

Ancilla Iuris

Deafening Silence.
The German Justice System and the
Decentralized Euthanasia Program, 1941-1945

Benjamin Lahusen*

Everything has been said about the national socialist judiciary. The ideological reinterpretation of the law and its far-reaching abuse have been comprehensively analyzed. Nevertheless, there are still sources that go beyond yet another refutation of the legend of positivism: Two hitherto unknown administrative circulars show that the judiciary was initiated into the state ‘euthanasia’ program right down to the local courts and still committed itself to inaction. The following contribution is devoted to the assessment of these new sources.

I.

INTRODUCTION¹

Between 1939 and 1945, according to conservative estimates, about 190,000 people in Germany became victims of the National Socialist euthanasia program. Until mid-1941, the killings were centrally planned, afterwards they were increasingly left to local initiative. A legal framework never existed. How the judiciary behaved towards this mass murder is only partially known. For the first phase of the centralized killing program, attitudes and positions of the judiciary are relatively well studied, the open protest of the Brandenburg judge supervising guardianship (Vormundschaftsrichter) Lothar Kreyssig certainly being the most prominent – albeit not representative – reaction.² For the second phase, on the other hand, the role of the judiciary is virtually unknown. This article attempts to fill this gap. After a brief overview of the different stages of the euthanasia program (II.), the article shows which practical problems the judiciary faced in the light of the lawless killing program (III. and IV.). In its central section, the article presents two previously unknown documents that shed some light on the way knowledge of the mass murder was spread among the judiciary in late 1941 (V.). After a look on other pieces of evidence (VI.), the article concludes with reflections on the extent to which knowledge of the euthanasia program can also contribute to an understanding of the Holocaust (VII.).

II.

FROM “T4” TO “WILD EUTHANASIA”

In the autumn of 1939 Hitler commissioned Reichsleiter Philipp Bouhler and his own personal physician, Karl Brandt, by secret decree to “extend the authority of certain physicians, designated by name, so that patients who, on the basis of human judgment, are deemed incurable can be granted a mercy death (Gnadentod) upon a most thorough medical examination of their state of health”.³ Several special authorities were subsequently created extra legem for this purpose, each of which was responsible for the administrative registration and medical examination of the sick, their transport to extermination sites, their gassing and any paperwork or formalities relating to their deaths. Overall, the office of the Reich Chancellor was in charge, but it did not appear by name. The program was given the name “T4”, taken from the address of the central killing administration, which was located at the prestigious Tiergartenstraße 4.

The administrative registration of more than 1,000 institutions and their patients, the selection of the killing centers and the assessment of possible candidates for death began in 1939. The first trial gasings took place at the end of 1939; after that, there was no stopping it. This monstrous process could not be kept secret for long. Although all authorities were bound by the strictest confidentiality and had been given code names and cover jobs, the number of people to be killed was simply too large to be handled discreetly. It soon became common knowledge that the notorious gray buses used for the patients’ transports only went in one direction. The whispers among the relatives, to whom the unexpected deaths were often communicated in identical letters of sympathy, the constant smoke over the crematoria, occasional blunders, the conspicuous accumulations of deaths, local expressions of solidarity, in addition to the obstructive attitude of a few doctors and isolated institutions – all this contributed to a climate of hints and forebodings, where those who wanted to know, knew. The widespread public unrest, most notably expressed in the sermons of Bishop Clemens Graf von Galen of Münster,⁴ marked the end of the official euthanasia operation. Once again on Hitler’s secret order, centrally controlled gasings were suspended on August 24, 1941. The Führer’s original goal had

* Prof. Dr. Benjamin Lahusen is professor for legal history at Europa-Universität Viadrina Frankfurt (Oder).

1 An earlier version of this article was published (in German) under the title “Die Normalität des Maßnahmenstaates” in JZ 2015, 805–814. The author would like to thank Randi Goring, Paris, to whose empathetic reading and sensitive translation the article is greatly indebted. General remark: Euthanasia generally denotes the practice of intentionally ending a life to relieve suffering. Obviously, the practice referred to in this article dating from the Nazi period was not for the well-being of those individuals who were killed for their differences. Where the term is used here, whether with or without quotation marks, it is there not intended to be understood literally.

2 His famous report is published by Ernst Klee (ed.), Dokumente zur “Euthanasie” (Frankfurt am Main 1985), document No. 73. For later reactions see *ibid.*, No. 74.

3 Published in Klee (*ibid.*), No. 21.

4 Published in Klee (*ibid.*), No. 72.

already been achieved: a total of more than 70,000 people had been murdered in the course of T4.⁵

It was never in dispute, however, that the killing did not stop in 1941. Between 1942 and 1945, approximately 117,000 patients committed to state hospitals and nursing homes were killed,⁶ often by the same personnel and even in the same institutions that had already carried out the mass killings for T4. In the wake of the bombing war from autumn 1941, and on a large scale from summer 1942, evacuations of state hospitals and nursing homes began, primarily in order to ensure continued medical care in the large cities. The connections to racial-political and hereditary biological motives – which were never robust to begin with⁷ – were gradually abandoned altogether and replaced by open utilitarianism; the utopia of a healthy body of the people gave way more and more to the supposed necessities of war.⁸ The patients were transferred to evacuation hospitals, in which they languished miserably until they were finally killed – no longer by gas, but by medication, narcotics, injections, food deprivation, cold or lack of care. The procedure soon developed into the “standard solution in the event of a disaster”.⁹

This new phase of mass murder thus deviated from T4 in several respects. It was no longer centrally planned and controlled, but initially an instrument of regional health policy. The killing of psychiatric patients was often not the overriding purpose, but was readily accepted as a means to an end. The murder itself was therefore not decided in the initial institution, but left to the host region.¹⁰ Although the number of victims was higher than during T4, from 1942 onwards the Anstaltsmorde no longer played a role in the public arena – even the church

expressed only sporadic protest.¹¹ This is probably due to the fact that interest in the weak and needy decreased under the sentiment of mounting destruction, while at the same time the politics of fear that engulfed every sign of internal opposition massively increased. Moreover, the different organization of the killings was much better suited to concealment: the decision to transfer could easily be justified based on the rising risk of airstrikes, the regional-based administration generally could act more inconspicuously, as the distance expanded between the transfer and the murder, the Gekrat buses no longer drove patients directly to their death and the standardized death notices were finally dropped.

These murders were not, however, “wild”, uncoordinated or random, but arose from a quintessential National Socialist logic: in the face of scarce resources, groups of people were questioned as to their overall benefit to society and then those strata, from which the greatest burden and the least resistance could be expected, were liquidated. Depending on how strong the centripetal forces are assessed to be within this disaster medicine calculus, the term “Operation Brandt” or “decentralized Krankenmord” (literally, the “killing of the sick”) is usually used today.¹² In any case, the latter term has one advantage: it makes it unmistakably clear that Hitler’s call for a halt to euthanasia did not mark the end of the state-organized Krankenmord, but merely ushered its transformation into a new phase.

III.

JUDICIAL INVOLVEMENT INTO T4

At no point did the unusually large numbers of fatalities remain hidden from the judiciary. The Reich Ministry of Justice was involved neither in the preparation nor in the implementation of the euthanasia program. That said, Lothar Gruchmann’s seminal research from 1972 on “Euthanasia and Justice in the Third Reich” revealed that a multitude of submissions, hints and complaints offset any information gap.¹³ By July 1940 at the latest, Reich Minister of Justice Franz Gürtner had largely been informed about the extent and organization of

5 Account based on Lothar Gruchmann, *Euthanasie und Justiz im Dritten Reich*, VfZ 20 (1972), 235–279, revised reprint in: Lothar Gruchmann, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner* (München 2001), 497–534; Hans-Walter Schmuhl, *Rassenhygiene, Nationalsozialismus, Euthanasie* (Göttingen 1987); Henry Friedlaender, *The Origins of Nazi Genocide. From Euthanasia to the Final Solution* (Chapel Hill 1995); Udo Benzenhöfer, *Der gute Tod? Euthanasie und Sterbehilfe in Geschichte und Gegenwart* (München 1999), 118–129; Winfried Süß, *Der “Volkskörper” im Krieg. Gesundheitspolitik, Gesundheitsverhältnisse und Krankenmord im nationalsozialistischen Deutschland 1939–1945* (München 2003); Ernst Klee, “Euthanasie” im Dritten Reich. Die “Vernichtung lebensunwerten Lebens” (Frankfurt am Main 2010); Götz Aly, *Die Belasteten. ‘Euthanasie’ 1939–45. Eine Gesellschaftsgeschichte* (Frankfurt am Main 2013).

6 For the numbers see Heinz Faulstich, *Hungersterben in der Psychiatrie 1914–1949. Mit einer Topographie der NS-Psychiatrie* (Freiburg 1998), 581 et seq.

7 The evaluation criteria of Philipp Bouhler und Karl Brandt (Klee, *Dokumente* (see note 2 above), No. 32) already demanded as Point 1: “Elimination of all those who are incapable of doing productive work, even in mental institutions, therefore not only of the mentally dead.” In any case, an alleged medical implication had never played a significant role among Jewish mental institution patients. An overview of the selection criteria is presented in Gerrit Hohendorf, *Der Tod als Erlösung vom Leiden. Geschichte und Ethik der Sterbehilfe seit dem Ende des 19. Jahrhunderts in Deutschland* (Göttingen 2013), 94–108.

8 Süß, “Volkskörper” (see note 5 above), 127.

9 Winfried Süß, *Dezentralisierter Krankenmord. Zum Verhältnis von Zentralgewalt und Regionalgewalten in der “Euthanasie” seit 1942*, in: John et al. (ed.), *Die NS-Gaue. Regionale Mittelinstanzen im zentralistischen “Führerstaat”* (München 2007), 123–135, 125.

10 This is all from Süß, *ibid.*, 126–128.

11 See on the whole Klee, “Euthanasie” (see note 5 above), 458; particularly on churches see Nathan Stoltzfus, *Hitler’s Compromises. Coercion and Consensus in Nazi Germany* (New Haven 2016), 174–206; also Hans-Walter Schmuhl, *Die katholische Kirche und die “Euthanasie”*, in: Vormbaum (ed.), *Jahrbuch der Juristischen Zeitgeschichte*, Volume 7 (Berlin 2005/2006), 56–63; Uwe Kaminsky, *Die Evangelische Kirche und der Widerstand gegen die “Euthanasie”*, in: *ibid.*, 64–88.

12 For a conceptual discussion, see Faulstich, *Hungersterben* (see note 6 above), 609–613. As to “Aktion Brandt”, most recently Melvin Conroy, *Nazi Eugenics. Precursors, Policy, Aftermath* (Stuttgart 2017), 187 et seq.

13 Gruchmann, *Euthanasie und Justiz im Dritten Reich* (see note 5 above).

the situation, first learned through various reports from lower authorities and finally by a discussion with Hans Heinrich Lammers, the Chief of the Reich Chancellery. Gürtner, who in an initial reaction is said to have been dismayed at “the lawlessness and godlessness of such action”¹⁴, subsequently downgraded his protest to the positivist side of the problem: the lawless euthanasia led to “embarrassments” in the judiciary and was therefore to be stopped,¹⁵ from which even minimal legal expertise would conclude *e contrario* that a killing program would be acceptable, so long as its manner of implementation were legally sound.

But Hitler had long since decided to impose these unpopular embarrassments on the judiciary. He repeatedly rejected a euthanasia law, which was demanded even by some T4 employees themselves, with reference to “political reasons”; a legal foundation meant going public, which was generally considered “inappropriate” in view of the feared resistance at home and abroad. The secret decree of September 1939 therefore stood as the sole basis of the killing program. This open contradiction between judicial claim and political reality had no repercussions. The judiciary confined itself to examining practical glitches and notifying the responsible authorities.

It was, of course, also necessary to ensure that the judiciary itself did not become a disruptive factor. After all, hardly any authority below the ministerial level was officially “in the know”. It was safe to assume, however, that the extermination program was quietly becoming a topic of discussion nationwide. For example, the president of the Higher Regional Courts (Oberlandesgerichte) of Jena reported, “It’s on everyone’s lips, as I have determined in the meantime”;¹⁶ from Stuttgart came the terse, “The children bring such messages home from school or the streets”;¹⁷ it emerged even more clearly from Frankfurt, “As I’m told, the children already call out when such trolleys come, ‘Here come some more gassings!’”¹⁸ William Shirer noted in his Berlin Diary on 21 November 1940, “The Gestapo, with the knowledge and approval of the German government, is systematically putting to death the mentally deficient population of the Reich. How many have been executed probably only Himmler and a handful of Nazi chieftains know. A

conservative and trustworthy German tells me he estimates the number at a hundred thousand.”¹⁹

All the same, the judiciary was confronted with numerous questions in which even their best guesses as to how to handle accordingly were hampered by the absence of official confirmation: doubts about death certificates necessitated investigations of their own, certificates of inheritance could not be issued, in some criminal proceedings the perpetrator had suddenly disappeared, while the principle of legality forced investigations to be initiated against euthanasia doctors.²⁰ Such adverse circumstances were repeatedly recorded by the judicial authorities and forwarded on to the Führer’s chancellery, where they finally compelled a reaction. The Reich’s top lawyers were invited to Berlin to give several “talks on a question of particular importance to the judiciary” in order to address first-hand the aims and implementation of the so-called euthanasia program. Afterwards the cards were laid on the table. In the infamous conference that took place from 23 to 24 April 1941 at the “Haus der Flieger” in Berlin, Franz Schlegelberger clarified the requirements of a truly National Socialist justice system, whereas Viktor Brack, Oberdienstleiter in the Führer’s chancellery, detailed the order given by Hitler and presented a photocopy of the euthanasia decree, and Werner Heyde, Obergutachter, explained the medical necessity of the plan.²¹ The presidents of the Reichsgericht, Volksgerichtshof, Landeserbhofgericht, Reichspatentamt and Higher Regional Courts, as well as the Oberreichsanwälte (senior Reich prosecutors) and Generalstaatsanwälte (prosecutor generals), were officially instructed on the process.

IV.

PROBLEMS OF THE PRACTICE

The greatest legal difficulties with the T4 program, however, were concentrated on another level of the judiciary. It was the local courts (Amtsgerichte), under whose jurisdiction guardianship cases fell according to § 35 of the Non-Contentious Legal Proceedings Act (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit or FGG). Anyone who was incapacitated was officially appointed a guardian, whose activities were to be supervised by the guardianship court. As a result, however, they were by virtue of their office particularly closely connected to the victims of T4.

14 In conversation with Pater Braune, quoted in Gruchmann, *Euthanasie und Justiz* (See note 5 above), 507.

15 *Ibid.*, 508.

16 Status report of the Higher Regional Court President for Jena, 31 January 1941, in: BA R 3001 No. 23369, p. 40 et seq.

17 Status report of the Higher Regional Court President for Stuttgart, 6 November 1940, in: BA (Federal Archives, Berlin), R 3001 Np. 25021, p. 76.

18 Status report of the Higher Regional Court President for Frankfurt, 16 May 1941, in: BA, R 3001 No. 25021, p. 102.

19 William Shirer, *Berlin Diary*. The Journal of a Foreign Correspondent (New York 1942), 569.

20 See Franz Schlegelberger’s letter to Hans Heinrich Lammers dated 4 March 1941, printed in Klee, *Dokumente* (see note 2 above), No. 78.

21 The minutes of Cologne Higher Regional Court President Bergmann are printed in Klee, *Dokumente* (see note 2 above), No. 79 and No. 80.

The local courts were already responsible for the incapacitation itself (§ 645 Code of Civil Procedure). The controlling factor for this was § 6 para. 1 Civil Code (BGB), of which two components – profligacy and drunkenness – can be disregarded, since they did not in themselves lead to admission to a psychiatric hospital. Essential here are the cases in which incapacitation was pronounced in accordance with § 6 para. 1 no. 1 BGB, that is, where the person concerned was “unable to attend to his affairs due to mental illness or mental retardation”. The Highest German Court (the Reichsgericht) understood this to mean a state in which “the thinking, will and action of the sick person is influenced by an impairment of his mental powers to such an extent that he either appears, like a child, to be wholly incapable of acting, or, in the manner of a minor who has reached the age of seven, only partially capable of acting”.²² In assessing whether such an impairment existed, the courts had granted themselves a certain autonomy over the findings of psychiatric science; above all, “mental retardation according to § 6 BGB was not equated with the medical findings of “mental deficiency”.²³ The triggers for an incapacitation procedure were therefore manifold. Possible indications were idiocy, mental deficiency, mental retardation, schizophrenia and various delusions, but also psychopathic predispositions or “shortcomings of character, of temper and affectivity, and of ethical sensibility”.²⁴

Anyone declared incapacitated as per the above was officially placed under guardianship in accordance with §§ 1896, 1897, 1774 BGB. The guardian took over the legal representation of the ward. This responsibility also extended to the ward’s education, property and physical well-being. In principle, this allowed the guardian free reign. However, everything a guardian did was under the supervision of the judiciary, which was obligated to ensure that the interests of the ward were protected.²⁵ If there was a breach of duty, the court had to intervene “by means of suitable orders and prohibitions” (§ 1837 BGB), the details of which – but not the application itself – was left to its discretion. If danger threatened, the court was forced to intervene by the principle of official investigation (Amtsermittlung) (§ 12 FGG). Depending on the situation, the intervention could either take the form of non-com-

pulsory information and advice, or mandatory directives – if necessary, reinforced by the threat of administrative sanction. In this respect, and while not exactly correct from a legal or technical point of view, the established term in the literature to describe the office of judge as a kind of „superior guardianship“ (Obervormundschaft) is factually appropriate.²⁶

In this capacity, the powers of a judge supervising guardianship extended as far as the state hospitals and nursing homes – provided that the patient had also been declared incapacitated. That was certainly not the case for all of the approximately 300,000 patients in 1941²⁷, and probably not even for the majority of them.²⁸ But a large proportion of the victims of T4 had likely been declared incapacitated. For the overwhelming majority of them – a good 80% – schizophrenia or mental deficiency was the cause for institutional placement²⁹ and it was precisely such a determination that typically also resulted in legal incapacitation. It must therefore be assumed that the wards of the guardianship courts were disproportionately represented among the victims of the Krankenmorde.

This explains the challenges that Operation T4 posed for the judiciary, but it also illustrates precisely how far-reaching the judicial custody obligations were at the time of the euthanasia program. General principles of guardianship law also applied to the question of whether – and how – a ward should be placed in an institution. The guardian was free to make decisions so long as such decisions had no negative consequences for the welfare of the ward.³⁰ However, since Hitler’s euthanasia decree, any contact with a psychiatric hospital represented an acute danger to the ward’s life. Accommodation therefore was no longer a mere question of expediency, which should have been at the discretion of the guardian. Rather, a judge supervising guardian-

26 Arnold Hesse, *Deutsches Vormundschaftsrecht unter besonderer Berücksichtigung der in den bedeutenden Bundesstaaten ergangenen Ausführungsbestimmungen* (Berlin 1900), p. 135. Georg von Marth, Art. “Vormundschaft”, in: HdR VI, 718–741, 718, speaks of “a power of protection incumbent upon the State”.

27 As asserted by Paul Nitsche on 26 March 1946, quoted in Faulstich, *Hungersterben* (see note 6 above), 269 et seq.

28 Only Prussia kept official statistics on legal incapacitation based on mental illness: There were about 2,350 incapacitation cases per year in the 1890s, which reached a peak number of 3,733 in 1900, presumably due to the transition to the BGB, before dropping to a low of 631 in 1918. Then the period 1930 to 1932 counts more than 1,500 incapacitation cases per year. There are no more statistics following this period. This information is taken from the volumes 1890–1933 of the *Justiz-Ministerialblattes für die preußische Gesetzgebung und Rechtspflege*, edited by the Prussian Ministry of Justice.

29 This result comes from a large-scale study of the preserved medical records; see Petra Fuchs, *Die Opfer als Gruppe: Eine kollektivbiographische Skizze auf der Basis empirischer Befunde*, in: Fuchs et al. (ed.), “Das Vergessen der Vernichtung ist Teil der Vernichtung selbst”. *Lebensgeschichte von Opfern der nationalsozialistischen “Euthanasie”* (Göttingen 2007), 53–72, 63.

30 Palandt (see note 25 above), § 1901, note 1 with citations. In most German states, official intervention was provided only for reasons of health or security, cf. Albert Adler, *Unterbringung Geisteskranker in Heil- und Pflegeanstalten durch private Personen mit staatlicher Ermächtigung*. Diss. Heidelberg, 1937.

22 RGZ 50, 207.

23 Reichsgericht, judgement of 30 November 1912, IV 475/12, in: Otto Warneier (ed.), *Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts soweit sie nicht in der amtlichen Sammlung der Entscheidungen des Reichsgerichts abgedruckt ist*. Volume 6 (1912–1913), No. 78; RGZ 42, 103 et seq.

24 RG JW 1925, p. 937 et seq.; see Karl Hausmann, *Die Rechtsstellung des wegen Geistesschwäche Entmündigten im B.G.B.* Diss. jur. Erlangen, 1931, 11 et seq.; J. v. Staudingers *Kommentar zum Bürgerlichen Gesetzbuch* (München 1925), § 6 note B I 5 (edited by Theodor Loewenfeld).

25 Otto Palandt (ed.), *Bürgerliches Gesetzbuch* (München 1939), § 1837 N 2) (edited by Lauterbach); Konrad Wedermann, *Das deutsche Vormundschaftsrecht* (Ansbach 1929), 336 et seq. This duty was legally defined in §§ 1897, 1901, 1902, 1793, 1800, 1631–1633 BGB.

ship had to oversee the progress of a ward at every step. Even an initial placement in an institution, and even more so the transfer to another institution could no longer take place without the consent of the judge. Given that any change of location of a ward was at that time virtually tantamount to being committed to the gas chamber, a judge supervising guardianship should have immediately and emphatically objected.

V. IN THE LOOP

Considering such definition of tasks, the knowledge of the judges who supervised guardianship in the euthanasia complex is of significance, but as yet there has been little research into this. Having all judges who were supervising guardianship in the loop, so to speak, was indispensable for the smooth operation of this death mill. But up until now, the channels taken by the information shared in the “Haus der Flieger” conference in April 1941 remained murky. Only the following is known: at the conference, the presidents of the Higher Regional Courts and the prosecutors general were instructed to single out for further review all legal cases “in which the question of the destruction of life unworthy of life can have a meaning”.³¹ Nothing was to be decided without the participation of the top legal practitioners. To put this into effect, the extermination measures were typically communicated orally to the presidents of the Regional Courts (Landgerichtspräsidenten).³² State Secretary Roland Freisler declined to provide further information to the presidia of the local courts, even when so requested: on 7 May 1941, at the request of the president of the Cologne Higher Regional Court, he explained that the presidents of the Regional Courts were certainly in a position “to ensure that the matter was carried out in an appropriate manner that would preserve confidentiality, without individual written instructions”.³³ Thus, the lowest level of the legal administration seems to have been let in on the practice – that is, if at all – quite informally. This conclusion is further supported by the occasional random report; for example, one account notes that the president of the Higher Regional Court in Kassel accomplished his mission of communicating this confidential information by inviting a judge supervising guardianship for a walk in

the woods, where he informed him of the Führer’s decree.³⁴

Private chats in woodland settings, however, were certainly not sufficient to keep the killing program running. There must have been a more formal communication to the officials on the ground. And indeed, in the end, all judicial authorities were officially informed. In October 1941, the Reich Ministry of Justice issued two administrative circulars, which spread through the usual channels, reaching the lowest level of the legal administration by the end of the month. Both instructions concerned the treatment of mentally ill persons. One dealt with the question of which circumstances determined placement in a psychiatric hospital, the other with the transfer of already admitted patients. The classification of both decrees reveals that this was more than just a technical matter: as per the file number, the Ministry of Justice had designated each a “Secret of the Reich” (“Geheime Reichssache”), which were subject to the highest possible confidentiality that the state could mobilize. Until 1945, the betrayal of state secrets was punishable by the death penalty. “Secrets of the Reich” were not to be reproduced, they were only to be passed on by hand if possible, and then only using a confidant.

The text of the circulars:

No. IV i1 56/41 gRS, 2 October 1941³⁵

“Subject: Transfer of mental institution patients by order of the Reich Defense Commissioner.

34 Described in Helmut Kramer, “Gerichtstag halten über uns selbst”. Fritz Bauer’s lawsuit on the judiciary’s involvement in the *Anstaltsmord*, in: Loewy/Winter (ed.), NS-“Euthanasie” vor Gericht. Fritz Bauer und die Grenzen juristischer Bewältigung (Frankfurt am Main 1996), 81–131, 127 Fn. 111.

35 State Archives Ludwigsburg, Collection F 283 II (AG Maulbronn), Büschel 1460, Vorgang 116; F 279 II (AG Leonberg), Büschel 1211, Vorgang 43. In the German original:

„Betrifft: Verlegung von Anstaltsinsassen auf Anordnung des Reichsverteidigungskommissars.

Im Zusammenhang mit der Verlegung von Anstaltsinsassen haben vereinzelt Gerichte bei Prüfung ihrer Zuständigkeit Erörterungen darüber angestellt, welche Bedeutung dem Umstand zukomme, daß in der vom Standesbeamten des Sterbeortes ausgestellten Sterbeurkunde der Verstorbene regelmäßig als am Sterbeort wohnhaft gewesen und in der Wohnung verstorben bezeichnet ist.

Nachdem die Gerichte über die Zusammenhänge unterrichtet worden sind, besteht in Fällen der fraglichen Art zu solchen Erörterungen umso weniger Anlaß, als der in der Sterbeurkunde anzugebende Wohnort des Verstorbenen keineswegs mit dem für die Zuständigkeit des Gerichts in erster Linie maßgebenden Wohnsitz übereinzustimmen braucht. Die Verlegung aus der Anstalt, in der der Verstorbene vor dem Eingreifen des Reichsverteidigungskommissars untergebracht war, hat immer ohne Rücksicht auf einen entgegenstehenden Willen des Kranken oder seines gesetzlichen Vertreters stattgefunden. Sie kann daher nicht zu einer Veränderung des bisherigen Wohnsitzes geführt haben. Bei der Beurteilung einer Rechtsfrage, bei der es auf den Wohnsitz ankommt, werden deshalb die Gerichte ohne Rechtsverletzung von dem Sachverhalt ausgehen können, der vor der Verlegung des Mündels oder des Erblässers aus der bisherigen Anstalt gegeben war. Insbesondere können bei der Beurteilung der Zuständigkeit die Angaben in der Sterbeurkunde über den Wohnort des Verstorbenen außer Acht bleiben. Es besteht auch kein Anlaß, die Frage einer Berichtigung dieser Angaben aufzuwerfen, zumal dies eine unnötige Beunruhigung der Beteiligten mit sich bringen und die gebotene Geheimhaltung gefährden kann. Wegen der Unterrichtung der Vormundschafts- und Nachlaßrichter bitte ich das Erforderliche zu veranlassen.“

31 This decree can be found in BA, R 3001 No. 25021, p. 98.

32 See for example the reports of the Presidents of the Higher Regional Court Darmstadt, 10.5.1941, BA, R 3001 No. 23361, p. 43, or of the Higher Regional Court Düsseldorf, 2.5.1941, BA, R 3001 No. 23363, p. 133.

33 BA, R 3001 No. 25021, p. 101.

For the purpose of determining jurisdiction in connection with the transfer of mental institution patients, some courts have discussed the significance of the fact that the deceased was routinely deemed to have been a resident of the place of death and was described as having died in the apartment, as indicated in the death certificate issued by the local civil registrar.

As the courts have been informed of the context, there is all the less reason for such discussions in cases of the kind in question, as the place of residence of the deceased, to be indicated in the death certificate, does not in any way have to correspond with the domicile, which is a primary determinant for the jurisdiction of the court. The transfer from the mental institution that housed the deceased before the intervention of the Reich Defense Commissioner has always taken place without consideration of the wishes of the patient or his legal representative. Therefore, any opposition could not have led to a change in domicile. In assessing a question of law that rests on the place of domicile, the courts will therefore be able to proceed from the facts of the case that existed before the transfer of the ward or the deceased from the prior institution, without violating the law. In particular, in determining jurisdiction, the information in the death certificate concerning the place of residence of the deceased may be disregarded. There is also no reason to raise the question of correcting this information, especially as this may cause unnecessary distress to those involved and jeopardize the necessary confidentiality.

I order that all necessary steps be taken to instruct the judges supervising guardianships and probate judges.”

The substance of this order, which, for the sake of simplicity, is referred to below as a “Transfer Order”, is simple to explain from a legal context. Under German law, establishing domicile is more than just a factual determination (then, as now, § 8 BGB). It is also necessary to have the legally binding intention to remain permanently, an intention expressed by the person concerned or, in the absence of legal capacity, his or her legal representative. The Transfer Order for mental institution patients propagated an exception to this principle: if their transfer had taken place at the request of the Reich Defense Commissioner, then – without exception – their intention was declared irrelevant. The courts were thus permitted to determine jurisdiction based on an earlier place of domicile, even if it was proven that the person concerned had not been housed there for some time. This regulation was manifestly important, as there had been deaths

among the transferred patients, whose administrative treatment had been made more difficult by an ambiguous file situation. The Transfer Order presented a practicable solution for this predicament: the fiction of the status quo ante. One was allowed to pretend that the transfer had never taken place; even conflicting notarizations of the registrar were obsolete. From a legal point of view, everything had remained the same.

The second circular:

No. IV b 125 gRS, 10 October 1941³⁶

“Placement of wards requiring institutionalization in mental institutions.

In connection with the transfers of mental institution patients by order of the Reich Defense Commissioners, the question arose as to whether the judge supervising guardianship had to take into consideration the possibility of such a transfer and its presumed consequences if the placement of a ward in need of institutionalization in a state hospital and nursing home or another institution for public assistance is under discussion.

Since the decision as to whether or not a ward is to be placed in a mental institution is primarily a matter for the legal guardian, under no circumstances will the judge supervising guardianship have cause to consider such question if the legal guardian, of his own accord, hands over his ward in need of institutionalization to a mental institution. But even if a legal guardian, perhaps with reference to certain rumors, should solicit dis-

36 State Archives Ludwigsburg, Collection F 283 II (AG Maulbronn), Büschel 1460, Vorgang 117; F 279 II (AG Leonberg), Büschel 1211, Vorgang 44. Gruchmann (see note 5 above) is aware of the existence of this circular, but has not been able to find it. Moreover, he indicates a false reference number for the Placement Order. The correct file number is “No. IV b 125 gRS”, whereas Gruchmann uses a “6” instead of the “b”. In the German original:

„Betrifft: Unterbringung von anstaltsbedürftigen Mündeln in Heilanstalten.

Im Zusammenhang mit den auf Anordnung der Reichsverteidigungskommissare durchgeführten Verlegungen von Anstaltsinsassen ist die Frage entstanden, ob der Vormundschaftsrichter auf die Möglichkeit einer solchen Verlegung und ihre mutmaßlichen Folgen Bedacht zu nehmen hat, wenn die Unterbringung eines anstaltsbedürftigen Mündels in einer Heil- und Pflegeanstalt oder einer sonstigen Versorgungsanstalt zur Erörterung steht.

Da die Entscheidung darüber, ob ein Mündel in einer Anstalt untergebracht werden soll oder nicht, in erster Linie dem Vormund obliegt, wird der Vormundschaftsrichter keinesfalls dann Anlaß zu Erwägungen der fraglichen Art haben, wenn der Vormund aus eigenem Entschluß sein anstaltsbedürftiges Mündel einer Anstalt zuführt. Aber auch wenn ein Vormund, vielleicht unter Hinweis auf gewisse Gerüchte, Erörterungen über die Verbringung in eine Anstalt herbeiführen oder sich gar weigern sollte, sein Mündel trotz dessen Anstaltsbedürftigkeit in einer Anstalt unterzubringen, wird der Vormundschaftsrichter bei der Beratung des Vormunds oder bei seiner etwa erforderlichen Entscheidung alle Erörterungen und Erwägungen zu vermeiden haben, die nicht unmittelbar für die Beurteilung der Anstaltsbedürftigkeit des Mündels erheblich sind und die gebotene Geheimhaltung der anderen Stellen obliegenden Aufgaben gefährden könnten.

Wegen der Unterrichtung der Vormundschaftsrichter bitte ich das Erforderliche zu veranlassen.“

cussion about the transfer to a mental institution or even refuse to place his ward in a mental institution despite the need for institutionalization, the judge supervising guardianship, when advising the legal guardian or in making any decision which may be necessary, shall avoid all discussions and considerations which are not directly relevant for the assessment of the ward's need for a mental institution and which could jeopardize the necessary confidentiality of the duties incumbent upon other authorities.

I order that all necessary steps be taken to instruct the judges supervising guardianships."

Apart from the introductory sentence and the standardized concluding formalities, the actual circular, hereinafter referred to as the "Placement Order", consists of only two sentences. The first asserts the decision-making prerogative of the legal guardian, which must also be respected by the judiciary. The second, of course, suggests that all players are treading across a large minefield: if the legal guardian's decision does not produce the desired result and the placement remains in dispute, the judge supervising guardianship should bypass the potential consequences of placement in a mental institution as far as possible so as not to give a forum to the discussion of "certain rumors". This directive is consistent with the mention made in the Transfer Order, which states that doubts as to the accuracy of the death certificate could "cause unnecessary distress to those involved". The justification for the discursive restrictions is also the same in both decrees: "the necessary confidentiality" of – not specified in more detail – "duties" which, as the Placement Order once again clearly emphasizes, would be incumbent upon "other authorities".

These two secret decrees thus brought about exactly what Roland Freisler had asked for: an order that became explicit without being explicit. The circulars, quite paradoxically, said everything and nothing at the same time. Among the mental institution patients, there had apparently been so many deaths standing in the way of a clean-cut administrative process that the Ministry felt compelled to elaborate a standard approach. The judicial apparatus was sworn to a complicity in which it was intended to be knowingly ignorant. Acknowledgments from the lowest judicial level as to the circulation of the Placement Order have also been filed in the holdings of the local courts of Leonberg and Maulbronn, documenting that – with places such as Knittlingen, Mühlacker, Renningen or Ditzingen – the official news of the killing program truly reached the last corners of the German Reich. This corresponds to the fact that the Transfer Order speaks in a sugar-coated generalization of "the courts" having been informed about "the goings on",

without somehow differentiating the circle of recipients more closely. Although it is not known what the information of the lower authorities looked like in detail, this formulation alone leaves little doubt as to the complicity of the entire judicial apparatus.

Moreover, the Placement Order shortly thereafter provided further indications of mass killings, which should have put to rest any remaining misunderstandings. The existence of „certain rumors" was not only officially confirmed, but was also at the same time subject to a gag order. Because of its categorical claim to validity as a "Secret of the Reich" ("Geheime Reichssache")³⁷, any attempts to even refute such rumors were off limits. One could hardly have understood this admission any differently than as a veiled statement that the rumors were indeed true – overriding false rumors would neither have needed to be prohibited nor treated as confidential.

Even if these instructions had only reached the local court presidia (Amtsgerichtsvorstände) and judges supervising guardianships (and in the case of the Transfer Order, also the probate judges), the number of individuals officially in the know would still be impressive: already by that point more than 60 attendees of the Berlin Conference³⁸ had been informed, as well as the presidents of the nearly 200 regional courts (Landgerichte) who received clarification with the subsequent report. Now some 1,400 judges supervising guardianships³⁹ joined their ranks, along with the presidia of the well over 2,200 local courts.⁴⁰ In addition, all judges of a district were occasionally informed in order to rule out any possibility of a blunder.⁴¹ How epidemically the knowledge about the euthanasia program had wormed its way into the judicial system becomes clear when one considers that the number of active judges in 1941 was far below 10,000.⁴²

37 Admittedly, there is a certain ambiguity here. The file reference – gRS – speaks for the existence of a Secret of the Reich; the stamps, however, only identify the Placement Order as "secret", whereas the Transfer Order is actually stamped as a "Secret of the Reich".

38 In total there were more than 100, see Kramer, "Gerichtstag halten" (see note 34 above), 84 et seq. From the judiciary, however, there were probably a maximum of 68 (from 34 Higher Regional Court districts).

39 This information comes from *Oberregierungsrat von Dohnanyi*; see Kreyssig's statement of 1 March 1963, reprinted in Klee, *Dokumente* (see note 2), No. 74.

40 To be precise: 198 regional courts und 2201 local courts; Reichsjustizministerium (ed.), *Kalender für Reichsjustizbeamte für das Jahr 1941*, Part 2 (Berlin 1942), p. 2.

41 Such as in the Higher Regional Court of Düsseldorf, as reported by its President in his status report dated 1 November 1941, in BA, R 3001 No. 23363, p. 170.

42 In 1941 there were still about 14,000 permanent positions, but at least one third of the positions were vacant at that time because the judges had been drafted for military service; see, for example, the status report of Berlin's *Kammergericht* dated 2 December 1944, in: BA, R 3001 No. 23356, p. 102.

The implications of this observation are far-reaching. That state-run euthanasia signified a breach of written law was readily apparent;⁴³ that such breach could be cured by a word from the Führer was at odds with both the logic of the system and the understanding of the judiciary. The use of private letterhead suggests that Hitler himself did not want to bestow the caliber of a law on his secret decree.⁴⁴ Furthermore, substance-wise the procedures used for these murders did not follow the guidelines that Hitler set out in 1939. The compulsory “most critical assessment” was almost impossible due to the organizational procedures – more than 100 expert opinions per day were not uncommon⁴⁵ – and moreover, where there was no danger to life, there could be no suggestion of “mercy death” (Gnadentod). Even the subject matter of the talk on relevant cases at the Berlin Conference, the “destruction of life unworthy of life”⁴⁶, no longer bothered to conceal its true intentions. Clearly, by October 1941 at the latest, the judiciary at all levels of its apparatus had been officially informed as to what was actually happening before its very eyes, as a normative matter, that this was mass murder.

VI. A REWORKING

The chronology is revealing. The two secret decrees were circulated in October, almost two months after Hitler’s suspension of the T4 program on 24 August 1941. They hit the ground when a new, decentralized routine of killing began. The judicial system was not affected by this transformation. The guardianship courts exercised their usual supervisory duties over a significant proportion of those who were removed from the state hospitals and nursing homes after 1942. Their percentage share would probably have been lower than during T4, because the victim group of the decentralized kill-

ing program was much more heterogeneous overall. But even after 1942, the largest fraction within individual transfers regularly consisted of schizophrenia patients.⁴⁷ Since the patients were often deported in hundreds, and for whom only death was reported and that only indefinitely later,⁴⁸ there were no fewer grounds for suspicion than in the period between 1939 and 1941.

The break in the organizational form must therefore not obscure the continuity of the actions themselves. The focus of the judiciary remained the same even after the end of T4: mass murder continued, and countless people who were subject to the special protection of the judiciary were still affected.⁴⁹ Thus, even in October 1941, the two secret decrees were not meaningless. On the contrary, they were part of a series of steps set in motion after the Berlin Conference – not to bring to an end an already expiring program, but to prepare the judiciary for a future that was still open. The judiciary should not, by any means, interfere with whatever obsession the völkisch ideology brought forth.

There are indications beyond the two secret decrees that show the message was understood. On 16 May 1941, immediately after the Berlin Conference, the Düsseldorf Prosecutor General turned to the Reich Ministry of Justice with suggestions for an improved cover for the killings: it would be better to avoid notifications of transfer, because they aroused suspicion; death notices, on the other hand, should be given, because a death ascertained only in the course of investigations by the public prosecutor would also make people suspicious. However, in order to ensure “the required cover for the proceedings”, he proposed “that the transfer not be reported, but that the death without an indication of the cause of death should be reported within a reasonable period of time to the files of the mental institution in which the person was first housed, so that the notifications do not accumulate within a short period of time”.⁵⁰ And so, it is no longer possible to imagine that the judiciary grappled with the

43 Refer to Otto Schwarz, *Strafgesetzbuch* (Munich 1942), preface to § 211 Note 3 B; Adolf Schönke, *Strafgesetzbuch für das Deutsche Reich* (Munich 1942), Preface to §§ 211 et seq., Note 2.

44 See the statement by Hans Heinrich Lammers on 4 July 1960, reprinted in Klee, *Dokumente* (see note 2 above), No. 24. The problem was discussed with Vera Groß-Vehne, *Tötung auf Verlangen* (§ 216 StGB), “Euthanasie” und Sterbehilfe. Reformdiskussion und Gesetzgebung seit 1870 (Berlin 2005), 131 et seq. As to the legal process, most recently and comprehensively Anika Burkhardt, *Das NS-Euthanasie-Unrecht vor den Schranken der Justiz: eine strafrechtliche Analyse* (Tübingen 2015), as well as the classic Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany. The ‘Euthanasia’ and ‘Aktion Reinhard’ Trial Cases* (The Hague 1996). See also Friedrich Dencker, *Strafverfolgung der Euthanasie-Täter*, in: Vormbaum (ed.), *Jahrbuch 7* (see note 11 above), Berlin: BWV, 113–124, and Willi Dreßen, *NS-“Euthanasie”-Prozesse in der Bundesrepublik Deutschland im Wandel der Zeit*, in: Loewy/Winter, *NS-“Euthanasie”* (see note 23 above), 35–58.

45 See Alexander Mitscherlich/Fred Mielke, *Das Diktat der Menschenverachtung* (Heidelberg 1947), 118; Schmuhl, *Rassenhygiene* (see note 5 above), 202.

46 As here Michael Förster, *Rechtsschutz für Behinderte im Dritten Reich? Wie die führenden Köpfe der Justiz den Massenmord an Behinderten deckten*, in: Loewy/Winter, *NS-“Euthanasie”* (see note 23 above), 59–79, 72, 75 et seq.

47 See Renate Otto, *Verschärfung der Katastrophenpolitik – Transporte in die Tötungsanstalt Hadamar*, in: Böhme (ed.), *Wege in den Tod. Hamburger Anstalt Langenhorn und die Euthanasie in der Zeit des Nationalsozialismus* (Hamburg 1993), 347–350; Michael Wunder, *Die Transporte in die Heil- und Pflegeanstalt Meseritz-Obrawalde*, in: *ibid.*, 377–396, 381 et seq.; Marc Bilhardt/Georg Dahmen, *Statistische Gesamtauswertung der Patientendaten*, in: *ibid.*, 471–494, 486 et seq. Heike Bernhardt, *Anstaltspsychiatrie und “Euthanasie” in Pommern 1933 bis 1945. Die Krankenmorde an Kindern und Erwachsenen am Beispiel der Landesheilanstalt Ueckermünde* (Frankfurt am Main 1994), p. 52 et seq.

48 For individual transports, see Faulstich, *Hungersterben* (see note 6 above), 326 et seq., 503 et seq., 460 et seq., 571, 574, 623; Friedlaender, *Origins* (see note 5 above), 153.

49 Refer to Robert Jay Lifton, *The Nazi Doctors. Medical Killing and the Psychology of Genocide* (New York 2017), 96: “What was discontinued was only the visible dimension of the project: the large-scale gassing of patients. T4 officially ceased as a program, but that turned out to be still another deception. Widespread killing continued in a second phase...”

50 Status report of the Prosecutor General of Düsseldorf, 16 May 1941, BA, R 3001 No. 25021, p. 111; additionally Schmuhl, *Rassenhygiene* (see note 5 above), 301, with interpretation as here.

ethics of what was happening. In any event, the subsequent decentralization of the killing program adopted the Düsseldorf AG's recommendations.

Even the Nazi Party (the NSDAP) had to be instructed not to meddle in certain affairs. When in late 1941 the Swedish translation appeared of a protest letter from Cardinal Faulhaber, which he had sent to Justice Minister Gürtner at the end of 1940, the NSDAP asked the Ministry to issue a copy in order to verify its authenticity. Inside the Ministry of Justice, this request met with considerable concern. As the content of Faulhaber's letter was possibly a punishable offense, Gürtner could have initiated investigations, but any resulting impact would be "at any rate undesirable at the present time," according to a note dated 21 November 1941. And, without regard to redundancy, it continued, "with an issue as sensitive at the moment as euthanasia, especially at this stage, undesirable implications are possible if such a document is handed out for undefined reasons." Of course, one could not entirely avoid the request; the Cardinal's letter was finally left in photocopy, however, accompanied by an urgent warning from the Ministry of Justice: the question of euthanasia was "being handled at the top" by Reichsleiter Bouhler, from which it could be presumed that without his cooperation "no steps" would be taken.⁵¹ The Nazi Party, too, should under no circumstances address "certain rumors".

Internally, the judicial apparatus at that time already ensured loyalty to the Party line. The strategy of denying justice, which began in the spring of 1940 when the first reports on events in the mental institutions fizzled out with no reaction, found its administrative linchpin in October 1941. With the two secret decrees, final adjustments were made to conclusively remove the state killing programs – in whatever form they might occur – from the jurisdiction of the judiciary: the files were declared normatively binding in order to exclude factual objections from the outset (Transfer Order), the well-known "danger to life" disappeared behind the "necessary confidentiality" of other authorities (Placement Order). The actual happenings were banned from the legally relevant world by ministerial decree; the cool fiction of normality concealed the unrestrained activities of those in charge.

This also explains why the sometimes resigned, sometimes approving and rarely outraged reports of the judiciary on the Krankenkord soon ceased

altogether.⁵² The last word probably belonged to a chief magistrate (Oberamtsrichter) from northern Germany, who informed the president of the Higher Regional Court of Celle at the end of February 1942 that the denial of a general level of awareness in guardianship proceedings exposed the judge to accusations of naïveté or deliberate concealment. In particular, "the choice of the mental institution and the possible consequences of placement in it" would have to be discussed. Therefore, he considered it "incompatible with the requirements of an orderly administration of justice" if the guidelines of the Placement Order were to be applied on a permanent basis. The Higher Regional Court President forwarded these considerations to the Ministry in his status report and added with the strongest rhetoric that the timid litotes of a subordinate judicial authority allowed for that he "did not consider the remarks unfounded".⁵³ This is followed by...nothing. There was nothing more to be heard from the judiciary about the tens of thousands of victims who were to follow.

VII. TESTING THE HOLOCAUST

Even after 1945, this silence did not elicit any response. The second phase of Nazi euthanasia has for long been left in the blind spot of history. There were too many actors on too many levels, insufficiently structured hierarchies, too much scope for decision-making, confusing scenes, altogether a thicket which seemed too impenetrable for bureaucratic decisions or even attributions of guilt. The selection of the term 'wild euthanasia' therefore already set the stage for the peripeteia of the history of justice. Whatever came after the end of T4, the judiciary had nothing to do with it. Their complicity was established with the Berlin Conference, but also essentially concluded.⁵⁴

52 A negative fact is naturally difficult to prove; apart from my own random sampling of status reports, I have consulted Hans Michelberger, *Berichte aus der Justiz des Dritten Reiches. Die Lageberichte der Oberlandesgerichtspräsidenten von 1940–1945 unter vergleichender Heranziehung der Lageberichte der Generalstaatsanwälte* (Paffenweiler 1989), esp. 482–494.

53 Status report of the Higher Regional Court President of Celle dated 28 February 1942, BA, R 3001 No. 23359, p. 51 et seq. The last word? The son of a victim reports that a judicial declaration of death by the Prosecutor General of Münsingen had been rejected in 1957 due to a lack of jurisdiction, as the murdered person "did not establish domicile in Grafeneck" (Hans Bader, Martin Bader – "Mein Name ist in Giengen und Umgebung gut bekannt", in Fuchs, "Das Vergessen" (see note 31 above), 105–122, 120). From a strictly judicial perspective, this estimate is correct; just as from a strictly judicial perspective, it could have only been made on the merits of the case, if the court considered the principles of the Transfer Order as relevant.

54 This picture was drawn in East and West alike; see as an example of a socialist accusation Friedrich Karl Kaul, *Nazimordaktion T4* (Berlin 1973), 121–129. For the West, refer to Kramer, "Gerichtstag halten" (see note 34 above), 110; Klaus-Detlev Godau-Schüttke, *Die Untätigkeit der Justiz vor 1945*, in: *Jahrbuch 7* (see note 11 above), 89–96.

51 The whole incident can be found in BA, R 3001 No. 25021, p. 165–168, 180–184.

It is of bitter irony that this ultimately exonerating account seems to have originated from the investigations of the prosecuting authorities, of all places. As early as the Nuremberg Doctors' Trial in 1947, the cybernetic centralism of T4 was juxtaposed with the image of an unrestrained, almost anarchic period "without any norm and without any procedure", as one of the accused stated,⁵⁵ whose excesses could no longer be attributed to "the apparatus" and "the system".⁵⁶ The major trials concerning *Krankenmorde* that took place in the Federal Republic of Germany in the 1960s have taken this view. And there was hardly any other way: criminal trials by their very nature have the goal of working out individualizable contributions to the crime by individual participants. With regard to the period after Hitler ordered an end to euthanasia, it seemed impossible to establish a chain of command that could lead to the liability of a prominent physician at the top of a hierarchy orchestrating the plot of the crime. Even the several hundred page indictment against Werner Heyde and his associates, compiled under the aegis of Fritz Bauer in 1962, finally concluded that T4 had in fact from 1942 "continued in another form, namely by individual killings", but that it was impossible to prove the involvement of the accused "in this so-called 'wild euthanasia'".⁵⁷

This also limited the extent of liability for the judiciary, whose output – in the form of judgments, as opposed to, say, administering lethal injections – was even further removed from the "action". When Fritz Bauer wanted to call the participants of the Berlin Conference to account in 1965, 'wild euthanasia' was not even mentioned. Their – indisputable – participation in T4 already seemed sufficient for a conviction. An extension of the proceedings to the phase of 'wild euthanasia' would have unnecessarily shaken this somewhat firm basis, as in such an instance the patchy information they had on this period also would have had to be addressed. In order

not to burden the proceedings with further imponderables, Fritz Bauer therefore had to curtail the judiciary's role in the *Krankenmorden* in two respects: on the one hand, the investigation was limited to those present in the "Haus der Flieger", of whom only 16 were arrested after more than 20 years. On the other hand, the accusation only referenced their silence during and immediately after the Conference. To what extent the instructions received were passed on in the summer of 1941, however, remained explicitly open; that the killing programs continued after 24 August 1941 was not even within the scope of the proceedings.⁵⁸

As a result, legal history has not given an important aspect of the Holocaust the attention it deserves. The much-quoted sentence Philipp Bouhler used at the time to reassure skeptics, "Of course the judiciary is involved"⁵⁹, is to be understood quite literally. What was really meant was "the judiciary", not only the heads of the judiciary, but practically the entire apparatus, unrestrictedly. Moreover, its participation was not only confined to the ongoing euthanasia program, but rather accompanied the mass murder of mental institution patients, which did not begin until after August 1941. If we were to boil this down to a criminal concept, it would be as an accessory to murder. But more importantly, the euthanasia program can also be seen as a kind of test run in how far the judiciary would allow itself to be used for the murderous *völkisch* means of the regime. The judiciary passed this test effortlessly. Even in the *Altreich*, where the concentration of the judiciary was much higher than in the occupied territories, the killing centers were able to operate largely undisturbed. And not only that: overall, it is precisely the judicial self-abandonment during the euthanasia program that paved the way for everything to come. The procedures for the *Anstaltsmorde* read down to the fine details like an announcement for the emerging Holocaust: morbid instructions to "transport all mentally ill people to the East more quickly"⁶⁰, pointless appeals in the mental institutions, selections on the platforms, the cover of shower rooms for gas chambers, the hasty construction of crematoria, the excavation of gold teeth and the succinct statement of a survivor: "The furnace was in operation daily."⁶¹

55 Friedrich Mennecke in an interrogation on 16 January 1947, quoted in Michael Wunder, *Die Spätzeit der Euthanasie*, in: Böhme (see note 47 above), 397–424, 399. It is often claimed that the term was already verifiable before 1945, but evidence of this is rarely mentioned; see for example Lifton, *The Nazi Doctors* (see note 51 above), and de Mildt, *In the Name of the People* (see note 44 above). On the conceptual difficulties, most recently Burkhardt, *NS-Euthanasie-Unrecht* (see note 36 above), 21–23.

56 See for example Mitscherlich/Mielke, *Menschenverachtung* (see note 45 above), 114 Note, 131 et seq., 133 et seq. Also in Alice Platen-Hallermund, *Die Tötung Geisteskranker in Deutschland. Aus der deutschen Ärztekommision beim amerikanischen Militärgericht* (Frankfurt am Main 1947), the focus of the account is on T4. This was also adopted later; in the account of Michael S. Bryant, *Confronting the "Good Death". Nazi Euthanasia on Trial, 1945–1953* (Boulder 2005), *Wild Euthanasia* occupies just 2 pages. See also Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials. From Medical War Crimes to Informed Consent* (Houndmills 2004), clearly as to the Doctors' Trial, 251: "The strategy of the Medical Trial prosecution was to reconstruct vertical chains of command".

57 Thomas Vormbaum (ed.), "Euthanasie" vor Gericht. Die Anklageschrift des Generalstaatsanwalts beim OLG Frankfurt/M. gegen Dr. Werner Heyde u.a. vom 22. Mai 1962 (Berlin 2005), 356 et seq. The situation was different with the henchmen on the ground, see for example KG DRZ 1947, 198 et seq. und OLG Frankfurt am Main SJZ 1947, 621 et seq.

58 Written accusation of 22 April 1965, reprinted in Loewy/Winter, *NS-"Euthanasie"* (see note 23 above), 145–167, here: 147 and 163. As is well known, even these limited efforts were delayed or discontinued after Fritz Bauer's death; see Helmut Kramer, *Oberlandesgerichtspräsidenten und Generalstaatsanwälte als Gehilfen der NS-"Euthanasie". Selbstentlastung der Justiz für die Teilnahme am Anstaltsmord*, *Kritische Justiz* 1984, 25–43.

59 As quoted in Fritz Bauer's written accusation (see note 58 above), 166.

60 Quoted from Klee, "Euthanasie" (see note 5 above), 422, with reference to Uwe Kaminsky. Emphasis in the original.

61 Quoting a survivor from Kaufbeuren, see Heinz Faulstich, *Von der Irrenfürsorge zur "Euthanasie". Geschichte der badischen Psychiatrie bis 1945* (Freiburg i.Br. 1993), 314.

When the persecution of the Jews finally turned into a policy of extermination in autumn 1941, personnel and tools were already ready.⁶² It was precisely in this phase of total radicalization that the judiciary gave the regime *carte blanche*. While there may have been organizational, administrative or – hard to imagine – humanistic concerns, they should have been settled by this point. The last remnants of humanity were silently collected by the judiciary; from then on, any path to death was permitted. An order from the Führer was no longer required, neither with regard to mental institutions nor the concentration camps: the logic of killing was sufficiently stabilized to stand alone.

⁶² The personal, technical and organizational links between T4 and the extermination of the Jews have often been pointed out, particularly by Friedlaender, *Origins* (see note 5 above), 284–302; de Mildt, *In the Name of the People* (see note 44 above), 227–235.