein to their sociopathy within the brutal, permissive conditions of the concentrationary universe. The hair-raising accounts of their deeds automatically guide us to such a conclusion. However, the special condemnation reserved for the sadistic perpetrator blunts our perception of an important aspect of the Holocaust—namely, that much of the destruction it wrought was done by dispassionate bureaucrats acting under orders, rather than by the “asocials” whose lurid crimes seized headlines across the world.6 The tendency to impose the harshest punishment on brutal perpetrators may have ancient roots in millennia of cognitive-ethical development; as a paradigm for dealing with modern forms of bureaucratic criminality, however, it may be both anachronistic and counterproductive.7 Already at the age of thirty, Hitler had realized that only an authoritarian government could move beyond the violent excesses of the pogrom to permanent exclusion of a persecuted minority. Bureaucratic rationality as expressed in the “anti-Semitism of reason,” and not the wild excesses of the “anti-Semitism of feeling,” was the indispensable precondition to effectual, long-term exclusion. In the Dachau concentration camp trials and their aftermath, we can discern this understandable yet regrettable inclination to mete out the severest punishment to “deviant” perpetrators while according favored treatment to the cool-headed bureaucratic killer.

THE DACHAU CONCENTRATION CAMP TRIALS

Established near Munich in March 1933 by Heinrich Himmler, at the time the Munich police president, Dachau began as a detention center for “protective custody” prisoners, primarily Communists and Social Democrats, under the command of the Bavarian state police. In April 1933, the SS assumed control of the camp, and in June of that year Theodor Eicke became its commandant. Eicke was responsible for instituting the system of regulations that governed life in the Dachau camp; when he later became inspector general for all concentration camps, he adopted the Dachau system as his model for camp structure and administration. Beginning in 1935, other types of internees entered the ranks of the Dachau camp population: prisoners who had served their prison term after judicial conviction; Jehovah’s Witnesses, imprisoned for flouting the draft; Gypsies, in order to segregate them from German society; churchmen, for resisting the Party’s encroachment on the churches; homosexuals, due to their “deviant” sexuality; and miscellaneous individuals accused of criticizing the regime. The first Jews who entered the camp in the years after 1935 were well-known critics of the Nazi government. The number of Jewish internees spiked considerably after Kristallnacht in November 1938, when more than ten thousand German Jews were sent to the camp. (Most of these Kristallnacht inmates were released after several months.)8

The deportation of thousands of Austrian prisoners to Dachau after the Anschluss in 1938 established a grim precedent that would be followed during the war years of transporting to Dachau “undesirables”—partisans,

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7 In his 1967 study, Verbrechen unter Totalitäten Herrschaft, Herbert Jäger referred to the need to locate a direct act of violence by the defendant before punishment can be imposed as “archetypal” and “avastatic.”
Jews, and those unwilling to collaborate—from each country the Nazis invaded. In this fashion, the Dachau camp population soared between 1939 and 1945 as prisoners from thirty or more countries poured into it, rapidly transforming the German inmates into a minority in the camp. By 1944, the camp population included Russians, Jews, Germans, Czechs, Spaniards, Dutch, Belgians, Norwegians, Lithuanians, Austrians, Italians, and French. These prisoners constituted a potential source of labor that was quickly tapped by the camp commandant, who put them to work in stone quarries, draining marshes, and road construction. As the camp population skyrocketed and the need for war production became acute, the SS centralized control of concentration camp labor in the SS Wirtschafts-Verwaltungshauptamt (Economic-Administrative Main Office, or WVHA). The Germans' war economy was voracious, and soon the work of concentration camp inmates had become essential. Additional camps were formed throughout Germany and Central Europe. Dachau grew into a forced labor Leviathan, embracing at least 85 subsidiary and branch camps in which some 65,000 prisoners toiled on German armaments. They worked not only for the WVHA, but for private contractors who paid the WVHA for the use of the inmates' slave labor.

Although Dachau was not a death camp per se, camp conditions were designed to harass, humiliate, intimidate, starve, exhaust, and brutalize the camp inmates. Beyond the daily fear of being beaten or killed at the whim of SS guards, inmates had to contend with the fatal medical experiments of camp physicians. Dr. Klaus Schilling freely took advantage of the limitless supply of human guinea pigs to test his homeopathic theories of malaria prevention by injecting prisoners with the disease. Dr. Sigmund Rascher conducted the notorious high altitude and freezing experiments that resulted in the deaths of between eighty and ninety inmates. Moreover, Dachau became the venue for the mass murder of Soviet POWs (6,000–8,000 of whom were shot just outside the camp in the spring of 1942) and prisoners deemed unable to work in the winter of 1941–42. This latter group fell into the net of the “14f13” program, which sought to relieve overcrowding in the camps by transferring the ill and infirm to “euthanasia” centers for killing. Transports of prisoners were sent from Dachau to the euthanasia center at Hartheim (near Linz), where 3,166 of them were gassed.

9 Ibid.; R&R, March 1946 [date illegible], NARA, RG 549, M 1217, Roll 3 (U.S. v. Martin Gottfried Weiss et al.).

The Parent Dachau Case (November 15–December 13, 1945)
The first of the U.S. Army trials of Dachau camp defendants began on November 15, 1945. The indictment enumerated the names of forty defendants, including the camp commandant from 1942 to 1943, Martin Gottfried Weiss; Dr. Klaus Schilling, a renowned expert in tropical diseases who operated an independent malaria station in the camp; and sundry camp guards and capos. The accused were charged with participating in a “common design” to commit war crimes (“killings, beatings, tortures, starvation, abuses and indignities”) on thousands of foreign civilian nationals and military members of belligerent nations. The relative earliness of the Dachau case, which began six days before the IMT at Nuremberg, meant that the prosecuting authorities had little by way of precedent to follow in drafting their charges. For guidance, they looked to the Bergen Belsen case tried by a British military court (September–November 1945) at Lüneburg, which, as noted in the Review and Recommendation of the Deputy Theater Judge Advocate, “was the first instance of a mass trial for war crimes committed by persons acting in concert.” In terms of the defendant numbers (forty-five in the Belsen case, forty in Dachau), the diversity of nationality among the victims, and the nature of the crimes alleged, the two cases were closely analogous. Following the British at Belsen, the Americans used the notion of a “common plan” to tie the Dachau accused to the war crimes perpetrated in the camp. The technique of alleging participation in an overall plan to commit violations of the laws of armed conflict was common to the U.S. prosecutions of Nazi criminality, appearing in most of the concentration camp trials, the trials of the Hadamar staff, the IMT trial of the major war criminals, and the twelve “subsequent” national trials at Nuremberg. Although often used interchangeably with the doctrine of “conspiracy” as a theory of criminal liability, the Review and Recommendation carefully distinguished between the two, noting that “common plan” required a lesser quantum of proof against the defendants: a showing of a “community of intention” between them was sufficient. Thus, to prosecute the Dachau accused successfully, the prosecutor needed only to prove that the defendants were aware that a “definite practice of cruelties and abuses, violative as to foreign nationals, military and civilian, of many of the laws and usages of war” had occurred, and that they “took active parts in encouraging” this practice (emphasis in the original). “Such a course of conduct,” the R&R concludes, “we believe, constitutes acting in pursuance of a common design to violate” the laws of war.

11 R&R, March 1946, NARA, RG 549, M 1217, Roll 3 (U.S. v. Martin Gottfried Weiss et al.).
Proving the “practice of cruelties and abuses” at Dachau was a comparatively simple matter. Before the trial commenced, the Army’s lead prosecutor, William Denson, had decided to make oral eyewitness testimony the crux of the prosecution’s case against the defendants. (In this regard, the trial differed from the “trial by document” conducted by Robert Jackson at Nuremberg.) Accordingly, the pretrial documentation Denson submitted to Judge Advocate General Headquarters listed 170 witnesses, many of whom offered testimony during the trial of the appalling conditions within the camp. The parade of horrors included starvation rations, extreme overcrowding that fostered typhus epidemics, the mass executions of Soviet POWs, the murders of mentally and physically ill patients by injections of phenol into their hearts, lethal medical experiments, clothing inadequate to protect the prisoners from the cold, “invalid transports” to killing centers, and an omnipresent round of beatings and abuse that included the practice of forcing newcomer prisoners to stand naked for hours in wintry weather.12

The Army prosecutors argued that this shocking bill of particulars, coupled with proof of the defendants’ participation in the common plan to perpetrate the atrocities, proved their inherent sadism. In his closing argument, Denson referred to the defendants at least three times as “sadistic,” and, in his peroration, called the accused “beasts” who “cannot lay claim to being human in any respect.” German defense counsel Hans Karl von Posern, by contrast, portrayed the defendants as loyal soldiers acting on superior orders: “Befehl ist Befehl – an order is an order. It had to be obeyed, however its quality was.” The clash between prosecution and defense centered on how the military court would interpret the interior psychologies of the defendants: that is, whether they would be seen as enterprising sadists acting within the spirit of a vague “common plan,” or as normal, law-abiding men who merely carried out their orders in a time of war. The conviction of all the accused along with the death sentences dealt to nearly all of them signal that the prosecutors’ conception prevailed.13

The Subsidiary Dachau Camp Trials (October 1946–September 1947)

Dachau’s theater of cruelty was not restricted to the stage of the main camp, but extended to the myriad subsidiary camps of the Dachau complex. The trials of personnel associated with these camps, as well as those of other main camp defendants, ensued after the close of the parent case in December 1945. As noted previously, the mounting demands of the German war economy after 1939 occasioned an expansion of main camps like Dachau, Buchenwald, and Mauthausen, so that hundreds of “subcamps” arose around them. Some of these subcamps, like the Kaufering site located 25 miles southwest of Munich, are perhaps best thought of as complex, epicyclical organizations that themselves embraced numerous subsidiary camps. Kaufering, for example, was created pursuant to Albert Speer’s jagerstab program between June and October 1944, its fifteen subcamps devoted to exploiting Jewish slave labor in the underground construction of German military aircraft. The first prisoners of Kaufering, a group of Lithuanian Jews, arrived in June 1944. Beginning in October 1944, transports of Hungarian, Czechoslovak, Polish, and Romanian Jews from Auschwitz were sent there. Starvation rations, lack of health care, daily physical abuse, and grinding hard labor were the lot of the Kaufering inmates. Precise figures of the camp population are unavailable; however, a prisoner who worked in the camp record office estimated a figure of 28,000 for the duration of its brief existence. Many of the prisoners who survived the harsh conditions of the camp perished at the hands of SS guards during forced marches in the last phases of the war, shortly before Kaufering was liberated by the U.S. Army in late April 1945.14

One of the hallmarks of the Kaufering subcamp trials was the number of hypertalent direct perpetrators involved. A few cases in point are the trials of Hermann Zisch (January 3–February 3, 1947), Martin Schreyer (February 26–March 6, 1947), Josef Neuner (March 27–28, 1947), Karl Ehrenboeck (July 2–7, 1947), and Franz Millenz (August 14–15, 1947). Zisch, a Waffen-SS sergeant in charge of the supply room at Kaufering XI (Landsberg) from December 1944 to April 1945, was a machinist; Neuner, an SS master sergeant who served at the main Dachau camp prior to service as roll call leader at Allach (an outcamp of Kaufering), was a miner; and Ehrenboeck, a Waffen-SS sergeant at both the main camp and Allach, was a glass painter. (The civilian occupations of Schreyer and Millenz, both SS sergeants and guards at the Kaufering complex, were not identified in the Review and Recommendation.) Evidence against each of them rested on the testimony of eyewitnesses. Zisch was accused of forcing ill prisoners to do vigorous exercises for eight consecutive hours every Sunday; of causing the death by hypothermia of prisoners by removing their coats; of administering constant beatings to the so-called Muselmänner, the emaciated, terminal prisoners in

12 Ibid.; Greene, Justice at Dachau, 36.
13 Greene, 101–4; R&R, March 1946, NARA, RG 549, M 1217, Roll 3 (U.S. v. Martin Geofrid Weiss et al.).
the camp; of tying the hands of prisoners behind their backs and hoisting them into the air for fifteen minutes; and of senseless atrocities during the prisoner march from Kaufering in April 1945, which included shooting a Czech prisoner for trying to drink from a stream and others for being too exhausted to continue the march. It was alleged that Schreyer routinely beat prisoners, some of them so severely that they later died from their wounds; forced inmates to stand in the cold without shoes for twenty-four hours or longer; reported prisoners for fashioning their blankets into rags for their feet (the prisoners were hanged as punishment); selected ill prisoners for “invalid transports” to locations where they were murdered; confined prisoners in a cellar without food or adequate clothing, thereby causing their deaths; and hanged prisoners from their wrists. Witnesses accused Neuner of hanging Russian escapee POWs, severely kicking prisoners and beating them with a stick, and shooting numerous prisoner evacuees during the forced march of April 1945. Ehrenbock was accused of setting his dog on prisoners with the apparent object of either punishing them for failing to work fast enough or to train the dogs in attacking human body parts; beating an inmate with a rubber hose and then, when the victim lay helpless on the ground, administering fatal kicks to his groin; beating and whipping prisoners for failure to remove their caps promptly; and participating in the mass executions of Russian POWs (presumably at the main camp). The evidence against Millenz alleged that he had forced all inmates at Kaufering—including those enfeebled with illness—to attend roll calls that could last up to four hours, no matter the weather, during which he often punched, kicked, or beat them with a club, causing the deaths of some of them; that he ordered the extraction by inmate dentists of healthy teeth from prisoners’ mouths; that he beat to death a Polish inmate for being unable to work due to a foot injury and two others for complaining of the inadequacy of their clothing to protect them against the cold as they worked; that he pistol-whipped to death Hungarian and Polish prisoners on work details; and that he testified shortly before liberation of the camp that “one should liquidate the entire bunch [of prisoners] before the Americans come.” Each of these defendants was sentenced to death, his punishment upheld on review.\(^{15}\)

\(^{15}\) R&R, July 17, 1947, NARA, RG 549, M 1217, Roll 4 (U.S. v. Hermann Ziehel); R&R, June 12, 1947, NARA, RG 549, M 1217, Roll 4 (U.S. v. Willi Fischer et al.); R&R, June 13, 1947, NARA, RG 549, M 1217, Roll 4 (U.S. v. Josef Neuner); R&R, March 2, 1948, NARA, RG 549, M 1217, Roll 4 (U.S. v. Karl Ehrenbock); R&R, November 10, 1947 NARA, RG 549, M 1217, Roll 4 (U.S. v. Franz Millenz). Millenz’s statement was hardly an idle threat. The SS administration at Dachau in the waning months of the war did, in fact, plan to murder all the prisoners with bombs and poison before the Americans arrived—a plan that was soon overtaken by events.

from the tattooed skin of murdered prisoners, lends a grotesqueness to the trial proceedings that may actually surpass that of the Dachau parent case.17

As in the Dachau main camp trial, the defendants in the Buchenwald case raised a superior-orders defense. According to this argument, the executions of prisoners at Buchenwald (such as the “detail 99” killings) were under the 1942 orders of Gestapo Chief Heinrich Müller and the Reich Security Main Office. According to the defendants, Müller’s orders concerned reprisals to be carried out on selected Jewish and Polish inmates. On the strength of these orders, the defense argued that executions like detail 99 were not illegal. Neither the military court nor the subsequent reviewing authorities were moved by the defendants’ argument, the latter noting that executions of spies and saboteurs could occur only after a fair trial (which did not occur at Buchenwald) and that reprisals against POWs were in any event illegal. The defendants knew or should have known that the killings were patently unjust and in violation of international law. Accordingly, the court convicted all thirty-one of the Buchenwald accused, sentencing all but eight to death.18

**Subsequent Buchenwald Main and Subsidiary Camp Trials (September 1947–December 1947)**

Following the parent Buchenwald trial, the U.S. Army prosecuted an assortment of main and subsidiary camp cases. Like their Dachau counterparts, most of these trials involved predominantly camp guards from working-class and petit bourgeois backgrounds charged as direct perpetrators with acts of breathtaking ferocity. The trials of Heinrich Buuck, Victor Hantscharenko,

17 The charge against Ilse Koch of participating in the murder of camp inmates in order to process their tattooed skin into lampshades and photo albums became, both within Germany and worldwide, a symbol of National Socialist criminality. When Koch’s life sentence, dispensed by the U.S. Army court in 1947, was reduced to a four-year prison term by an Army review board, the international sensation aroused by her release from prison led to her indictment by the Landgericht (state court) of Augsburg in 1951, which sentenced her to life in prison. She committed suicide in 1967.

Koch emerged from her two trials as an infamous, even monstrous, figure, the “bitch of Buchenwald” whose alleged crimes both shocked and titillated consumers of the German and international press. Significantly, as Ulrich Herbert notes, Koch lived out the rest of her life in jail while “former Gestapo chiefs, generals of the Waffen-SS, and Einsatzgruppen commanders responsible for shooting tens of thousands of Jews regained their freedom after a handful of years in prison, and often quickly became esteemed and prosperous citizens.” Ulrich Herbert et al., *Die nationalsozialistischen Konzentrationslager*, 18–19. See also Alexandra Przybylski, “Ilse Koch – ‘normal’ SS-Ehefrau oder ‘Kommendeure von Buchenwald’?” in *Kariieren der Gewalt: Nationalsozialistische Täterbiographien*, ed. Klaus-Michael Mallmann and Gerhard Paul (Darmstadt: Wissenschaftliche Buchgesellschaft, 2004), 127–9.

18 R&R, November 15, 1947, NARA, RG 549, M 1217, Roll 4 (U.S. v. Josias Prince zu Waldeck et al.). Several of these sentences were either commuted or reduced on review, including that of Ilse Koch (see note 17).

Ignaz Seitz, Adam Ankenbrand, and a group of SS guards who participated in detail 99 at the main camp illustrate the kind of sensational brutality that increasingly defined the worst excesses of Nazi criminality. Witnesses accused Buuck, a farmer and guard at subcamp Sonnenberg, of shooting numerous prisoners at both the Sonnenberg camp and during the evacuation march in April 1945, allegedly for eating potatoes or being too weak to continue. Hantscharenko, a Russian national, laborer, and SS guard at the main camp, faced accusations that he had shot and killed twelve prisoners during the forced march from the camp in April 1945 for being unable to continue the march or for eating beets along the roadside. Seitz, a farmer and SS guard at both the main camp and the Leau subcamp, confessed to shooting under orders eleven prisoners for being physically incapable of marching during the evacuation of Leau. Ankenbrand, a laborer and SS technical sergeant at the Schlieben subcamp, was charged with several acts of pure sadism: shooting and wounding one prisoner as he lay on the ground, then killing another as the first cried out in pain; snapping at a distance of 40 meters a starving prisoner who had briefly left a transport train to pick grass to eat; and shooting and killing five prisoners during the same prisoner transport for trying to eat grass. Evidence against the detail 99 defendants – all SS guards at the main camp from the lower rungs of the German socioeconomic ladder – indicated that a former horse stable had been remodeled to convey the appearance of a medical exam room. SS personnel medical POWs into this bogus facility, ostensibly for the purpose of a medical exam; as they stood with their backs against the wall to have their height measured, the defendants, standing behind the wall in a secret compartment, inserted the barrels of their guns into a hidden aperture and shot the POWs in the back of the head. In this manner, between two thousand and three thousand Russians were murdered (from late 1941 to mid-1942).19

In three of the five cases above, the defendants unsuccessfully raised a superior-orders defense. In each instance, the military court and reviewing authorities dismissed the defense arguments. According to the Reviews and Recommendations of the trials, “compliance with superior orders does not constitute a defense to the charge of having committed a war crime.” The R&R’s did note, however, that compliance with orders was relevant...
in mitigation/extenuation of punishment, but only when the defendant proved:

(a) that he received an order from a superior in fact . . .
(b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and
(c) that he acted, at least to some extent, under immediate compulsion.20

In denying any grounds for accepting defense claims of superior orders, the military courts essentially identified the defendants as direct perpetrators freely choosing to commit acts of gratuitous cruelty on helpless camp inmates.

THE MAUTHAUSEN CONCENTRATION CAMP TRIALS
(MARCH 1946–NOVEMBER 1947)

The third of the major concentration camp trial complexes focused on Mauthausen and its subsidiaries. Established after the 1938 Anschluss near a stone quarry in Upper Austria, the camp first housed convicted criminals and “asocial elements” transferred to it from Dachau. In the ensuing four years, the camp population grew with infusions of political prisoners (German, Czech, and Spanish) and Dutch Jews. In 1942 alone, 13,000 new prisoners flooded into the camp, among them both civilians and POWs from Czechoslovakia, the Netherlands, the USSR, Yugoslavia, France, Belgium, Greece, and Luxembourg. The following year, the prison population grew by 21,028, spiking again in 1944 as large transports of Jews from Auschwitz arrived in Mauthausen and its subcamps. In March 1945, the population of the main camp and the subcamp of Gusen reached 84,000.21

Estimates reckon that of the 199,404 prisoners to pass through Mauthausen during its existence, around 119,000 of them perished. The mortality rate of 60 percent is particularly jarring as compared with Dachau and Buchenwald (15 and 18 percent, respectively). The remarkable lethality of Mauthausen within the concentration camp system may have its origins in an August 19, 1942, decree of Reinhard Heydrich, chief of the Reich Security Main Office, who introduced a grading scale of I to III for concentration camps based on the harshness of their conditions, with Category I camps rated the mildest and III the harshest. Only Mauthausen and Gusen were classified as Category III camps. Accordingly, “problem” prisoners — recidivists, negativists, and those in “protective custody” — were transferred to Mauthausen after Heydrich’s decree. The mortality rates as recorded in the camp Sterbebuch (Death Book) confirm this trend: in 1942, between 50 and 150 prisoners died per day; in 1943, between 200 and 300; in 1944, between 350 and 400. At the time of the camp’s liberation in April 1945, deaths from starvation alone had risen to 400–500 per day.22

The Mauthausen Parent Case (March 29–May 13, 1946)

The subject matter of the Mauthausen parent case resembles an act from the Théâtre du Grand Guignol, a resemblance that may explain why, of the sixty-one defendants tried and convicted, sixty were sentenced to death by hanging. The indictment charged the defendants with participating in a “common design” to commit war crimes (“killings, beatings, tortures, starvation,” etc.) against foreign nationals and POWs at the Mauthausen concentration camp and its subcamps. Newcomers to Mauthausen were bathed and forced to stand outdoors for hours in bitter winter temperatures. On one occasion in February–March 1945, 300 sick prisoners who arrived in a transport were subjected to hot and cold showers, then exposed to the cold, leading to the deaths of 230 of them. Clothing and food were inadequate as a matter of camp policy. As at Dachau and Buchenwald, Mauthausen prisoners sometimes became human guinea pigs for camp doctors. In July 1942, the chief medical officer at Gusen had his inmate physicians operate on 300 prisoners to instruct them on surgical technique. Of this group of “patients,” who were selected for their debilitated condition, only 150 survived. The survivors later disappeared on invalid transports. The violence inflicted on camp inmates was without limit, as the R&R of the Deputy Theater Judge Advocate for War Crimes observed: “Virtually every known form of killing was used at Mauthausen. To list some, inmates were killed by gassing, hanging, clubbing, heart injections, driving inmates into the electric fence, kicking in genitals, being buried alive and by putting a red hot poker down the throat.”23

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20 R&R (U.S. v. Heinrich Bauk). The language quoted is boilerplate that appears verbatim in hundreds of the R&Rs that considered the issue of the superior-orders defense.
This statement was not hyperbole. Prisoners selected for extermination on account of their physical debility were injected with cyanide, gasoline, magnesium sulphate, and Lysol. Lethal injections were supplemented with asphyxiation in the “blue automobile” (a gas van) and in the camp gas chamber, which, as in the death camps and the Reich’s euthanasia centers, was disguised as a shower room. The gas used to kill prisoners was the fumigant Zyklon B, employed to the same effect in the gas chambers of Auschwitz. Two crematoria installed in the camp incinerated the bodies. The Mauthausen trial court found that a large but unspecified number of Czech women and children were gassed there in October 1942. As the Third Reich veered toward its final collapse in April 1945, at least 1,400 camp patients were dispatched in the Mauthausen gas chamber.24

The military court formulated “special findings” during the trial that would prove fateful to the defendants. As trier of fact, the court would assume the following postulates as proven by the evidence:

1. That the Mauthausen Concentration Camp was essentially a criminal enterprise;
2. That it was impossible for anyone to be employed at or present in the camp without acquiring definite knowledge of the criminal practices;
3. That every employee and official connected with the camp, regardless of his capacity, is guilty of the crime of violating the laws and usages of war.

To rebut their guilt under the presumptions above, defendants could show either that they were not present at Mauthausen, or, if present, were unaware (and should not have been aware) of the camp’s criminal operations, or that their participation in such operations did not in any way promote the commission of war crimes. The majority of the defendants, being SS camp guards, were unable to meet this burden.25

The Mauthausen Subsidiary Camp Cases (March–November 1947)

After the parent case had concluded, the Army launched an extensive series of trials of Mauthausen subcamp defendants, including those of Groß-Raming, Linz (Kleinnüchhen), Wiener-Neudorf, Gusen, Ebensee, Ober-Ilmühle, Steyr, St. Aegyd, and St. Lambrecht. Defendants were primarily SS guards from lower-class backgrounds, intermingled with occasional capos and subcamp commandants. Hans Bergerhoff, a factory worker and SS block leader at Linz III, was convicted of beating inmates with a rubber cable and blackjack for “trivial reasons.” Friedrich Felsch, a baker and guard at subcamp Linz III, was charged with pistol-whipping at least one inmate to death and beating others with his rifle butt. Willy Auerswald, a textile worker and SS roll call leader at the Steyr subcamp, beat prisoners with his fists, a club, a riding crop, and an oxtail whip. In addition, witnesses charged that he severely beat a Russian prisoner during a work detail, then, as the prisoner begged on his knees for his life, threw him against the electrical fence that encircled the camp, instantly killing him. When defendants raised the superior-orders defense, as Auerswald did, the military court tersely rejected it, indicating that superior orders was not a defense to a war crimes charge, and that the defendants (like Auerswald) acted under neither ignorance nor compulsion.26

Constructions of Excess in the Dachau Trials: Typologies of Perpetration

“We were the bottom of the basement, not even pebbles in their shoes,” Paul Guth, assistant trial counsel to William Denson at Dachau, groused about the kinds of defendants he and his team prosecuted.27 His standard of comparison was the trial by the IMT at Nuremberg of the major war criminals, which roughly coincided with the parent Dachau case in November 1945. In contrast with the former leadership corps of the Nazi regime at Nuremberg, the Dachau defendants were farmers, factory workers, glasscutters, bakers. With the exception of a commandant like Martin Weiss or a medical doctor like Klaus Schilling, the accused filled the lower echelons within the concentration camp apparatus, occupying positions that guaranteed them daily, intimate exposure to their victims and boundless opportunity to harass, torture, beat, degrade, and murder them with their own hands.

Guth’s distinction between the IMT defendants and the accused at Dachau hints at a significant criminological dimension of Nazi perpetration: the difference between “direct perpetrators” and “facilitators,” distinguished from each other by their relative distance from the crime. In the language of the criminal law, direct perpetrators commit the criminal act (actus reus) intentionally (mens rea) and without either justification or excuse. Facilitators, on the other hand, do not directly perform the actus reus themselves, but knowingly contribute to a chain of actions that lead to it. At their trials, both Rudolf Höss and Adolf Eichmann staked their

24 Ibid.
25 Ibid.
27 Quoted in Greene, Justice at Nuremberg, 62.
defense on the remoteness of their connection with atrocity, Höss boldly asserting at his trial that he "never abused or killed anyone." The absence of a proximate relationship between the facilitator’s actions and the violence of his crime attenuates the impression of culpability. Thus, at the Eichmann trial in 1961, despite the voluminous evidence of Eichmann’s central role in the deportation of European Jews to their deaths, the prosecution strove unsuccessfully to prove direct acts of violence committed by Eichmann — a tactical move amounting to a virtual admission that the facilitator was something less than a true murderer. By contrast, proximity between the direct perpetrator’s willful acts and the crime alleged confirms the actor as a real criminal deserving of the harshest sanctions the law can impose. Most of the defendants tried at Dachau fall into the latter category.28

Herbert Jäger’s typology of individual participation in totalitarian criminality enables us to locate the crimes of the Dachau accused on a spectrum of perpetration. Jäger divided it into three types: (1) crimes without orders, or "crimes of excess" (Exzessstaten); (2) carrying out orders with relative independence, or "crimes of initiative" (Initiativstaten); and (3) carrying out orders in a situation in which the actor exerts little personal influence on the event, or "crimes of command" (Befehlstaten).29 In this framework, the offenses of the Dachau trial defendants largely fall into the first (crimes of excess) and, to a lesser degree, the second (crimes of initiative) categories. Jäger’s subdivision of Exzessstaten into additional subcategories further clarifies the nature of these crimes. Of his six subcategories, four are particularly apposite to the Dachau accused: (a) arbitrary crimes; (b) operational excesses; (c) crimes of compliance; and (d) unauthorized commands.

28 On the curious fixation of the Israeli prosecutor on proving that Eichmann had personally murdered a Jewish youth in Hungary, see Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (New York, 1977), 22. Jäger, Verbrechen unter Totalitäten Herrschaft, 22-75. Jäger’s typology of individual perpetration within the overall context of National Socialist criminality bears comparison with the more recent classification of Klaus-Michael Mallmann and Gerhard Paul. In an edited volume containing the biographies of Nazi perpetrators, Mallmann and Paul distinguish between five types of perpetrators: (1) "band wagon Nazis," in other words, political opportunists whose crimes were chiefly motivated by a desire to advance their careers; (2) ideological killers (Weltanschauungskiller), whose crimes aimed at achieving "the national socialist project of the new racial order of Europe"; (3) "hardcore" killers (Exzeßtäter), whose savage crimes required no orders; (4) bureaucratic killers (Schreibstübchen), who made administrative contributions to the process of destruction, but did not harm others directly; and (5) a hybrid category of hard-core and bureaucratic perpetrators (Mischung aus Schreibstübchen und Direktstaten). The authors caution that each category of perpetrator is an ideal type, and should thus be regarded as descriptive of distinctive features of Nazi criminals without precluding other aspects important to understanding the killers’ motives. Klaus-Michael Mallmann and Gerhard Paul, "Sozialisation, Milieu und Gewalt: Fortschritte und Probleme der neuesten Täterforschung," in Mallmann and Paul, Karrieren der Gewalt: Nationalsozialistische Täterbiographien, 17-18.

29 Jäger, Verbrechen unter Totalitäten Herrschaft, 22-75.

a. Arbitrary Crimes. Arbitrary crimes are crimes of excess committed for no apparent motive or for trivial motives. They typically are unaccompanied by clear orders or external pressure; rather, their commission lies squarely within the actor’s discretion. The gratuitous practice of forcing naked prisoners to stand outside in winter weather for hours at a time would meet this definition, as would defendant Zisch’s weekly habit of forcing sick inmates to perform hours of vigorous exercise and defendant Millenz’s extraction of healthy teeth from prisoners’ mouths. The pattern of punishing ill and starving prisoners for attending to biological needs — for example, scavenging for grass to eat, or fashioning rags into footwear — also satisfies the definition of an arbitrary crime.

b. Operational Excesses. The operational excess perpetrator commits his crimes as part of an organized scheme aimed at the persecution of others — ghetto clearings, searches of Jewish districts, raids, deportations, prisoner transports. In these situations, the actor’s crimes rarely are enforced by concrete orders. As Jäger notes, operational excesses occurred most often in connection with prisoner transports at the end of the war, in the midst of a “collective atmosphere of lawlessness and cruelty.”30 Defendant Hatecharenko’s murder of twelve prisoners during the forced march from Buchenwald in April 1945 and defendant Seitz’s shooting of eleven prisoners during a similar transport from the Leau subcamp are two notable examples from the Dachau trial series.

c. Crimes of Compliance. This subcategory pertains to crimes perpetrated in situations in which "orders" exist, but are vague or merely suggestive. Such "orders" enabled the higher strata of the Nazi government to steer the criminal enterprise in a desired direction without the need to issue explicit instructions. Rather, they could rest assured that lower-ranking functionaries would "comply" with their ambiguously expressed wishes by translating them into murderous practice. Jäger cites the example of personnel records shipped with some prisoners (especially those unable to work) that bore the inscription, "Return not desired!" or "not desired in the concentration camp," words interpreted by camp personnel as instructions for killing. Although the message in these instructions was clear, it cannot be identified as an explicit order to kill the affected prisoner. A camp guard or administrator who failed to act on it would not face charges for disobedience. Rather, as Jäger points out, "he would only have missed the opportunity to ‘prove himself within the spirit of the system.’" The claim by SS guards charged with killing Soviet POWs as part of detail
had swung decisively against further war crimes trials. Growing aversion to continued prosecutions led by 1951 to serious discussion within German political circles about a general amnesty for war criminals. Chancellor Konrad Adenauer approved of a more limited amnesty, since, in his words, "among the convicted there was a certain percentage to whom the word 'war criminal' perfectly applies, and whose punishment must be preserved." Although the Allies had convicted many German defendants on political grounds, the "real criminals" would be exempted from any amnesty of convicted war crimes defendants. For German historian Ulrich Herbert, however, Adenauer’s identification of “real” Nazi criminality with heartless sadism obscured the vital roles of the "Gestapo Chief or Einsatzgruppen Commander" in the regime’s projects of mass extermination. Instead, the chancellor’s ascription effectively transformed the plebeian character of Nazism – the “SA brawler and concentration camp guard” – into the essence of its criminality. The lawyer with a doctorate charged with mass shootings on the eastern front, or the general indicted for shooting hostages, went unrecognized as a Nazi perpetrator because he did not fit the profile of the “common” murderer.34

The reason Adenauer and many others tended to exonerate the professional, bureaucratized killer may have more to do with deep structures of historical change than with idiosyncratic values. In the historical transition to modernity, the “organization man” emerged as the ideal of bourgeois instrumental rationality; calculating, acting within the dictates of a professional group, objectively scientific, and personally restrained, he readily found his place in increasingly complex bureaucracies as the giver and recipient of orders. Whether in business, government, or organized criminal groups, the organization person became prerequisite to the system’s efficient achievement of its purposes. This was, and remains, no less the case when the system served by the organization person pursued monstrous criminal aims. The very fungibility of bureaucratic killers (itself an attribute of modernity) meant that they looked much like professionals in noncriminal settings. When called on to prosecute, convict, and punish their look-alikes, noncriminal professionals tended to hesitate, framing rationales like Adenauer’s to mitigate or excuse the bureaucratic killer’s actions.35

**CONCLUSION**

By December 1947, the U.S. Army Dachau trials had run their course; however, they continued to exert a significant influence on German perceptions of Nazi crimes. By the late 1940s, public opinion in West Germany

31 Ibid., 35–6.
32 Ibid., 42–3.
33 Before World War II, international law on the issue of superior orders as a defense to a war crime was inconclusive. The jurisprudence addressing the subject before 1945 – primarily the trials of German military personnel prosecuted by the Reichsgericht at Leipzig after World War I – produced conflicting views. In the Dover Castle case, the court acquitted the defendant on the ground that a subordinate was obliged to obey superior orders; if the result was illegal, then the superior who issued the command, and not the recipient of it, was accountable. The same court returned a different verdict in the Llandovery Castle case, which dismissed the superior-orders defense on the ground that "[the commander’s] order does not free the accused from guilt," particularly where, as in the case at bar, the international rule of law was "simple and universally known." American Journal of International Law 16 (1922): 707–22. See also the discussion of the defense of superior orders in M. Cherif Bassioumi, Crimes against Humanity in International Law (The Hague, 1999), 467–8.

34 Herber, Best, 455–6. In a subsequent essay published with Karin Orth and Christoph Dieckmann, Herber affirms that "through the press coverage of the first large trials of guards and commandants of the camps this impression [of horror] grew stronger, and the concentration camp now became the symbol for the abhorrent crimes of Nazism as a whole." Ulrich Herber, Karin Orth, and Christoph Dieckmann, "Die nationalsozialistischen Konzentrationslager. Geschichte, Erinnerung, Forschung." in Die nationalsozialistischen Konzentrationslager, Band 1, 18.

35 On the relationship between the rise of modernity and the bureaucratic perpetrator of state violence, see the classic study by Hannah Arendt, The Origins of Totalitarianism (New York, 1994), especially
The half-century since the Dachau trials has witnessed an elaboration of this divided mentality that seems ingredient within the process of modernity. In U.S. v. von Leeb (1948), the American National Military Tribunal followed the proximity rule of perpetration, holding that a war crime must be directly traceable to a superior before he can be held criminally liable for it. The reasoning of von Leeb reappeared in the trial of the commanding officer during the My Lai massacre. In U.S. v. Medina (1971), an army court-martial acquitted Capt. Ernest Medina on the ground that he had no “actual knowledge” his subordinates would commit war crimes. One of Medina’s lieutenants was not so fortunate: in his 1973 trial, William Calley was convicted on multiple counts of murder. Like many of the Dachau trial defendants, and just as unsuccessfully, he argued that he had merely followed Medina’s orders to shoot the victims. Rejecting his defense, the court held that even if Medina had issued the order, Calley knew or should have known it was illegal. In each of these trials, a primary issue was how the court would categorize the defendant on the scale of perpetration: as an excess perpetrator (Calley) or as a facilitator sufficiently removed from the direct violence of the act to escape criminal liability (von Leeb, Medina).36

The different treatment accorded excess and bureaucratic perpetrators seems ill-suited to punish the state-organized crimes of the past century. As German historian Jörg Friedrich has observed, the freelancing sadist is inefficient: to commit murder on a grand scale, “a measure implemented bureaucratically and industrially requires agents that conform to it.”37 The thirty-year-old Adolf Hitler, an ingénue to genocide in 1919, seems to have sensed this truth when he distinguished between the anti-Semitism of reason and emotion: the latter wild, brutal, and ineffectual; the former coldly deliberate, organized, and effective. Each of Hitler’s forms of persecution calls forth its own agent of destruction, a grim version of its own toxic self. The anti-Semitism of emotion produces the concentration camp thugs, a sadist acting within the torturous spirit of Nazi orders yet freely interpreting them, often with demonic inventiveness. The anti-Semitism of reason conjures the cool bureaucrat and scheming Organisator, the issuer and transmitter of orders who coordinates railroad timetables and streamlines the industrial macroprocess of annihilation.

In the taxonomy of perpetration, the horrors recounted in the U.S. Army Dachau trials belong to the category of excess and emotion. In these trials, the acts of the indirect perpetrators, those desk-bound facilitators whose instruments of genocide are paper and typewriters rather than guns and poisonous gases, are submerged in the bestial cruelties of the Lager. Of all men’s “sinners,” murder alone “shreiks out,” as Elizabethan playwright John Webster once wrote. We might expand on Webster’s words by adding that murder shrieks loudest when it is sensational and directly committed. In seeking to understand Nazi criminality, however, we are advised to listen to the voices of men’s other “sinners,” the arms-length but crucial acts of bureaucratised atrocity. Refined but malefic, these other voices tell the real secret of the Nazis’ extraordinary capacity for evil. It resided not in their power to unleash human beings’ latent sociopathy within the camp’s realm of the unreal, but in their strange success in creating a species of perpetrator made in their own image: fantastical, yet frigidly objective; chimerical, yet administratively realistic; suited to the bland routines of the office suite, yet virulently—and perhaps uniquely—lethal.