

# “Annihilation through Labor”: The Killing of State Prisoners in the Third Reich\*

Nikolaus Wachsmann  
*Downing College, Cambridge*

## I

One of the most distinctive features of Nazi society was the increasingly radical division of its members into “national comrades” and “community aliens.” The former were to be protected by the state and encouraged to procreate, while the latter were seen as political, social, racial, or eugenic threats and were to be ruthlessly eliminated from society.<sup>1</sup> With the start of the Second World War, various nonlethal forms of discrimination against these “community aliens” were gradually replaced by policies geared to physical annihilation, culminating above all in the extermination of the European Jews. In view of a crime of this previously unimaginable magnitude, it is hardly surprising that when historians started in earnest to examine the genocidal policies of the Nazi dictatorship in the 1960s they focused on the development and administration of the “Final Solution of the Jewish Question,” as the Nazis called it. But in the last two decades, the fate of other “community aliens” in the Third Reich, such as the Roma and Sinti (“Gypsies”), slave laborers, and the disabled, has been investigated too.<sup>2</sup>

Some historians have also begun to examine those who deviated in various other ways from the norms of society, people who were often classified in the Third Reich, and indeed before, as “asocials.” There was never an agreed definition as to who these people were, and the term was used to stigmatize a vast variety of nonnormative behavior. According to a 1938 directive by the head

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<sup>1</sup> See D. J. K. Peukert, *Inside Nazi Germany* (London, 1989).

<sup>2</sup> M. Zimmermann, *Verfolgt, vertrieben, vernichtet: Die nationalsozialistische Vernichtungspolitik gegen Sinti und Roma* (Essen, 1989); E. Klee, “Euthanasie” im NS-Staat: Die “Vernichtung lebensunwerten Lebens” (Frankfurt am Main, 1983); M. Burleigh, *Death and Deliverance: “Euthanasia” in Germany, 1900–1945* (Cambridge, 1994); H. Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill, N.C., and London, 1995); U. Herbert, *Fremdarbeiter: Politik und Praxis des “Auslander-Einsatzes” in der Kriegswirtschaft des Dritten Reiches* (Berlin and Bonn, 1985).

of the German security police, Reinhard Heydrich, any person could be classified as "asocial" who "demonstrates through conduct opposed to the community . . . that he does not want to adapt to the community."<sup>3</sup> During the Third Reich, such vague statements served as the basis for the persecution of juvenile delinquents, criminal offenders, vagrants, prostitutes, and homosexuals, among many others. Certain groups were simultaneously classified as racial and social outsiders and thus suffered "dual racism." This was true in particular for the Sinti and Roma, who had been persecuted for their way of life long before the Nazi "seizure of power" in 1933.<sup>4</sup>

Historical research into the fate of the "asocials" has produced some valuable insights into the treatment of members of these marginal groups in the Third Reich, many of whom died in SS concentration or extermination camps.<sup>5</sup> Yet despite this growing interest, the most comprehensive of all the extermination programs directed against "asocials" in the Third Reich has never been investigated. From late 1942 onward, over twenty thousand offenders classified as "asocial" were taken out of the state penal system and transferred to the police for "annihilation through labor."<sup>6</sup> At least two-thirds of them perished in concentration camps. But in the historical literature this program has either been dealt with in passing or completely ignored.<sup>7</sup>

<sup>3</sup> Erlaß des Chefs der Sicherheitspolizei und des Sicherheitsdienstes Reinhard Heydrich, 4.4.1938, reprinted in W. Ayass, ed., *"Gemeinschaftsfremde": Quellen zur Verfolgung von "Asozialen," 1933–1945*, Materialien aus dem Bundesarchiv series, no. 5 (Koblenz, 1998), pp. 124–26.

<sup>4</sup> For the term "dual racism," see W. Wippermann, *Wie die Zigeuner: Antisemitismus und Antiziganismus im Vergleich* (Berlin, 1997), p. 142.

<sup>5</sup> W. Ayass, *"Asoziale" im Nationalsozialismus* (Stuttgart, 1995), and *Das Arbeitshaus Breitenau* (Kassel, 1992); G. Grau, ed., *Hidden Holocaust? Gay and Lesbian Persecution in Germany, 1933–1945* (London and New York, 1995); D. Peukert, "Arbeitslager und Jugend-KZ: die 'Behandlung Gemeinschaftsfremder' im Dritten Reich," in *Die Reihen fast geschlossen*, ed. D. Peukert and J. Reulecke (Wuppertal, 1981), pp. 413–34. For a general introduction to this topic, see J. Noakes, "Social Outcasts in the Third Reich," in *Life in the Third Reich*, ed. R. Bessel (Oxford and New York, 1987), pp. 83–96.

<sup>6</sup> The German penal system consisted of different institutions of confinement: *Zuchthäuser* (penitentiaries) for what were considered to be particularly serious offenses, *Gefangnisse* (prisons), and *Gerichtsgefängnisse* (jails) for very short periods of confinement. The treatment of inmates in penitentiaries was generally harsher than in prisons (e.g., longer working hours). Jails are of no interest for the present study. The general term in this article used for both penitentiaries and prisons is state penal institutions. However, terms like "prison governors" refer to governors not just of prisons but of penitentiaries as well.

<sup>7</sup> Ayass, *"Asoziale" im Nationalsozialismus*, pp. 175–76; M. Burleigh and W. Wippermann, *The Racial State: Germany, 1933–1945* (Cambridge, 1991), pp. 180–81; Projektgruppe für die vergessenen Opfer des NS-Regimes in Hamburg, ed., *Verachtet-Verfolgt-Vernichtet* (Hamburg, 1988). There is only one useful more detailed account. However, it also fails to address vital questions concerning the transfer of "asocial" inmates to the police and is not always accurate; R. Mohler, "Strafvollzug im 'Dritten

Why have historians neglected the murder of state prisoners? There appears to be a reluctance to focus on offenders against the law in the Third Reich, unless their offences can be seen in some way as forms of political or social protest. In contrast to the racially or politically persecuted, not all common criminals can be described merely as innocent victims, and the often brutal behavior of criminal *Kapos* in concentration camps probably further alienated historians from dealing with the criminals. Another factor that explains the poor state of research is the inaccessibility of source material. Leading officials in the Ministry of Justice made sure that most files relating to the “annihilation through labor” of state prisoners were pulped before the end of the war.<sup>8</sup> Yet individual documents have survived, scattered around various archives in Germany. They can be complemented by information gained from individual prisoner files, as well as from unpublished documents and testimonies collected in numerous postwar legal investigations. None of these criminal investigations ever led to the conviction of the prison officials involved—another reason for the lack of historical interest. Finally, German legal history after the war spread the myth that the legal administration had rejected or even resisted the Nazi regime.<sup>9</sup> State penal institutions, if dealt with at all, were described as safe havens that had “nothing to do with the concentration camps.”<sup>10</sup> Thus, until today, historians have largely ignored the state prison system and its inmates.<sup>11</sup>

This article will first describe the origins of the decision in 1942 for the extermination of certain state prisoners. Then the actual process of transfer will be investigated in detail, examining issues such as the background of the transferred inmates and the participation of prison officials. The article will also deal with the fate of the state prisoners after their transport to the Nazi concentration camps and the radicalization of policy against the prisoners remaining in the state penal institutions. Exploring these issues contributes to our knowledge of the treatment of deviants in the Third Reich.

But this article will also address some wider issues concerning the nature of the Nazi dictatorship, such as the origins of extermination policies in the Third

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Reich’: Nationale Politik und regionale Ausprägung am Beispiel des Saarlandes,” in *Strafvollzug im “Dritten Reich”: Am Beispiel des Saarlandes*, ed. H. Jung and H. Müller-Dietz (Baden-Baden, 1996), pp. 9–301, here pp. 152–60.

<sup>8</sup> Bundesarchiv Berlin (hereafter cited as BA Berlin), 99 US 2 FC 585, microfilm 22933, Bl. 300: Protokoll über die Abteilungsleiterbesprechung am 31. Januar 1945.

<sup>9</sup> H. Schorn, *Der Richter im Dritten Reich: Geschichte und Dokumente* (Frankfurt am Main, 1959); H. Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus: Ein Überblick*, Quellen und Darstellungen zur Zeitgeschichte series, no. 16/I (Stuttgart, 1968).

<sup>10</sup> J. Muntau, *Strafvollzug und Gefangenenfürsorge im Wandel der Zeit* (Bonn, 1962), p. 74. Muntau had been a leading German prison official until 1939.

<sup>11</sup> Historians only started in the last decade to examine critically the Nazi prison system. The first full-scale study of the prison system in the Third Reich was published in 1996; see Mohler.

Reich. In recent years, a number of historians have argued that it was time to move beyond the “sterile debates” between so-called intentionalist historians, who focused on the murderous will and ideology of the Nazi leaders, above all Hitler, and so-called structuralist historians, who pointed to the dynamic and uncoordinated interactions between different agencies of the Nazi dictatorship that led to a “cumulative radicalization” (Hans Mommsen).<sup>12</sup> Various historians have now put forward a synthesis of both positions, while ground-breaking empirical research into the “final solution” has posed new questions and provided new answers.<sup>13</sup> Still, many of the more recent studies of Nazi genocide continue to explore central issues first raised in the debates between intentionalists and structuralists such as Hitler’s role in extermination policy, the interaction between regional officials and the decision makers in Berlin, and the role of racial ideology versus more material motives in Nazi mass murder.<sup>14</sup> This study of the “annihilation through labor” of state prisoners addresses some of these general issues.

It will also shed new light on the relation between the judiciary and the police in the Third Reich. The postwar portrait of a passive or even anti-Nazi judiciary has not gone unchallenged.<sup>15</sup> Still, many historians continue to describe the judicial authorities and the police as having been in a constant state of conflict. They describe the Third Reich as a “dual state,” split between the “prerogative state” and the “normative state.”<sup>16</sup> The latter was the traditional

<sup>12</sup> The term “sterile debates” is used in U. Herbert, “Vernichtungspolitik: Neue Antworten und Fragen zur Geschichte des ‘Holocaust,’ ” in *Nationalsozialistische Vernichtungspolitik: Neue Forschungen und Kontroversen*, ed. U. Herbert (Frankfurt am Main, 1998), pp. 9–66, here p. 22. For a very clear introduction to the intentionalist-structuralist debate, see I. Kershaw, *The Nazi Dictatorship* (London, 1989), pp. 62–70.

<sup>13</sup> C. Browning, “Beyond ‘Intentionalism’ and ‘Functionalism’: The Decision for the Final Solution Reconsidered,” in his *The Path to Genocide* (Cambridge, 1995), pp. 86–124; S. Friedlander, *Nazi Germany and the Jews*, vol. 1 (London, 1997). For an overview of new research, see the volume edited by Herbert.

<sup>14</sup> See the various essays in Herbert, ed.; see also C. Gerlach, *Krieg, Ernährung, Völkermord: Forschungen zur deutschen Vernichtungspolitik im Zweiten Weltkrieg* (Hamburg, 1998), pp. 263, 287–88.

<sup>15</sup> R. Angermund, *Deutsche Richterschaft, 1919–1945* (Frankfurt am Main, 1990); I. Müller, *Hitler’s Justice* (London, 1991); Redaktion Kritische Justiz, ed., *Der Unrechts-Staat*, vol. 1 (Frankfurt am Main, 1979), and *Der Unrechts-Staat*, vol. 2 (Baden-Baden, 1984); B. Diestelkamp and M. Stolleis, eds., *Justizalltag im Dritten Reich* (Frankfurt am Main, 1988).

<sup>16</sup> The main representative of this line of interpretation is the historian Lothar Gruchmann. See L. Gruchmann, “Rechtssystem und nationalsozialistische Justizpolitik,” in *Das Dritte Reich*, ed. M. Broszat and H. Moller (Munich, 1986), pp. 83–103, and “Die ‘rechtsprechende Gewalt’ im nationalsozialistischen Herrschaftssystem,” in *Der Nationalsozialismus: Studien zur Ideologie und Herrschaft*, ed. W. Benz, H. Buchheim, and H. Mommsen (Frankfurt am Main, 1993), pp. 78–103, and *Justiz im Dritten Reich: Anpassung und Unterwerfung in der Ara Gurtner*, Quellen und Darstellungen zur Zeit-

state apparatus, ensuring that normal life was ruled by legal norms. However, in matters that were thought to touch on the interest of the state, the “prerogative state” could override these legal norms, above all through the agency of the police, locking up all political, racial, and social suspects in SS concentration camps without trial. Thus, state attorneys and the police are seen as competing institutions of prosecution, while state penal institutions and concentration camps are described as competing institutions of confinement.<sup>17</sup> A detailed investigation of the transfer of state prisoners can help to establish how far this picture of the “dual state” stands up to critical scrutiny.

## II

On August 20, 1942, Adolf Hitler appointed Otto-Georg Thierack as his new Minister of Justice. He used the opportunity to spell out privately to Thierack his vision of the role of the legal system in the Nazi state. For instance, Hitler complained that during the war a prison sentence was no longer adequate punishment for criminals, as war inevitably led to a “negative selection”: while “the bravest” were killed at the front, the criminals survived in state penal institutions: “Anyone who ever enters a prison knows with absolute certainty that nothing more is going to happen to him. If you can imagine this going on for another three or four years, then you can see a gradual shift in the balance of the nation taking place. . . . If I decimate the good, while conserving the bad, then what happened in 1918, when five or six hundred ruffians raped the nation, will happen again.” To avert such a catastrophe, Hitler concluded, he had to “ruthlessly exterminate the vermin.”<sup>18</sup>

Hitler in this lecture repeated views that he had expressed openly to members of the Nazi elite and foreign leaders since late July 1941.<sup>19</sup> Judging from Hitler’s rants at his lunch and dinner table, he became obsessed with preventing an internal uprising. One of the most important lessons of 1918 for Nazism

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geschichte series, no. 28 (Munich, 1990). Gruchmann draws on the structural analysis of the emigre German political scientist Ernst Fraenkel; see E. Fraenkel, *The Dual State* (New York, 1969), esp. pp. 3–73.

<sup>17</sup> Suspects could be taken by the police into protective custody (*Schutzhaft*) and into preventive police custody (*polizeiliche Vorbeugungshaft*); see K.-L. Terhorst, *Polizeiliche planmäßige Überwachung und polizeiliche Vorbeugungshaft im Dritten Reich* (Heidelberg, 1985); G. Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich* (Berlin and New York, 1989).

<sup>18</sup> W. Jochmann, ed., *Adolf Hitler: Monologe im Führerhauptquartier, 1941–1944* (Hamburg, 1980), pp. 347–54, here pp. 348–49. The translation of this section follows R. J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987* (London, 1997), pp. 702–3.

<sup>19</sup> A. Hillgruber, ed., *Staatsmänner und Diplomaten bei Hitler: Vertrauliche Aufzeichnungen und Unterredungen mit Vertretern des Auslandes, 1939–1941* (Frankfurt am Main, 1967), pp. 611–12; see also Jochmann, ed., pp. 125–27.

was, in his words, that the war would be lost on the home front if the authorities failed to act “quickly and brutally” against criminals.<sup>20</sup> In 1942, Hitler frequently pointed to the link between the revolution of 1918 and common criminality. Nearly all individuals involved in the revolution, he claimed, had been criminal recidivists, who had only just been released from prisons or penitentiaries.<sup>21</sup> In order to prevent another revolution in a time of crisis, he maintained on July 7, 1942, one had to “beat to death [*totschlagen*] the entire asocial vermin.”<sup>22</sup> In an extraordinary outburst three months earlier, Hitler had declared that if an uprising broke out in Germany, he would give orders to execute immediately all political opponents, all concentration camp inmates, and all “criminal elements,” whether in prison or not. After this execution of “a few hundred thousand” of that “scum,” the uprising would break down.<sup>23</sup>

While Hitler’s table talks testify to his determination to counter any internal threats with unlimited brutality and violence, his link between political revolution and common criminality was by no means original. Similar views had already been expressed on the German right after the failed revolution of 1848 and were reinforced after the revolution of 1918, which coincided with an increase in common criminality.<sup>24</sup> Leading Weimar psychiatrists classified revolutionaries as “psychopaths,” just as they had done in the past with ordinary criminal offenders.<sup>25</sup> Also, various raids by political activists on state penal institutions occurred in the years of revolutionary upheaval after the end of the First World War, which left a deep impression on many officials. In late September 1942, Thierack reminded his subordinates that every revolution motivated by “vile” instincts, such as the German revolution of 1918, immediately opened the prison gates in order to gain the support of the “asocial elements.”<sup>26</sup>

Thierack was quick to turn Hitler’s vague if forcibly expressed views into

<sup>20</sup> Table talk of May 10, 1942, reprinted in H. Picker, ed., *Hitlers Tischgespräche im Führerhauptquartier*, 3d ed. (Stuttgart, 1976), p. 280. For the wider context, see T. Mason, “The Legacy of 1918 for National Socialism,” in *German Democracy and the Triumph of Hitler*, ed. A. Nicholls and E. Matthias (London, 1971), pp. 215–39. Mason, however, only focuses on the lessons the Nazis drew from the revolution in 1918 in regard to the working class.

<sup>21</sup> Table talk of April 7, 1942; May 22, 1942; and July 7, 1942; reprinted in Picker, ed., pp. 200, 331–32, 430.

<sup>22</sup> Table talk of July 7, 1942, reprinted in *ibid.*, p. 430.

<sup>23</sup> Table talk of April 7, 1942, reprinted in *ibid.*, p. 201.

<sup>24</sup> R. J. Evans, *Szenen aus der deutschen Unterwelt* (Reinbek bei Hamburg, 1997), pp. 119, 123. This theme was apparently not central in Hitler’s mind in earlier periods. For instance, in his speeches in the early 1920s, he used the term “November-criminal” to attack Jews and “Bolsheviks,” not common criminals; see E. Jackel and A. Kuhn, eds., *Hitler: Samtliche Aufzeichnungen, 1905–1924* (Stuttgart, 1980).

<sup>25</sup> See, e.g., M. M. Weber, *Ernst Rudin: Eine kritische Biographie* (Berlin, 1993), pp. 89–90.

<sup>26</sup> BA Berlin, R 22/4199, Bl. 8–137: Besprechung mit den Chefpräsidenten und Generalstaatsanwälten im RJM, 29.9.1942, here Bl. 39.

reality. Already in late August or early September 1942 he met with leading prison officials in the Ministry of Justice in Berlin. It was Hitler's opinion, Thierack said, that "degenerate" inmates and serious offenders should be killed in order to prevent a "negative selection" during the war. He added: "Gentlemen, please do not think me a blood-guzzler, certain things just have to be."<sup>27</sup> Thierack had to determine which of the more than 190,000 inmates of Germany's state penal institutions were to be selected for annihilation.<sup>28</sup> For just as Nazism had divided up society in general into "national comrades" and "community aliens," so too German legal theory since the late nineteenth century had frequently distinguished between "reformable" and "incorrigible" (or "habitual") offenders.<sup>29</sup> In the Third Reich this meant that, at least in theory, the state had a responsibility to reintegrate first-time offenders, who had merely "tripped up."<sup>30</sup> Following Hitler's table talk, only those prisoners deemed a serious threat were to be killed. Thierack also had to decide how these prisoners, once selected, should be murdered. After all, they had all been legally sentenced to imprisonment and no more. In September 1942, these questions were debated in several meetings between Thierack's deputy Curt Rothenberger and high-ranking SS officials. Thierack himself discussed his plans with leading members of the Nazi state such as Hans Heinrich Lammers, the head of the Reich Chancellery, who had been present at Hitler's table talk of August 20, 1942. Thierack also spoke to propaganda minister Joseph Goebbels, who made important suggestions concerning who among the inmates should be exterminated as "asocial."<sup>31</sup>

On September 18, 1942, Thierack met with Heinrich Himmler, head of the

<sup>27</sup> Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen in Ludwigsburg (hereafter cited as ZStL), II 416 AR 2643/65, Bl. 117–21; interrogation Eugen E., 25.1.1949. See also the judgment of the Landgericht Wiesbaden of 24.3.1952 (2 Ks 2/51), reprinted in A. L. Ruter-Ehlermann, H. H. Fuchs, and C. F. Ruter, eds., *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen, 1945–1966*, vol. 6 (Amsterdam, 1971), pp. 267–367, here p. 274.

<sup>28</sup> On September 30, 1942, there were 190,250 state prisoners in Nazi Germany; BA Berlin, R 22/897, Bl. 82: Gesamtbelegung am 30. September 1942.

<sup>29</sup> F. von Liszt, "Der Zweckgedanke im Strafrecht," in *Strafrechtliche Aufsätze und Vorträge*, ed. F. von Liszt, vol. 1 (Berlin, 1905), pp. 127–78, here pp. 167–70.

<sup>30</sup> See, e.g., R. Christians, "Ziele des Strafvollzugs," *Blätter für Gefängniskunde* (hereafter cited as *BlGefK*) 68 (1937–38): 339–50.

<sup>31</sup> Goebbels diary entry of September 15, 1942, reprinted in *Die Tagebücher von Joseph Goebbels*, ed. E. Frohlich, vol. 2/5 (Munich, 1995), p. 504; BA Berlin, R 22/4062, Bl. 52: Aussprache zwischen Thierack und Lammers, 16.9.1942; K. H. Roth, "'Abgabe asozialer Justizgefangener an die Polizei'—eine unbekannte Vernichtungsaktion der Justiz: Eine Dokumentation," in *Heilen und Vernichten im Mustergau Hamburg: Bevölkerungs- und Gesundheitspolitik im Dritten Reich*, ed. A. Ebbinghaus, H. Kaupen-Hass, and K. H. Roth (Hamburg, 1984), pp. 21–25, here p. 21.

SS and the German police, in Himmler's Field Headquarters in Zhitomir, west of Kiev. One of the issues settled was the "transfer of asocial elements from the prison service to the *Reichsführer SS* for annihilation through labor (*Verichtung durch Arbeit*)."<sup>32</sup> This transfer was to be accomplished under two separate policies, which can be termed the "general transfer" and the "individual transfer." In the "general transfer," all Jews, Sinti and Roma, Russians, and Ukrainians in state penal institutions were to be handed over to the police without exception. The same was agreed for Poles with sentences of more than three years. Also, all state prisoners sentenced to security confinement (*Sicherungsverwahrung*) were to be transferred to the police. This form of incarceration had been introduced in the "Law against Dangerous Habitual Criminals" of November 24, 1933. Judges had been given the option of ordering the indefinite imprisonment of repeat offenders with a "criminal disposition." After the end of their prison or penitentiary sentence, these inmates were transferred either to special penal institutions set up by the Ministry of Justice or to separate wings in penitentiaries or prisons reserved for the security confined.<sup>33</sup> Only a small number of inmates were ever released.<sup>34</sup>

The policy governing "individual transfer" of state prisoners was crucially different. It covered all German and Czech inmates with penitentiary sentences of more than eight years. They were not to be transferred automatically to the police. Rather, they would be examined individually by a commission of the Ministry of Justice as to their "asociality." Only if this commission concluded that the examined prisoners "will forever be worthless for the national community" would they be turned over to the police. Following a suggestion by the

<sup>32</sup> BA Berlin, R 22/4062, Bl. 35a–37: Besprechung mit Reichsführer SS Himmler am 18.9.1942 in seinem Feldquartier. At first, this program was only aimed at male prisoners, as well as female Jewish, Polish, and Sinti and Roma inmates. However, "asocial" women in security confinement and penitentiaries were later (possibly from December 1942 onward) also included in the program.

<sup>33</sup> "Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung vom 24.11.1933," *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (hereafter cited as *MSchriftKrim*) 25 (1934): 261–68; Gruchmann, *Justiz im Dritten Reich* (n. 16 above), pp. 838–40. For the background and the application of this law, see C. Müller, *Das Gewohnheitsverbrechergesetz vom 24. November 1933: Kriminalpolitik als Rassenpolitik*, Juristische Zeitgeschichte series, no. 3/2 (Baden-Baden, 1997). By February 1941 there were fourteen individual institutions or special wards for the security confined.

<sup>34</sup> Between 1934 and 1938, 7,862 inmates were sentenced to security confinement. By April 30, 1938, 701 inmates had been released, only for at least seventy-nine of them to be immediately arrested again. From May 1940 onward, no more inmates were released at all; F. Exner, "Wie erkennt man den gefährlichen Gewohnheitsverbrecher?" *Deutsche Justiz* 11 (1943): 377–79; A. Wingler, "1. Tagung der Gesellschaft für Deutsches Strafrecht, München 27./29. Oktober 1938," *BlGefK* 69 (1938): 305–12, here p. 310; BA Berlin, R 22/1337, Bl. 416: Reichsminister der Justiz to Generalstaatsanwälte, 4.5.1940.



Berlin Chief State Prosecutor (*Generalstaatsanwalt*), Friedrich Jung, the Ministry of Justice decided in early October 1942 that these individual examinations should be extended to some inmates in security confinement (and those in penitentiaries who had been sentenced to security confinement after their imprisonment). If prison officials were “convinced that because of their positive development they could be released in due time,” probably after the end of the war, then such inmates were not to be transferred to the police but rather were to be examined by the commission of the Ministry of Justice as well.<sup>35</sup> These exceptions clearly highlight the fundamental difference between “criminal” and “racial” categories in the Third Reich. While some German inmates could be classified as “reformable” and escape from being transferred to the police, there were no such exceptions for Jews, Sinti and Roma, Russians, and Ukrainians. They were to be exterminated primarily as “racial aliens,” not as criminals.

Both Thierack and Himmler were aware that they were translating Hitler’s will into reality. On September 22, 1942, just four days after the discussion with Thierack, Heinrich Himmler met Hitler at his *Werwolf* headquarters north of Vinnitsya (Ukraine). During their lengthy meeting, Himmler mentioned his agreement with Thierack and evidently received Hitler’s “approval for execution of German professional criminals.”<sup>36</sup> Thierack received confirmation that Hitler had accepted the proposals on September 28. The following day, Thierack met the Chief State Prosecutors (the direct superiors of the prison governors in their regions) and other senior figures of the legal establishment in Berlin. Thierack set out his general plans for “our asocials in the penitentiaries,” informing his audience that Hitler had given the green light for their extermination: “I have spoken to the *Führer* and he personally gave me his consent yesterday.”<sup>37</sup> This approval by Hitler gave the whole process a quasi-legal basis,

<sup>35</sup> BA Berlin, 99 US 2 FC 588, microfilm 22941, Bl. 50–55: Besprechung am 9. Oktober 1942, signed Dr. Crohne, 13.10.1942. The minutes of the meeting of October 9, 1942, do not state that this provision was also to be valid for all “reformable” prisoners with a sentence of security confinement after their prison or penitentiary term. However, this was, in fact, the case. Jung’s suggestion was made at the meeting in Berlin on September 29, 1942, between Thierack and the leading members of the German judiciary; BA Berlin, R..22/4199, Bl. 8–137: Besprechung mit den Chefpräsidenten und Generalstaatsanwälten in RJM, 29.9.1942, here Bl. 125–26. For some minor exceptions to the transfer, e.g., regarding prisoners of war and certain other foreigners, see BA Berlin, 99 US 2 FC 588, microfilm 22941, Bl. 56–61: Reichsminister der Justiz to Generalstaatsanwälte, 22.10.1942.

<sup>36</sup> The quotation is taken from Himmler’s notes in his diary of this meeting. On the margins, this entry is ticked, signifying that this topic had been raised with Hitler: BA Berlin, NS 10/1447, Bl. 78–89: Vortrag b. Führer, 22.9.1942, here Bl. 88. Himmler’s notes have now been published in P. Witte, U. Lohalm, and W. Scheffler, eds., *Der Dienstkalender Heinrich Himmlers 1941/1942* (Hamburg, 1999).

<sup>37</sup> BA Berlin, R 22/4199, Bl. 8–137: Besprechung mit den Chefpräsidenten und Generalstaatsanwälten in RJM, 29.9.1942, here Bl. 41. On September 16, 1942, Lammers had suggested to Thierack that he should personally present to Hitler his plans for dealing

as Hitler's will was considered law in the Third Reich. The absolute centrality of Hitler in the process is also obvious when examining the reasons Thierack set out in his speech for the program of mass murder, repeating almost verbatim the points Hitler had made to him on the day of his appointment, August 20, 1942. Thierack had even been sent a copy of Hitler's remarks as a guideline for his decisions.<sup>38</sup> Clearly, Hitler's remarks at the lunchtime meeting had been taken as an order. Only one month after this meeting, Thierack had finalized an agreement to hand over substantial numbers of state prisoners to the police for "annihilation through labor." To explain the speed of this process, one has to take a brief look at the position of the judiciary in 1942.

By the time of Thierack's appointment, the standing of the judicial apparatus within the Nazi dictatorship had reached a low point. Hitler had always been critical of the legal process and encouraged the growth of a parallel system of punishment: increasingly, he relied on the SS and police apparatus to realize his vision of a society free from all "community aliens." This led to several areas of conflict and competition with the judiciary. For instance, from late 1939 onward, Hitler used the SS to "correct" court sentences he regarded as too lenient by ordering the murder of the offender.<sup>39</sup> Hitler even made his strong criticisms of the judiciary public in one of his increasingly rare speeches in the *Reichstag* on April 26, 1942.<sup>40</sup> The weak position of the judiciary at that time was exemplified by the status of the acting Minister of Justice, the career civil servant Franz Schlegelberger, who clearly did not possess Hitler's support.

In contrast, *SS-Gruppenführer* Thierack, until August 1942 the President of the People's Court, had the right credentials to restore the status of the legal profession. The swift decision by Thierack to act on Hitler's views on the destruction of the "asocials" must thus be seen partly as an attempt to demonstrate hardness on the part of the new minister. What better way to show determination than voluntarily to hand over state prisoners to the police for extermination? Handing over the security-confined inmates also had symbolic value, for between 1937 and 1939 the SS leadership had put growing pressure on the Ministry of Justice to transfer these inmates from state penal institutions to concentration camps.<sup>41</sup>

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with "the problem asocials." On October 1, 1942, Thierack informed Lammers that Hitler had endorsed the plans for the "treatment of the asocials (*sic*)"; BA Berlin, R 22/4062, Bl. 52–53: Fortsetzung der Aussprache am 16.9.1942; *ibid.*, Bl. 50: Besprechung mit Reichsminister Dr. Lammers, am 1. Oktober 1942. ..

<sup>38</sup> L. Gruchmann, "Hitler über die Justiz: Das Tischgespräch vom 20. August 1942," *Vierteljahreshefte für Zeitgeschichte* 12 (1964): 86–101, here pp. 86, 91. ..

<sup>39</sup> Evans (n. 18 above), pp. 696–700; A. L. Ruter-Ehlermann and C. F. Ruter, eds., *Justiz und NS-Verbrechen: Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen, 1945–1966*, vol. 4 (Amsterdam, 1970), pp. 149–55.

<sup>40</sup> W. Johe, *Die gleichgeschaltete Justiz* (Frankfurt am Main, 1967), p. 175.

<sup>41</sup> See BA Berlin, R 22/1437, Bl. 60–61: Vermerk, 15.2.1937; BA Berlin, R 22/1429, Bl. 133: Reichsführer SS to Reichsminister der Justiz, 26.8.1939.

Thierack also tried to bring the judiciary in line with the already existing murderous policies of the regime. In a functioning legal system, sentences pronounced by the courts must be served. However, by the early 1940s, this principle was being undermined increasingly by large-scale extermination programs that also included certain state prisoners. From early 1940 onward, criminal offenders who had been committed to psychiatric institutions were among the first victims of the “euthanasia” program, deemed “undesirable” because of both medical (mental illness) and social (criminality) criteria. Even though these inmates in mental institutions were still subject to the legal service, their murder was not cleared initially with the regional Chief State Prosecutors.<sup>42</sup> In April 1942, the “Final Solution of the Jewish Question” was extended to some Jewish state prisoners who had not yet completed their sentences. Following a request by the Berlin Gestapo to transfer Jewish inmates to the police, the Ministry of Justice instructed the regional judicial authorities all over Germany that “the execution of a prison sentence against Jews, who should be evacuated, is to be discontinued after a requisition by the state police authority.” In such cases, the prisoners were to be handed over directly to the Gestapo. The same principle was applied to Jewish remand prisoners, “unless it is expected that they will be sentenced to death”—revealing even to the most obtuse bureaucrats that “evacuation” really stood for “extermination.”<sup>43</sup>

In view of these developments, Thierack aimed at a general redefinition of the role of the legal apparatus. The transfer of “asocial” state prisoners from late 1942 onward was part of his wider vision, which aimed at a division of labor between the state penal system and concentration camps. The state penal service was to be limited to “reformable” inmates only, while the police were to be given jurisdiction over all “incorrigible criminals” and “racial aliens.” Concerning the latter category, Thierack explained in a letter to Martin Bormann on October 13, 1942, that the judiciary “could only contribute on a small scale to the extermination of members of these races” (Poles, Russians, Jews, Sinti and Roma). Handing them over to the police would “produce much better results.”<sup>44</sup> Concerning “incorrigible criminals,” Thierack saw the “Law against

<sup>42</sup> Friedlander (n. 2 above), pp. 88, 117; G. Aly, “Medizin gegen Unbrauchbare,” in *Aussonderung und Tod: Die klinische Hinrichtung der Unbrauchbaren*, Beiträge zur Nationalsozialistischen Gesundheits- und Sozialpolitik, vol. 1 (Berlin, 1985), pp. 9–74, here pp. 42–44; Gruchmann, *Justiz im Dritten Reich* (n. 16 above), p. 516.

<sup>43</sup> BA Berlin, R 22/1238, Bl. 286: Reichsminister der Justiz to Oberreichsanwalt beim Volksgerichtshof, Oberlandesgerichtspräsidenten, and Generalstaatsanwälte, 16.4.1942.

<sup>44</sup> BA Berlin, 99 US 2 FC 585, microfilm 22933, Bl. 287: Reichsminister der Justiz to Reichsleiter Bormann, 13.10.1942. It was already agreed in the meeting between Himmler and Thierack on September 18, 1942, that “in future criminal law cases involving Jews, Poles, Gypsies, Russians and Ukrainians should no longer be dealt with by ordinary

Community Aliens” as the way forward. The law, which was frequently discussed during the war and went through numerous drafts, was never implemented. It had included the provision that judges could order the transfer of “incorrigible” offenders straight to the police, rather than sentencing them to imprisonment.<sup>45</sup> As two former officials in the Ministry of Justice recalled after the war, the extermination of state prisoners as agreed between Himmler and Thierack was designed as a short-term measure in the fight against “incorrigible” criminals until this law came into effect.<sup>46</sup>

### III

From late October 1942 onward, the Ministry of Justice in Berlin received monthly lists from the various German penal institutions with names of those prisoners assigned to be part of the “general transfer.”<sup>47</sup> The “general transfer” was organized by Section V in the Ministry of Justice, the section responsible for the running of the prison service. It was headed by Rudolf Marx, an experienced prison administrator who had served since 1916 as governor in various German state penal institutions. In January 1931 he had been appointed to the Prussian Ministry of Justice, at a time when Prussia was still ruled by the Social Democrats, and like so many other judicial officials he simply continued his career after the Nazi “seizure of power.” Despite repeated attempts, he was never admitted into the National Socialist German Workers Party (NSDAP).<sup>48</sup> The official whom Marx put in charge of the day-to-day organization of the “general transfer” was Robert Hecker, another long-serving member of the German prison administration from the pre-Nazi era. Hecker, who had joined the NSDAP on May 1, 1933, was above all a bureaucrat with a deep knowledge

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courts, but by the *Reichsführer SS*”; BA Berlin, R 22/4062, Bl. 35a–37: Besprechung mit Reichsführer SS Himmler am 18.9.1942 in seinem Feldquartier. This agreement excluded Poles in the German *Volksliste*.

<sup>45</sup> See, e.g., Besprechung zwischen dem Reichsführer-SS Heinrich Himmler und Reichsjustizminister Thierack, 21.12.1942; reprinted in Ayass (n. 3 above), pp. 319–20. For the wider context, P. Wagner, “Das Gesetz über die Behandlung Gemeinschaftsfremder,” in *Feinderklärung und Pravention: Kriminalbiologie, Zigeunerforschung und Asozialenpolitik*, Beiträge zur Nationalsozialistischen Gesundheits- und Sozialpolitik, vol. 6 (Berlin, 1988), pp. 75–100. See also Angermund, p. 186; Werle, pp. 619–80.

<sup>46</sup> BA Berlin, film.44325, interrogation Albert Hupperschwiller, 24.1.1947; Ruter-Ehlermann, Fuchs, Ruter, eds. (n. 27 above), p. 317.

<sup>47</sup> ZStL, VI 415 AR-Nr 1310/63, Staatsanwaltschaft beim Kammergericht Berlin, Einleitungsvermerk vom 30.4.1965. The transfer apparently also included a small number of Jews, Sinti and Roma, Russians, and Ukrainians in state workhouses; BA Berlin, 99 US 2 FC 588, microfilm 22941, Bl. 56–61: Reichsminister der Justiz to Generalstaatsanwälte, 22.10.1942.

<sup>48</sup> BA Berlin, R 22/Pers. 67687; *ibid.*, R 2/Pers. SG (ex. BDC), Rudolf Marx.

of the technical side of prison organization. Like Marx, he was not a zealous Nazi ideologue but rather an experienced penal administrator.<sup>49</sup>

Hecker examined the lists of prisoners sent in by the penal institutions, checking whether the formal criteria for transfer to the police had been fulfilled. Then the lists were passed on to the Reich Security Head Office (RSHA), which in turn sent the names of the state prisoners to local police officials who organized their transport to a designated concentration camp.<sup>50</sup> The transports to the camps started in November 1942, and by summer 1943 most prisoners had been transferred.<sup>51</sup> Overall, more than 17,300 state prisoners were turned over to the police as part of the “general transfer.”<sup>52</sup>

According to detailed statistics of April 24, 1943, the names of 16,830 prisoners (15,198 men and 1,632 women) had already been reported for transfer to the RSHA by the Ministry of Justice. This figure can be broken down into various prisoner categories.<sup>53</sup> It included a total of 6,242 Poles. After the German invasion of Poland in 1939 and the deportation of several hundred thou-

<sup>49</sup> BA Berlin, R 22/Pers. 59371; ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949; ZStL, II 416 AR 2643/65, Bl. 117–21: Interrogation Eugen E., 25.1.1949.

<sup>50</sup> BA Berlin, film 44840, interrogation Rudolf Marx and Robert Hecker, 25.3.1947. At the RSHA, the lists containing the names of Jewish, Polish, Russian, and Ukrainian prisoners, as well as of political prisoners, were passed on to the Gestapo. The criminal police (*Kripo*) in turn were responsible for Sinti and Roma and the “criminal” prisoners; Reichskriminalpolizeiamt to Kommandantur des KZ Mauthausen, 10.3.1943, reprinted in ZStL, VI 415 AR-Nr 13 10/63, Staatsanwaltschaft beim Kammergericht Berlin, Vermerk vom 17.4.1969.

<sup>51</sup> ZStL, VI 415 AR-Nr 1310/63, Staatsanwaltschaft beim Kammergericht Berlin, Einleitungsvermerk vom 30.4.1965.

<sup>52</sup> According to this statistic, probably drawn up in late spring 1943, 15,590 men and 1,717 women had been reported to the police for deportation; BA Berlin, R 22/1262, Bl. 15: Abgabe asozialer Gefangener an die Polizei, no date (spring or summer 1943). The actual figure is higher, as prisoners were still reported to the police after this statistic was drawn up. See, e.g., E. Scharf, “Strafvollzug in der Pfalz unter besonderer Berücksichtigung der JVA Zweibrücken,” in *Justiz im Dritten Reich: Justizverwaltung, Rechtsprechung, und Strafvollzug auf dem Gebiet des heutigen Landes Rheinland-Pfalz*, ed. Ministerium der Justiz Rheinland-Pfalz, 2 vols. (Frankfurt am Main, 1995), 2:757–849, here p. 822.

<sup>53</sup> This figure also includes 246 Sinti and Roma and 451 Russians; BA Berlin, R 22/1417, Bl. 141: Abgabe an die Polizei, Stand: 24. April 1943. There was an obvious time gap of several weeks between the moment when the Ministry of Justice passed on the lists of prisoners to the police and the actual transfer of prisoners to the camps. Thus, by April 30, 1943, 14,700 prisoners had actually been transported by the police to concentration camps; BA Berlin, R 22/1262, Bl. 15: Abgabe asozialer Gefangener an die Polizei, no date (spring or summer 1943).

sand Poles as forced laborers, German state penal institutions, in particular those in the East, had filled up dramatically with Polish offenders.<sup>54</sup> In comparison to Poles, the number of Jewish prisoners (1,078) handed over to the police was rather small. At this time, many fewer Jews than Poles were confined in state penal institutions. The majority of so-called offenses by Jews never reached the courts but were dealt with directly by the police or SS. One of the cases still to come in front of the courts during the war was that of the Czech Jew Karl H., who was accused of collecting money for communist prisoners and distributing leaflets. H. was sentenced by the Peoples' Court in Berlin to ten years imprisonment in 1942 and transferred to the Untermaßfeld penitentiary in Thuringia. Following the agreement between Thierack and Himmler, he was handed over to the police in March 1943 and put on a transport to Auschwitz.<sup>55</sup>

The largest single group of prisoners handed over to the police as part of the "general transfer" were prisoners sentenced to security confinement. In the statistics of April 24, 1943, they made up more than half (8,813) of all the transferred inmates.<sup>56</sup> These prisoners were often characterized by Nazi legal officials as dangerous violent criminals, sex offenders, and professional confidence tricksters. This view is echoed in the memoirs of former political concentration camp inmates who encountered the security confined after their transfer to the camps.<sup>57</sup> However, this picture is not accurate. In fact, only a small number of these prisoners had been convicted of violent or sex crimes. The vast majority of convictions was for minor property offenses, involving the theft of food, bicycles, or very small sums of money. The offenders frequently came from deprived social backgrounds. Being unskilled laborers, they often relied on occasional petty crimes for a living. Most had committed their first offenses in their teens, and by the time of being sentenced to security confinement they had collected a great number of previous convictions. On average, the offenders in security confinement by January 1, 1937, had accu-

<sup>54</sup> At the end of March 1943, after large numbers of Polish prisoners had already been handed over to the police, there were still 36,148 Poles in German penal institutions—almost 19 percent of all state prisoners; Institut für Zeitgeschichte, Munich (hereafter cited as IfZ), MA 624, Bl. 3664437–38: Vermerk, Reichsjustizministerium, no date.

<sup>55</sup> Thüringisches Staatsarchiv Meiningen (hereafter cited as ThStA Mgn.), Zuchthaus Untermaßfeld, Nr. 456.

<sup>56</sup> The figure consists of 4,296 inmates in security confinement (including 223 women) and 4,517 inmates in penitentiaries with subsequent security confinement (including 267 women); BA Berlin, R 22/1417, Bl. 141: Abgabe an die Polizei, Stand: 24. April 1943.

<sup>57</sup> BA Berlin, film 44184, interrogation Karl Engert, 5.12.1946; E. Kogon, *Der SS-Staat* (Munich, 1995), pp. 68–69; H. Eiden, "Das war Buchenwald: Tatsachenbericht," in H. Gobrecht, ed., *Eh' die Sonne lacht: Hans Eiden-Kommunist und Lagerältester im KZ Buchenwald* (Bonn, 1995), pp. 207–64, here p. 221.

mulated fourteen previous sentences. This meant that despite the petty nature of their offenses they often had spent most of their adult life behind bars.<sup>58</sup>

One example of these offenders is Richard F., born in 1906. His father died when F. was only four years old, and the boy was brought up for three years in a corrective state institution. After the war, F. worked for several years as an unskilled laborer. He was convicted for the first time at the age of twenty, in 1926, and in the following years he was frequently sentenced for minor thefts to some weeks or months imprisonment. From 1929, F. was unemployed and traveled through Germany seeking work and subsistence. In 1937, he was sentenced to fifteen months imprisonment for the theft of a garden hose. After his release, F. tried to stay on the straight and narrow, but between late 1939 and spring 1940 he stole several chickens and rabbits. He probably knew that under the new draconian criminal law in wartime he might be sentenced to death for his crimes, and while awaiting trial he tried to kill himself. In view of the economic hardship that had driven F. to his crime, the judge decided to spare him the death penalty and instead sentenced him to fifteen years in the penitentiary with subsequent security confinement. However, after the agreement between Himmler and Thierack this sentence became synonymous with a death sentence. On November 29, 1942, Richard F. was handed over as “asocial” to the police and transferred to Mauthausen concentration camp. Three weeks later, he was dead.<sup>59</sup>

#### IV

While the program of “general transfer” was slowing down by mid-1943, the process of “individual transfer” went on until almost the end of the war. On October 19 and 20, 1942, all prison governors involved were personally informed in the Ministry in Berlin about the details of this program.<sup>60</sup> The gover-

<sup>58</sup> E. Schmidt, “Sicherungsverwahrung in Zahlen,” in *Dringende Fragen der Sicherungsverwahrung*, ed. R. Freisler and F. Schlegelberger (Berlin, 1938), pp. 105–13; J. Hellmer, *Der Gewohnheitsverbrecher und die Sicherungsverwahrung, 1934–1945*, Kriminologische Forschungen series, no. 2 (Berlin, 1961), pp. 41–50, 209–47, 261–66, 300; F. Weber, “Erfahrungen in der Sicherungsanstalt,” *BlGefK* 68 (1938): 429–48, here p. 432; L. Lotz, *Der gefährliche Gewohnheitsverbrecher*, Kriminalistische Abhandlungen series, no. 41 (Leipzig, 1939), p. 46.

<sup>59</sup> ThStA Mgn., Zuchthaus Untermaßfeld, Nr. 311, Bl. 19–45: Urteil des Sondergerichts für den Oberlandesgerichtsbezirk Jena, 11.7.1940; *ibid.*, Bl. 47: Selbstverfasster Lebenslauf des Gefangenen F., 30.7.1940; *ibid.*, Bl. 76: Strafanstaltsdirektor Gericke to Oberstaatsanwalt bei dem Landgericht in Weimar, 28.1.1943.

<sup>60</sup> The meeting for south German governors took place on October 19, 1942; the meeting for north and west German governors one day later; Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above), p. 283.

nors were given a crucial role in the organization of the “individual transfer.” It was their responsibility to divide up the security-confined prisoners (and those inmates in penitentiaries with subsequent sentences of security confinement) into “asocials” and “reformables.” The former were transferred directly to the police, as part of the “general transfer,” while the latter were examined by the commission of the Ministry of Justice under the policy of “individual transfer.”<sup>61</sup> The governors prepared for these examinations by filling in questionnaires about all inmates who were part of the “individual transfer.” In these forms, they commented on the labor power of each prisoner, his state of health and supposed eugenic value (“has the offender a bad hereditary disposition?”), and in conclusion had to answer the question: “Is his inner being asocial?”<sup>62</sup> As the governors had little intimate knowledge of most inmates, they generally enlisted the help of other prison officials, such as doctors, warders, and chaplains, in filling out the forms.<sup>63</sup>

The ministry official put in charge of the individual examinations was Karl Engert. Born in 1877, he had joined the NSDAP in April 1921 and had gotten to know Hitler personally. In 1932 he was elected a member of the Bavarian State Parliament. Engert’s political activism in Weimar paid its dividends after 1933. Having been a low-ranking regional judge in the 1920s, by 1938 he had risen to vice-president of the People’s Court, where he was nicknamed “the greatest bloodhound” by defense lawyers. It was here that he became friendly with Thierack, then president of the People’s Court. As a Nazi *Reichsredner* and *SS-Oberfuhrer im Stab des RFSS*, Engert also had excellent links to the party and SS. Engert’s name had apparently already been put forward in the discussion between Thierack and Himmler on September 18, 1942, and on November 1, 1942, he was officially appointed head of the newly created secret Section XV of the Ministry of Justice. This section, which also included two ambitious junior members of the Ministry (Albert Hupperschwiller and Friedrich Wilhelm Meyer) dealt with the individual examinations of “asocial” state prisoners. Unusually, Engert was made directly responsible to Thierack.<sup>64</sup>

<sup>61</sup> IfZ, MB-1, interrogation Otto Gundner, 12.3.1948, 13.3.1948, 15.3.1948, 16.3.1948, 17.3.1948; Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above), pp. 313–14.

<sup>62</sup> This passage is based on two preserved questionnaires filled in by the governor of the penal institution in Kassel-Wehlheiden on March 29, 1944. It seems likely that the same forms were used in 1942/3; ZStL, VI 416 AR-Nr 1127/66, Bl. 280–81.

<sup>63</sup> BA Berlin, film 44564, interrogation Joseph P., 17.12.1946; BA Berlin, 99 US 2 FC 38577/47455 P, testimony Benedikt W., Militärgerichtshof Nr. 3, Nuremberg, 28.4.1947.

<sup>64</sup> BA Berlin, R 22/Pers 55261; BA Berlin, R 22/4349, Bl. 51–53; BA Berlin, R 2/Pers. SG (ex. BDC), Karl Engert; BA Berlin, R 22/58, Geschäftsverteilungsplan; BA Berlin, film 44184, interrogation Karl Engert, 6.12.1946, 6.2.1947; Ifz, F 37/2, 1942/II, Telefongesprache des Reichsfuhrers SS am 18.9.1942. The members of section XV were later



From November 1942, Ministry officials traveled to the various penal institutions to carry out the examinations, sometimes alone, at other times together. During such visits, they would first examine the files and papers concerning each prisoner. Usually, they would also personally examine the inmate.<sup>65</sup> Then they would make a decision, using different colored paper. If the official declared a prisoner “asocial,” he used red paper. A green sheet signaled “reformability.” A white paper meant “unclear.” Engert apparently insisted on personally reexamining some cases where his subordinates had decided on “reformable” or “unclear.” If, however, the officials had decided on “asocial,” Engert would not be involved.<sup>66</sup>

There are some similarities here to the organization of the “euthanasia” program that started in late 1939. Here, too, forms were sent out to individual institutions, asking about the inmates’ state of health and ability to work. These forms were then processed by “experts,” who marked them with a red cross if the patients were to die. Others were selected to live or classified as doubtful.<sup>67</sup> Karl Engert testified after the war that in 1941–42 he had heard a talk by Victor Brack (a key figure in the “euthanasia” program) on the killing of the mentally ill. Engert evidently referred to a meeting on April 23 and 24, 1941, in Berlin, when the leading members of the judiciary were informed about the “euthanasia” program, its organization, and the methods used to single out certain inmates.<sup>68</sup> It is likely that the murder of mentally and physically disabled people influenced Engert’s designs for exterminating state prisoners, just as it helped to shape the “final solution.”<sup>69</sup>

Apart from these structural similarities with the “euthanasia” program, there were also personal connections. The agency Hitler had charged in 1939 with carrying out the “euthanasia” program was the Chancellery of the Führer of the NSDAP, a party organization. In a highly unusual move, Karl Engert asked a senior member of this agency, Kurt Giese, to join his team in the examination

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joined by another more junior official, Otto Gundner. For their personal details, see ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949. Engert was promoted in June 1943 and made head of Section V (in addition to being head of Section XV). Rudolf Marx was relegated to the brief for prison farming and security.

<sup>65</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944. I wish to thank Herrn Zarwel at the Bundesarchiv-Berlin for sending me a copy of this document at short notice.

<sup>66</sup> IFZ, MB-1, interrogation Herbert Peter, 13.7.1948; BA Berlin, film 44320, interrogation Robert Hecker, 16.4.1947; Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above), p. 315. For the operational details, see also BA Berlin, film 44325, interrogation Albert Hupperschwiller, 24.1.1947.

<sup>67</sup> Friedlander, pp. 74–77, 83; Burleigh and Wippermann (n. 7 above), p. 144.

<sup>68</sup> IFZ, MB-1, interrogation Karl Engert, 5.1.1949; Friedlander, p. 122.

<sup>69</sup> Friedlander, pp. 295–302; Burleigh (n. 2 above), pp. 220–37.

of state prisoners. Giese, who had become a member of the NSDAP in the early 1920s, was head of the section in the Chancellery of the Fuhrer that dealt with confirmations and commutations of death sentences. He had known Engert since at least 1940, when he served as an associate judge at the People's Court. Giese responded enthusiastically to Engert's proposal to join his commission. As he recalled after the war, "I was very keen to get personally involved. I have time and again been inspired by high idealism."<sup>70</sup> Kurt Giese started the examinations of prisoners in 1943, apparently focusing on inmates sentenced for political offenses. Thus, the "normative" judicial system and the "prerogative" Chancellery of the Fuhrer worked hand in hand in the selection of "asocials" to be exterminated.

The term "asocial" was popular in the Third Reich because it could be applied to all forms of nonnormative behavior. Its power lay precisely in the fact that it could not be clearly defined. It is possible nevertheless to isolate some criteria that influenced decisions by the commission. Engert apparently instructed his subordinates to judge if the offender came from a "degenerate" family. Thus, the officials tried to determine "whether the father was a drinker, the mother a whore." A divorce, or lack of contact to the family on the outside, also counted as a negative.<sup>71</sup> The commission also concentrated on former active Social Democrats or Communists, for whom they designed special questionnaires.<sup>72</sup> Echoing Hitler's obsession with preventing another "stab in the back," they decided to hand over all offenders "who could become politically dangerous . . . when large parts [of the country] are occupied and the enemy moves into an area with a penal institution and one has to anticipate mutiny, disorder and violence against the prison officials."<sup>73</sup> Still, the criteria for the classifications remained extremely vague, and one official in Engert's commission complained after the war that "I have never received any hint what was to be understood by the term 'asocial'; I had to work it out by myself."<sup>74</sup>

The prisoners individually examined were different in two ways from the ones transferred to the police as part of the "general transfer." First, they included a large number of political prisoners, who had been almost absent in

<sup>70</sup> IfZ, MB-1, Staatsanwaltschaft Wiesbaden, interrogation Kurt Giese, 3.6.1948; BA Berlin, R 2/Pers. SG (ex. BDC), Kurt Giese. Giese later introduced Herbert Peter, a more junior member of the Chancellery of the Fuhrer, to the murderous project. For the workings of the chancellery, see J. Noakes, "Philipp Bouhler und die Kanzlei des Fuhrers der NSDAP," in *Verwaltung contra Menschenfuhrung*, ed. D. Rebenitsch and K. Teppe (Göttingen, 1986), pp. 208–36.

<sup>71</sup> BA Berlin, film 44184, interrogation Karl Engert, 5.12.1946; BA Berlin, film 44325, interrogation Albert Hupperschwiller, 24.1.1947.

<sup>72</sup> IfZ, MB-1, Ernst Niekisch to Deutsche Justizverwaltung, 8.12.1948.

<sup>73</sup> BA Berlin, film 44184, interrogation Karl Engert, 5.12.1946.

<sup>74</sup> IfZ, MB-1, interrogation Herbert Peter, 13.7.1948.

the “general transfer.” About one-third of all those inmates reported to Engert’s commission by December 1942 had been classified by the penal authorities as political offenders.<sup>75</sup> One of these inmates was a former senior official in the Thuringian Ministry of the Interior, Hermann Brill, who had been sentenced for high treason to twelve years imprisonment and had been taken in October 1939 to the Brandenburg-Goerden penitentiary. In May 1943, Brill was interrogated for more than thirty minutes by one of the members of Engert’s commission. According to Brill’s testimony after the war, the conversation was conducted in a rather polite manner. Among other issues, the official raised the question whether Brill still stood by his political convictions, which he answered in the affirmative. On December 21, 1943, Brill was handed over as “asocial” to the police and taken to Buchenwald.<sup>76</sup>

Second, a number of the criminal offenders who were part of the “individual transfer” were serving very lengthy sentences for violent crimes, such as murder, rape, and robbery, rather than petty property offenses, as in the case of many prisoners in the “general transfer.”<sup>77</sup> For instance, Ernestine S. was committed to the Aichach women’s penitentiary in Bavaria in January 1940. She had been sentenced to lifelong imprisonment for murdering her husband. In February 1943, the governor commented on S.: “Sometimes one has the feeling that she is possessed by the devil. Her inner being is possibly asocial.”<sup>78</sup> Engert’s commission apparently agreed with this judgment, for on November 12, 1943, she was handed over to the police and transported to Auschwitz.<sup>79</sup>

By February 23, 1944, the members of Engert’s commission had personally examined approximately six thousand inmates in forty-six different penal in-

<sup>75</sup> IfZ, MA.624, Bl. 3664611–12: Anzeigen der Anstaltsvorstände über die durch Abteilung XV zu überprüfenden Gefangenen, 7.12.1942. Political opponents of the regime were routinely sentenced to very lengthy spells in penitentiaries. Only very few political prisoners had been sentenced to security confinement (see n. 89). And following a secret decree of October 22, 1942, all of these inmates were to be individually examined by Engert’s commission as well; BA Berlin, 99 US.2 FC 588, microfilm 22941, Bl. 56–61: Reichsminister der Justiz to Generalstaatsanwälte, 22.10.1942.

<sup>76</sup> IfZ, MB-1, Vermerk über die Rücksprache mit Dr. Brill, 3.9.1949; IfZ, ED 106, Bd. 86, Bl. 131–35: Eduard W. (et al.) to Oberstaatsanwaltschaft beim Landgericht Hannover, 15.5.1948. For Brill, see M. Overesch, *Hermann Brill: Ein Kämpfer gegen Hitler und Ulbricht* (Bonn, 1992).

<sup>77</sup> For instance, according to the prison ledger of the Ebrach penitentiary, nineteen of the thirty-six inmates transported to Mauthausen between June 1943 and March 1944 after “individual” examinations had been sentenced for murder; BA Berlin, 99 US 2 FC 588, Microfilm 22941, Bl. 89–102: Ebrach Prisoner Ledger.

<sup>78</sup> Staatsarchiv München (hereafter cited as StAMu), Justizvollzugsanstalten Nr. 13672, Direktor Reitzenstein on Ernestine S., 11.2.1943.

<sup>79</sup> *Ibid.*, Direktor der Anstalt Aichach to Staatsanwaltschaft beim Landgericht Wien II, 2.12.1943.

stitutions all over Germany. Another 1,300 inmates were still left to be investigated. Of all the already examined inmates, only 998 prisoners were judged “reformable” by the commission and remained in the penal institutions. A further 437 were reported for service in special army formations for criminal offenders (*Bewahrungstruppen*). By contrast, more than 40 percent of the examined inmates (2,464) had already been handed over as “asocial” to the police. In the case of another 1,250 inmates, a decision by the commission had been postponed for economic reasons. These inmates were skilled laborers (mainly communists and Czechs) employed in armaments factories. Their fate depended on Germany’s military fortune. If it deteriorated, and the inmates were judged a security risk, then a decision about their future would be taken by Engert. Such economic considerations also temporarily saved the remaining 705 of the approximately six thousand examined inmates from transfer to the police. While they had already been judged by the commission as “asocial,” they still remained in the state penal institutions for the time being, for reasons of economic productivity. These developments will be investigated in the following section.<sup>80</sup>

## V

The ever-increasing shortage of labor in Nazi Germany since the second half of the 1930s had made efficient labor into the most important goal of Nazi penal policy. There was a slow shift from inefficient and labor-intensive prison work to industrial-style production for the war effort. It was stressed that a good governor had to be first and foremost a good plant manager.<sup>81</sup> When speaking to the leading penal officials on September 29, 1942, Thierack had made it absolutely clear, however, that the annihilation of “asocial” state prisoners was to take precedence over any economic gain that could be derived from their labor power in penal institutions. But some prison governors were concerned initially about the possible disruption of the smooth running of their penal “factories.” They criticized the proposed transfer as it could lead to seri-

<sup>80</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944. A further 105 of the approximately six thousand inmates were judged “asocial” by Engert’s commission. As they were Czech nationals, their transfer to the police was recommended to the responsible *Reichsprotector* Wilhelm Frick. For the *Bewahrungstruppen*, see H.-P. Klausch, *Die Geschichte der Bewahrungsbattallione 999 unter besonderer Berücksichtigung des antifaschistischen Widerstands*, 2 vols. (Cologne, 1987).

<sup>81</sup> Bericht des Generalstaatsanwalts in Hamm, 9.6.1944, reprinted in Justizakademie des Landes Nordrhein-Westfalen, ed., *Zum Strafvollzug 1933–1945 und seiner Vorgeschichte in der Weimarer Republik* (Recklinghausen, n.d.), source 26h.

ous short-term shortages of skilled prison labor, warning of “catastrophic consequences.”<sup>82</sup> For instance, the governor of the Ebrach penitentiary was faced with the transfer of up to 38 percent of the entire prison population.<sup>83</sup>

In the end, the Ministry of Justice settled for a compromise between economics and extermination. While the transfer began without any delays, causing some disruption to the production process,<sup>84</sup> state penal institutions were instructed to report at first only prisoners employed in less productive lines of work. Skilled laborers working in vital industries were exempted from the transfer for as long as it took to train new inmates to fill their positions, which was not always possible. This special provision did not apply to Jews, Poles, and Sinti and Roma. Just as they could not be classified as “reformable,” their economic skills were also regarded as irrelevant. For them, no escape was possible in the Nazi racial state.<sup>85</sup>

For other inmates, the temporary exemption on economic grounds could mean the difference between life and death. By April 1943, 3,068 “asocial” state prisoners, who would otherwise have been part of either the “general” or the “individual” transfer, had been spared temporarily and not yet reported to the police.<sup>86</sup> This meant that it was possible for governors to claim certain inmates as irreplaceable workers to save them from being handed over to the police. However, there is only one known case in which a governor used this strategy, and his charity extended only to political and not to criminal prisoners.<sup>87</sup> In general, the governors supported the transfer, once exceptions had been made for some skilled prisoners.

Their attitude can be demonstrated most clearly by examining the fate of the

<sup>82</sup> BA Berlin, R 22/4049: Vorstand des Zuchthauses Kaisheim to Reichsminister der Justiz, 29.10.1942.

<sup>83</sup> Of the 684 prisoners in Ebrach, 129 were sentenced to subsequent security confinement and were deemed “incorrigibly asocial”; sixty-seven prisoners had received sentences of more than eight years for political crimes; fifty-seven inmates had been sentenced to more than eight years for nonpolitical crimes and were seen as “asocial”; four inmates were Jews and three inmates were Sinti and Roma; BA Berlin, R 22/4045, Bl. 55: Vorstand des Zuchthauses Ebrach to Reichsminister der Justiz, 29.10.1942.

<sup>84</sup> ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949; here reference to the testimony of S. Noerr.

<sup>85</sup> Reichsminister der Justiz to Generalstaatsanwälte, 2.11.1942; reprinted in ZStL, VI 416 AR-Nr 1127/66, Bl. 259.

<sup>86</sup> BA Berlin, R 22/1417, Bl. 141: Abgabe an die Polizei, Stand: 24. April 1943.

<sup>87</sup> This exception was Dr. Karl-Friedrich Engelhardt, the governor of the Remscheid-Luttringhausen penitentiary; for Engelhardt, see ZStL, VI 416 AR-Nr 1127/66, Bl. 174–80: Vorstand der Strafanstalt Remscheid-Luttringhausen to Generalstaatsanwalt in Dusseldorf, 27.8.1947; A. Breidenbach, *Antifaschistischer Widerstand im Zuchthaus Remscheid-Luttringhausen* (Remscheid, 1992), pp. 13–14; Justizakademie des Landes Nordrhein-Westfalen (n. 81 above), sources 29d, 29g.

security confined. As we have seen, it was the governor's own decision whether to classify an inmate sentenced to security confinement as "asocial" (which resulted in the automatic transfer to the police, unless a temporary exemption was granted on economic grounds) or as "reformable" (which led to an examination by Engert's commission and thus gave the inmates the chance of escaping the camps). Clearly, if governors had wanted to save prisoners from the grasp of the police, they could have classified a large number of these inmates as "reformable." In late 1942, the German prison governors reported the results of their first examinations to the Ministry of Justice. At the time, there were around fourteen thousand inmates with sentences of security confinement. The governors classified only 593 as "reformable."<sup>88</sup> Approximately 95 percent of the inmates were reported as "asocial."<sup>89</sup> How can this level of support be explained?

<sup>88</sup> In October 1942, there were approximately 7,600 inmates held in security confinement. Unfortunately, there are no detailed statistics for those inmates sentenced to security confinement but still serving other sentences in penal institutions. Here, we have to rely on estimates. Regarding the figures for the "general transfer," by spring 1943 a total of 4,557 inmates in state penal institutions with sentences of subsequent security confinement (*mit anschließender Sicherungsverwahrung*) had already been reported to the police. Probably another 1,500 such inmates in state penal institutions had been temporarily exempted from the "general transfer" to the police as skilled workers (around 3,100 "asocial" inmates overall had been exempted. The great majority of them were inmates in security confinement or in state penal institutions with subsequent security confinement). Regarding the figures of the "individual transfer," approximately three hundred inmates in state penal institutions with subsequent security confinement had been reported to the Ministry of Justice as possibly "reformable" (in December 1942 governors had reported a total of 593 inmates in security confinement or in state penal institutions with subsequent security confinement for individual examinations). Adding up these different figures, one arrives at a number of approximately 6,350 inmates in penal institutions with subsequent sentences of security confinement. If one adds the number of inmates already in security confinement, one arrives at a total of approximately fourteen thousand inmates. Only a very small number of these inmates were "racial aliens" and as such had to be included by the governors in the "general transfer." All the remaining inmates could have been judged as potentially "reformable" by the governors and thus would have been included in the "individual transfer." For the figures, see BA Berlin, R 22/1262, Bl. 15: Abgabe asozialer Gefangener an die Polizei, no date (spring or summer 1943); IfZ, MA 624, Bl. 3664611-12: Anzeigen der Anstaltsvorstände über die durch Abteilung XV zu überprüfenden Gefangenen, 7.12.1942.

<sup>89</sup> IfZ, MA 624, Bl. 3664611-12: Anzeigen der Anstaltsvorstände über die durch Abteilung XV zu überprüfenden Gefangenen, 7.12.1942. This figure of 593 inmates is not quite complete. It does not yet include the (very small number of) "asocial" women to be examined and the potentially "reformable" inmates with sentences of security confinement in the Brandenburg-Goerden institution. Examining these statistics, one has to recall that the governors had to automatically include all those inmates in the "individual transfer" lists with sentences of security confinement who had been sentenced for high treason (*Hoch- und Landesverrat*). This was the case for twenty-two of the 593 inmates.

With the outbreak of the Second World War in September 1939, “community aliens” increasingly became victims of the Nazi extermination drive. This development is evident also in penal policy. By the time of Thierack’s agreement with Himmler in 1942, many members of the legal service accepted that, in war, confinement was not a sufficient “weapon” against certain “habitual criminals.” Rather, they should be killed. This determination was reflected in legislation, above all in the amendment of September 4, 1941, to the Criminal Code. This extended the death penalty to all “dangerous habitual criminals” if the “protection of the racial community or the need for a just expiation demand it.” This law contributed to the enormous increase in the number of death sentences passed by German courts, from 139 in 1939 to 4,457 in 1942.<sup>90</sup>

The Ministry of Justice in Berlin encouraged the “annihilation (*Vernichtung*) of these alien elements.” On January 1, 1943, Thierack in his monthly “judges’ letter” (*Richterbrief*) to the German courts reminded the officials to “exclude the asocial criminal ruthlessly from the community through imposition of the death penalty.” Their “annihilation” was vital not just for security reasons, Thierack stated, but also as a contribution to the racial-hygienic aim of “cleansing the racial body” from all “degenerates.”<sup>91</sup> These developments clearly radicalized prison officials, not least because executions were carried out within the walls of state penal institutions. The Brandenburg-Goerden prison doctor Werner Eberhard demanded publicly in 1942, in an example typical of the medicalization of criminality, that all those “who have been conclusively diagnosed as habitual offenders should be exterminated through the death penalty.”<sup>92</sup>

This new murderous policy, however, could only be applied to offenders who came up for sentencing before the courts. Many inmates imprisoned in security confinement or penitentiaries before the war would have been sentenced to death after 1939. While the courts sentenced more and more “habitual criminals” and other “community aliens” to death, many of those who were already imprisoned were surviving, or in Hitler’s words were being “conserved.” Even though these inmates were treated ever more brutally, a fact obvious in growing death rates due to deliberate malnourishment and overwork,

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Thus, the governors themselves only chose 571 of the inmates as potentially “reformable”; see also BA Berlin, 99 US 2 FC 588, microfilm 22941, Bl. 56–61: Reichsminister der Justiz to Generalstaatsanwälte, 22.10.1942.

<sup>90</sup> Cit. in Evans (n. 18 above), pp. 690–93. For statistics on death sentences, see *ibid.*, p. 916 (table 1).

<sup>91</sup> Richterbrief Nr. 4, 1.1.1943, reprinted in H. Boberach, ed., *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung, 1942–1944*, Schriften des Bundesarchivs series, no. 21 (Boppard, 1975), pp. 51–67, here pp. 55–58.

<sup>92</sup> W. Eberhard, “Zu neuen Wegen im Strafvollzug,” *MSchriftKrim* 33 (1942): 59–68, here p. 64.

many legal officials believed that during the war the police were better placed to deal with these offenders than the judiciary.<sup>93</sup>

Transferring inmates from state penal institutions to the police was no departure for most prison officials. Most governors had willingly cooperated with the police since the Nazi “seizure of power” by informing the police authorities of the imminent release of certain offenders. The police then decided whether to transfer the inmate to a concentration camp. By 1938, German prison officials informed the police of the release dates of various political prisoners, all Sinti and Roma, all Jehovah’s Witnesses, and every inmate sentenced for “race defilement.”<sup>94</sup> Before the outbreak of war, this cooperation was limited to the transfer of state prisoners to the police after they had completed their prison sentences. But with the extension of Nazi extermination programs during the war to state penal institutions, prison officials also got used to handing over some inmates who had not yet completed their sentences. In individual cases, it was the prison officials themselves who took the initiative. For instance, on February 11, 1942, the governor of the state penal institution in Teschen wrote to the Gestapo in Katowice concerning the Polish inmate Leopold T.: “Asocial elements like that are good for nothing.” If the Gestapo were to take over T., the governor argued, “he will disappear very soon, and will not have any more opportunities for further crimes.” T. was duly transferred to the Gestapo on February 18, 1942.<sup>95</sup>

One can argue, therefore, that Thierack’s decision in 1942 to hand over “asocial” inmates was in line with widespread thinking within the legal establishment. However, this reason is not sufficient to explain the level of support by the regional prison officials for the transfer. There appear to have been at least three more structural factors which also influenced them. First, the transfer was seen as a way of reducing the pressure on individual penal institutions due to overcrowding.<sup>96</sup> The number of inmates had increased after the Nazi “seizure

<sup>93</sup> StAMu, Oberlandesgericht Munchen Nr. 527, Reichsminister der Justiz to Generalstaatsanwälte, 18.8.1942.

<sup>94</sup> BA Berlin, R 3001/5982, Bl. 89–99; Reichsministerium der Justiz, Kommissarische Beratung vom 11.10.1933 über den Entwurf eines Gesetzes gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung, 19.10.33; *ibid.*, R 22/1337, Bl. 319; Reichsminister der Justiz to Generalstaatsanwälte, 2.7.1937; *ibid.*, R 22/1338, Bl. 11; Ministerialrat Schmidt to Stolzenburg, 17.6.1935; *ibid.*, R 22/1337, Bl. 330; Reichsminister der Justiz to Generalstaatsanwälte, 8.3.1938; D. Majer, “*Fremdvölkische*” im Dritten Reich: Ein Beitrag zur nationalsozialistischen Rechtssetzung und Rechtspraxis in Verwaltung und Justiz unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernement, Schriften des Bundesarchivs series, no. 28 (Boppard 1981), p. 649.

<sup>95</sup> Scharf, (n. 52 above), pp. 834–35.

<sup>96</sup> StAMu, Generalstaatsanwalt beim Oberlandesgericht Munchen, Nr. 52, Frauenstraf- und Verwahrungsanstalt Aichach to Generalstaatsanwalt in Munchen, 18.2.1943;



of power” and quickly rose further during the war, putting considerable pressure on local prison administrations. Between early 1939 and autumn 1942 alone, the prison population in the *Altreich* increased by 40 percent.<sup>97</sup>

Second, the prison officials welcomed the transfer as an opportunity to get rid of prisoners who were seen as nuisances. These inmates were loathed by the administration, as they caused additional work by complaining about conditions, about their treatment, or about their sentences. In a number of cases, the prison governors reported such inmates as “asocial” to the officials in Berlin. As Karl Engert recalled after the war: “Some prison governors had been irritated a couple of times by inmates and wanted to get rid of these people.”<sup>98</sup>

For example, in early 1943 the Chief State Prosecutor in Katowice wrote to the Ministry of Justice regarding the inmate Max M., who was being held in security confinement in the Groß-Strehlitz institution in Eastern Prussia. The Chief State Prosecutor claimed that Max M. “is one of the worst prisoners in this district . . . he constantly writes petitions and complaints. . . . The governor of Groß-Strehlitz explicitly asked me to ensure that M. be individually transferred as an asocial as soon as possible to the [Reich] Security Head Office. I fully support this request.”<sup>99</sup> The official in charge in Berlin reacted swiftly: “I will make sure to accelerate the transfer of M. to the police.”<sup>100</sup> In this context, it is important to note that the transfer provided the prison governors with an unprecedented degree of disciplining power over unruly inmates. In a number of cases, they threatened inmates with immediate transfer to a concentration camp if their behavior was seen as undermining the functioning of the institution.<sup>101</sup> Just as brutal actions against “community aliens” in German society at large served as a warning for “national comrades” not to step out of line, so too such threats were used in prison to discipline “reformable” inmates.

Finally, at a time when economic productivity had become the overriding goal of penal policy, prison officials were keen to rid their institutions of all prisoners who stood in the way of higher productivity. The main obstacles to the economic rationalization of the state penal institutions were many of the

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ibid., Generalstaatsanwalt beim Oberlandesgericht Munchen, Nr. 51, Dienstaufsicht über die Vollzugsanstalten, 26.3.1943.

<sup>97</sup> Inmate numbers increased from just over 100,000 to 139,636, calculated for the pre-1939 borders; BA Berlin, R 3001/9920/2, Bl. 2; BA Berlin, R 22/897, Bl. 83. These increases were partly the result of ideological beliefs, such as the determination of the German judges in fighting “community aliens.”

<sup>98</sup> BA Berlin, film 44184, interrogation Karl Engert, 5.12.1946.

<sup>99</sup> Ibid., R 22/1424, Bl. 20–21: Generalstaatsanwalt in Kattowitz to Reichsminister der Justiz, 24.3.1943.

<sup>100</sup> Ibid., Bl. 14: Reichsminister der Justiz to Generalstaatsanwalt in Kattowitz, 1.4.1943. The fate of M. is unknown.

<sup>101</sup> ZStL, VI 416 AR-Nr 1127/66, Bl. 209–17: Verfügung des Leitenden Oberstaatsanwalts bei dem Landgericht Dortmund.

security-confined prisoners, and weak and unproductive inmates in penitentiaries. Already in 1939, over 28 percent of all inmates in security confinement were fifty years or older and in many cases no longer able to fulfill their production quotas.<sup>102</sup> As few of these inmates were ever released, the average age of the prisoners in security confinement steadily increased. One governor had warned in 1938: "In the near future, the aging, frail, and crippled inmates will pose a considerable problem for the administration of security confinement. . . . All these people . . . will in the long run be extraordinarily disruptive of the labor process, which is set up exactly in accordance with the Four-Year Plan."<sup>103</sup>

With the start of the war, the state of health of many inmates in security confinement and penitentiaries deteriorated rapidly. One of the first wartime measures of the officials in Berlin was to increase the working day for inmates to twelve hours. At the same time, rations were cut to the same level as in concentration camps.<sup>104</sup> The increase in working hours and the cuts in food proved to be a lethal combination, and by 1942 the health of inmates in German penal institutions had declined to catastrophic levels. Malnourishment, unhygienic living conditions, and physical exhaustion led to illness, weight loss, and increasing inability to work among inmates. It was not unusual for female prisoners transferred as "asocial" to concentration camps to weigh less than forty kilograms.<sup>105</sup> Considering the repeated calls by prison officials before 1942 to be relieved of "unproductive" prisoners, the governors undoubtedly welcomed the transfer of these inmates to the police. Not surprisingly, the first prisoners handed over were predominantly those classified as "unproductive" on account of old age, illness, or disability.

## VI

Overall, more than twenty thousand state prisoners were handed over to the police as part of the "general" and "individual" transfers.<sup>106</sup> At a very conser-

<sup>102</sup> BA Berlin, R 22/1429, Bl. 106–21: Niederschrift über die Besprechung mit den Vorständen der Sicherungsanstalten der Reichsjustizverwaltung, 14.8.1939.

<sup>103</sup> O. Seibert, "Invaliden-Sicherungsanstalten," *BIGefK* 69 (1938): 286–90, here p. 286.

<sup>104</sup> BA Berlin, R 22/1261, Reichsminister der Justiz to Generalstaatsanwälte, 28.10.1939; *ibid.*, R 22/1442, Bl. 125: Verordnung des Reichsministers für Ernährung und Landwirtschaft, 16.1.1940.

<sup>105</sup> StAMu, Justizvollzugsanstalten, Nr. 10756; *ibid.*, JVA 12340, Krankenakte Elisabeth S.; *ibid.*, Justizvollzugsanstalten, Nr. 7112; *ibid.*, JVA 12340, Krankenakte Luise M.

<sup>106</sup> More than 17,300 state prisoners were part of the "general transfer." By February 23, 1944, 2,464 inmates had already been transferred to the police as part of the "individual transfer." By the end of the war, this figure had probably increased to approximately three thousand; ZStL, VI 415 AR-Nr 1310/63, Staatsanwaltschaft beim Kammergericht Berlin, Einleitungsvermerk vom 30.4.1965.

vative estimate, around two-thirds of them died in the camps; the real total may well have been higher.<sup>107</sup> All Jewish inmates were transported to Auschwitz. Some non-Jewish women prisoners were also taken there, while others were transported by the police to the women's concentration camp in Ravensbrück. A number of male prisoners were taken to camps in Buchenwald and Neuengamme. But the majority of former state prisoners was transported to the concentration camp in Mauthausen near Linz, which according to SS guidelines was reserved for the most dangerous inmates, "in particular those with previous criminal convictions and asocials, i.e. practically incorrigible inmates."<sup>108</sup>

For most of the former state prisoners, mainly German inmates with sentences of security confinement, the transport to Mauthausen was a death sentence.<sup>109</sup> They were savagely beaten when they arrived on the trains, so that often the first inmates were already dead before the transport had even reached the camp. Once inside, the torture continued. In roll calls that lasted several hours, the SS made clear to the prisoners that the only way out was through the chimneys of the crematoria. Some were beaten up by the camp guards, others were maimed by dogs. The SS selected for immediate extermination most prisoners who were old, weak, or ill.<sup>110</sup> Many of those inmates who survived the beatings and shootings of the first weeks faced "annihilation through labor" in the main camp's quarry (*Wiener Graben*), which was notorious for its murderous conditions.<sup>111</sup> The Wiesbaden State Prosecutor described this torture in 1949, based on several testimonies:

<sup>107</sup> The Wiesbaden State Prosecution after the war conducted an investigation into the transfer of state prisoners. Of 3,696 prisoners who were individually identified as having been handed over, it was established that 1,712 had died and 580 had survived the war. In all other cases, the fate of the prisoners was unknown. Undoubtedly, at least half of those prisoners also died in the camps. After all, the prosecution authorities had put all the Jewish prisoners into this "unknown" category. Thus, at least 2,414 prisoners in the sample can be assumed to have died; ZStL, VI 415 AR-Nr 1310/63, Staatsanwaltschaft beim Kammergericht Berlin, Einleitungsvermerk vom 30.4.1965.

<sup>108</sup> Geheimerlaß des Chefs der Sicherheitspolizei und des SD, 2.1.1941, reprinted in ZStL, VI 415 AR-Nr 1310/63, Staatsanwaltschaft beim Kammergericht Berlin, Einleitungsvermerk vom 30.4.1965.

<sup>109</sup> Overall, approximately 11,200 state prisoners were taken to Mauthausen. At least 7,500 of them were German prisoners, another three thousand were Polish; H. Marsalek, *Die Geschichte des Konzentrationslagers Mauthausen: Dokumentation* (Vienna, 1974), p. 119.

<sup>110</sup> ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949; Marsalek, p. 30; IfZ, MB-1, testimony Franz S., 4.10.1948.

<sup>111</sup> M. Fabreguet, "Entwicklung und Veränderung der Funktionen des Konzentrationslagers Mauthausen," in *Die nationalsozialistischen Konzentrationslager*, ed. U. Herbert, K. Orth, and C. Dieckmann, 2 vols. (Göttingen, 1998), 1:193–214, here p. 199.

In a completely mindless way, without any obvious economic use for the war effort, the inmates had to perform the hard labor of cutting big blocks of stone, weighing up to 50 kilograms, which they had to carry up and down 186 steps. In all cases, this had to be performed at a running pace. Weakened by insufficient nutrition, many inmates broke down under the weight of the stones and plunged into the quarry. If they did not die instantly, they were either shot by SS-guards or beaten to death by *Kapos*. Many inmates were simply thrown down into the quarry from a height of 30 to 40 meters. Also, inmates at the top of the site were often forced to empty their trucks of stones, thus striking dead many prisoners working beneath them in the quarry. A great number of prisoners also voluntarily jumped down into the quarry to put an end to the agony, which they had to endure again and again.<sup>112</sup>

This brutal treatment, senseless labor, and murder of the former state prisoners in Mauthausen, all of whom were non-Jews and predominantly German, contradicts recent claims that the “Germans . . . gave senseless work almost exclusively to Jews.”<sup>113</sup> Just like Jewish inmates, these “asocial” state prisoners were also seen in Nazi propaganda as “work-shy” and thus tortured with largely useless work. Forcing them to perform “Sisyphean tasks” had no economic benefit; its goal was to make them suffer by demonstrating the complete uselessness of their physically destructive labor.<sup>114</sup>

Most former state prisoners did not survive for long in Mauthausen. By March 1943, only a few months after the “transfer” had started, 3,306 of the 7,587 state prisoners transported to Mauthausen were already dead. By February 1944, 10,231 state prisoners had been taken to Mauthausen. Three out of four of them had died since their arrival.<sup>115</sup> Often, they were murdered with unimaginable brutality. This direct, physical violence stands in sharp contrast to the still widespread image of Nazi genocide as a factory-like, anonymous, and largely bureaucratic process.<sup>116</sup>

The former security-confined inmates were the victims of particularly excessive violence in late 1942 and early 1943. They could be identified immediately by the SS guards, as they were forced to wear a special sign, distinct from both the green triangle of the so-called professional criminals and the black triangle worn by other “asocials” in the camps.<sup>117</sup> They were practically at the

<sup>112</sup> ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949.

<sup>113</sup> D. J. Goldhagen, *Hitler's Willing Executioners* (London, 1997), p. 313.

<sup>114</sup> For this general point, see W. Sofsky, *Die Ordnung des Terrors: Das Konzentrationslager* (Frankfurt am Main, 1997), p. 220.

<sup>115</sup> IFZ, Fa 183, Bl. 67: Chef des SS-Wirtschaftsverwaltungshauptamtes Pohl to Reichsführer SS Himmler, 18.3.1943. Pohl only refers to “security confined” in his letter, but clearly means all transferred state prisoners with this term; Marsalek, p. 97, n. 5. State prisoners transported to the camps later in 1943 had better chances of survival.

<sup>116</sup> For his point, see also Herbert (n. 12 above), p. 57.

<sup>117</sup> There is some controversy as to what this sign looked like. According to Eugen Kogon, a former inmate in Buchenwald, it consisted of the green triangle for “criminals” with the added letter S in the middle; Kogon (n. 57 above), p. 72. By contrast, Wolfgang

bottom of the camp hierarchy. Jewish inmates apart, the security confined were far more likely than any other group of inmates in Mauthausen to be killed in this period. In late 1942, more than one out of three of the security confined died each month in Mauthausen.<sup>118</sup> Unlike other criminal offenders in the camps, who had been arrested by the police and transferred straight to the camps, the former state prisoners were systematically singled out by SS officials.

At this point, one can only speculate about the motives of the SS. It is very likely that there were direct orders from above. Also, the label as “incorrigible dangerous habitual offenders” probably further heightened the resolve of the SS officials to kill the former state prisoners. Another important factor for the local camp officials was probably that many of the security confined were in particularly poor health, compared to other new inmates. In any case, it is clear that “annihilation through labor” was an intentional policy of extermination of former state prisoners.<sup>119</sup>

## VII

As we have seen, under the 1942 agreement between Thierack and Himmler, only certain categories of prisoners were subject to “annihilation through labor.” But in the following years, more and more inmates in state penal institutions were targeted by the judicial authorities, until almost any inmate could be classified as a “community alien.” Soon after members of Section XV of the Ministry of Justice had started their visits to the various state penal institutions in November 1942, they realized, according to Karl Engert, that there were many inmates not eligible for transfer because of their shorter sentences who were as “worthless and intolerable for the national community” as the inmates already handed over. Their inclusion in the examinations had apparently also been demanded by various prison governors. As a consequence, in February 1943 the Ministry of Justice announced that “asocials” in penitentiaries with sentences of less than eight years, as well as “asocials” in prisons, were to be reported as well. The inmates targeted in this way were offenders with comparatively minor sentences who either had accumulated many previ-

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Sofsky states that the security confined had to wear the green triangle, pointing up; Sofsky, p. 141.

<sup>118</sup> Between November and December 1942, the average monthly mortality rate among the security confined was 35 percent. By contrast, the mortality rate of inmates classified as “professional criminals” was 1 percent, among “asocials” less than 0.5 percent. Among Polish inmates, it was 4 percent. By contrast, no Jew in Mauthausen apparently survived longer than one month; F. Pingel, *Häftlinge unter SS-Herrschaft* (Hamburg, 1978), pp. 186, 302.

<sup>119</sup> See also Pingel, pp. 186–87. For some of the wider issues, see B. Perz, “Der Arbeitseinsatz in Mauthausen,” in Herbert, Orth, and Dieckmann, eds., 2:533–57, esp. p. 545.

ous convictions (and thus fitted the criminological type of the “habitual offender”) or were vaguely described by Engert as “alien to the community for other reasons.”<sup>120</sup>

By spring 1943, the governors had already reported 1,350 such inmates to Section XV in Berlin. Some of them were examined by Engert’s “experts.” In three out of four cases, they agreed with the governors’ judgment. This apparently convinced Engert of the importance of this project, and by early 1944 a much wider and more extensive examination of inmates with sentences of less than eight years was under way. One official estimated after the war that a total of four thousand such inmates were reported by the governors to Engert’s commission.<sup>121</sup> As these inmates were not part of the original agreement with Himmler, the Ministry of Justice decided against handing them over to the police before the end of their sentences. Instead, the judicial service set up its own program of “annihilation through labor” (although this term was not used). It was decided that these “asocial” prisoners were to be transported to state penal institutions where they would be “occupied with work which is exceptionally tough, harmful to their health or dangerous.” To realize this plan, a member of Section XV of the Ministry of Justice was dispatched by Karl Engert to find those penal institutions with the worst working conditions.<sup>122</sup>

In February 1944, Engert designated several penal institutions for these “asocial” inmates, all of which were distinguished by particularly dangerous working conditions. The first was the Siegburg penitentiary, where inmates were forced to pack explosives into detonators and cartridges. Accidents and explosions were frequent. Engert also picked the Enisheim penitentiary in Alsace. Prisoners here were used in the mining and transport of potash salts. Working up to 1,100 meters underground, in very cramped conditions and extreme heat, was especially exhausting for the inmates. Similarly exhausting was the work carried out by prisoners in the quarry of the Rottenburg prison. Conditions here were particularly appalling and most warders routinely beat up the inmates.<sup>123</sup> It is unclear how many prisoners were transported as “aso-

<sup>120</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944; ThHStAW, Generalstaatsanwalt bei dem Oberlandesgericht Jena, Nr. 431, Bl. 172–87: Tagung der Oberlandesgerichtspräsidenten und Generalstaatsanwälte im Reichsjustizministerium in Berlin am 10. und 11.2.1943; IfZ, MB-1, interrogation Friedrich W. Meyer, n.d.

<sup>121</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944; IfZ, MB-1, Bl. 129–40: interrogation Albert Huppenschwiler, 17.2.1948.

<sup>122</sup> BA Berlin, R 22/5103, Reisebericht des Staatsanwalts Dr. Gundner über die im Auftrag von Ministerialdirektor Engert vorgenommene Besichtigung von Arbeitsbetrieben bei den Vollzugsanstalten in Siegburg, Enisheim, und Rottenburg (Neckar), 26.1.1944.

<sup>123</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944; BA Berlin, R 22/5103, Reisebericht des Staatsanwalts Dr. Gundner über die im Auftrag von Ministerialdirektor Engert vorgenommene Besichtigung von Arbeits-

cials” to these institutions and how many of them perished. The murderous intention behind the policy was clear enough, however. As Engert remarked casually in February 1944, “those physically not fully fit will probably perish after a short while.”<sup>124</sup>

Another group of inmates targeted by the Ministry, irrespective of their sentences, were physically disabled inmates. In July 1944, one official of Section XV, Albert Hupperschwiller, examined prisoners in the Werl penitentiary whom he later described as repulsive and “cretinous.” Hupperschwiller was evidently inspired by the theories of the nineteenth-century Italian criminologist Cesare Lombroso, who had claimed that “born criminals” could be distinguished by certain external “atavistic” features. This theory still had followers among German criminologists in the last years of the Second World War.<sup>125</sup> After the war, a former inmate in Werl testified that the infirm, mentally and physically disabled prisoners selected by Hupperschwiller were shortly afterward transported to a concentration camp.<sup>126</sup> Several months later, the Ministry of Justice informed the Chief State Prosecutors that it was looking at the nationwide extermination of disabled prison inmates: “Time and again during different visits to state penal institutions, inmates are being noticed who on account of their physical build do not deserve to be called human; they look like monstrosities straight out of hell. . . . Getting rid of these inmates is being considered as well. Type of offense or length of sentence is immaterial.”<sup>127</sup> The killing of state prisoners classified by the judicial authorities as “asocial” continued until the last days of the war. The greatest single massacre took place on the night of January 30, 1945. Probably following general guidelines issued by the Ministry of Justice, the governor of the Sonnenburg penitentiary, one hundred kilometers east of Berlin, divided up his inmates into two groups. A small group of less than two hundred prisoners was marched west, while the remaining “asocial and subversive” prisoners, more than eight hundred in number, including all the sick inmates, were handed over to the SS and executed on the spot.<sup>128</sup>

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betrieben bei den Vollzugsanstalten in Siegburg, Enisheim, und Rottenburg (Neckar), 26.1.1944; IfZ, Ms 361, Walter Schwerdtfeger, “Zuchthausjahre 1935–1945” (manuscript). In addition to these three penal institutions, Engert also designated the prisoner camps in Griebo (for women) and Norway for “asocial” inmates.

<sup>124</sup> BA Berlin, R 22/895, Karl Engert, Tätigkeitsbericht der Abteilung XV, Stand vom 23.2.1944. . .

<sup>125</sup> See D. Dolling, “Kriminologie im ‘Dritten Reich,’ ” in *Recht und Justiz im “Dritten Reich,”* ed. R. Dreier and W. Sellert (Frankfurt am Main, 1989), pp. 194–235, here pp. 218–19. . .

<sup>126</sup> Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above), pp. 316, 340. . .

<sup>127</sup> ZStL, Verschiedenes, 301 Cz, Nr. 184, Bl. 226–36, here p. 232: Niederschrift über die Tagung bei der Generalstaatsanwaltschaft in Bamberg vom 16.11.1944.

<sup>128</sup> Some aspects of this slaughter are described in A. Hohengarten, *Das Massaker im Zuchthaus Sonnenburg vom 30./31. Januar 1945* (Luxemburg, 1979). The judicial

No legal official was ever convicted for his role in the “annihilation through labor” of state prisoners. Karl Engert was accused at the Nuremberg War trial of members of Germany’s legal service in 1947.<sup>129</sup> But the prosecution against him was dropped because of his alleged ill health, and he died in 1952. The other leading officials of the Ministry of Justice, involved in the transfer as well as two officials from the Chancellery of the Fuhrer, were tried separately before a German court at Wiesbaden in 1952. None of them were convicted, as they denied all knowledge of inmates having been killed in the camps.<sup>130</sup> The same defense was successfully employed by the Chief State Prosecutors and the prison governors in individual investigations after the war, which were pursued only with reluctance by the German legal authorities.<sup>131</sup> Many of the prison governors involved in the transfer remained in office for years after the end of the war.<sup>132</sup>

The claim by penal officials that they had expected the former state prisoners not to be killed, but to be used for labor in the SS camps, is without any foundation. As we have seen, Thierack openly told all Chief State Prosecutors at the Berlin meeting on September 29, 1942, that “asocial” prisoners were to be killed. Also, many inmates transferred first to the police by the prison governors were precisely those unfit for labor on account of their poor health, disability, or old age. The governors also received reports directly from the concentration camps which made clear that the former state prisoners were systematically exterminated. For instance, of some twenty-three inmates transported from the Untermaßfeld penitentiary on April 18, 1943, to the police, the governor was informed that fourteen had “died” within three weeks of their arrival at the Buchenwald concentration camp.<sup>133</sup> Apparently, this information raised no alarm in Untermaßfeld. The prison officials were only interested in the return of clothing which the inmates had worn when they were transferred.<sup>134</sup>

Thus, despite the secretive nature of the initial organization of the transfer, knowledge of the destiny of the selected state prisoners was soon spread widely among prison governors, warders, chaplains, and even some of the inmates

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authorities were also involved in the transfer to the police of western European civilians (so-called NN-prisoners).

<sup>129</sup> H. Ostendorf and H. ter Veen, *Das “Nurnberger Juristenurteil”: Eine kommentierte Dokumentation* (Frankfurt am Main and New York, 1985).

<sup>130</sup> Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above).

<sup>131</sup> For an overview, see ZStL, VI 416 AR-Nr 1127/66.

<sup>132</sup> Of 119 prison governors still in office after 1953 in West Germany, at least thirty-three had been governors before the end of the war; Mohler, p. 120. Many of these thirty-three officials had been involved in the transfer.

<sup>133</sup> ThStA Mgn., Zuchthaus Untermaßfeld, Nr. 13, 62, 66, 184, 227, 309, 414, 448, 564, 656, 664, 738, 756, 757, 802, 803, 1,381, 1,388, 1,420, 1,427, 1,438, 1,580, 1,679.

<sup>134</sup> *Ibid.*, Nr. 227, Direktor der Strafanstalt Untermaßfeld to Verwaltung des Konzentrationslagers Buchenwald, 23.12.1943.



themselves.<sup>135</sup> In fact, leading party and state officials made little effort to keep their aims secret from the German public. No other extermination program in the Third Reich was so openly discussed, although Nazi officials were careful to present their policies as directed against “habitual criminals.” That these measures were also aimed at Jews, Poles, and political prisoners was never mentioned. Shortly after he had given his consent for the agreement between Thierack and Himmler, Hitler used the occasion of a widely transmitted speech on September 30, 1942, in Berlin to make public his views on the treatment of persistent offenders during the war: “Most importantly, no habitual criminal should be under the illusion that he can save himself until the end of the war by a new crime. We will ensure . . . that the criminal and indecent persons at home will under no circumstances survive this time! . . . We will exterminate these criminals, and we have exterminated them.” Extracts of the speech by Hitler, including this passage, were even reprinted in the only nationwide German prisoner newspaper, edited by prison officials.<sup>136</sup>

Thierack was even more open. His speech at a mass propaganda meeting in Breslau on January 5, 1943, in parts closely followed the script of the talk he had given to the Chief State Prosecutors on September 29, 1942. While Thierack did not mention the deal with Himmler, he did make clear that thousands of penitentiary inmates were now employed in such a way that they would inevitably die. Thierack’s deputy Rothenberger declared one month later in a speech in Luneburg that it was dangerous to “conserve” the “asocials, the degenerates” for years. Rather, the legal establishment must “mercilessly exterminate” them. In October or November 1942, in a public speech in Vienna, Rothenberger had already stated that at a time when the most valuable Germans were killed at the front it was wrong to preserve “asocial elements” in penal institutions. Some Germans, like Victor Klemperer, privately expressed concern about the murder of the state prisoners. But the general public was indifferent to their fate.<sup>137</sup>

## VIII

This investigation into the killing of state prisoners from 1942 onward has shed light on a previously neglected aspect of Nazi extermination policy. Retrieving

<sup>135</sup> ZStL, Sammelakte Nr. 27a, Antrag des Oberstaatsanwalts in Wiesbaden auf Eröffnung des Hauptverfahrens vor dem Schwurgericht Wiesbaden, 24.11.1949.

<sup>136</sup> Cited in Ruter-Ehlermann, Fuchs, and Ruter, eds. (n. 27 above), p. 278; *Der Leuchtturm*, vol. 18 (18.10.1942).

<sup>137</sup> BA Berlin, 99 US 2 FC 585, microfilm 22933, Bl. 142–68: Rede des Reichsministers der Justiz Dr. Thierack in der Grosskundgebung der NSDAP am 5. Januar 1943 in der Jahrhunderthalle in Breslau; *ibid.*, Bl. 169–76: Rede des Staatssekretars Dr. Rothenberger am 17. Februar 1943 in Luneburg; V. Klemperer, *Ich will Zeugnis ablegen bis zum*

the memory of the “forgotten victims” is important in itself. They deserve a place in the history of the Third Reich. But this research also has some wider implications for our conception of the Nazi dictatorship. It contributes to the debate about the origins of extermination policies under the Nazis. Clearly, Hitler’s role in the “annihilation through labor” program was absolutely central. On August 20, 1942, he explained to Thierack the importance of preventing a “negative selection” in the state penal institutions and later sanctioned Thierack’s agreement with Himmler regarding the transfer of “asocial” inmates to the police. Of course, this policy did not simply flow from top to bottom. Hitler’s views were expressed in a rather vague form, and it was left to Thierack, the prison administration, and the officials in the Reich Security Head Office to work out the details of the program. Still, it was probably more a case of “working for the *Führer*” than “working toward the *Führer*.”<sup>138</sup>

There are striking similarities here to the genesis of the “euthanasia” program. Here too, the initial decision for mass extermination was taken by Hitler, whose wishes were then worked out in detail by his subordinates.<sup>139</sup> In view of these parallels, it is very probable that a similar decision must have also been taken by Hitler in the case of the Jews. It seems unlikely that if Hitler initiated the murder of the mentally and physically disabled and of state prisoners, both of whom had always been marginal to his thinking, he did not also initiate personally the extermination of the Jews, who were always central to his ideology.<sup>140</sup> It is more plausible to argue that, just as in the “euthanasia” program and the “annihilation through labor” of state prisoners, so too in the “final solution,” it was Hitler who first charged his subordinates with the planning and organization of genocide.<sup>141</sup>

But one must not overlook the contribution of prison officials in Berlin and the rest of Germany. Without the active support of local prison governors and Chief State Prosecutors, many of the murdered state prisoners would have survived the war. Mass extermination in the Third Reich was not carried out single-handedly by the SS and police. Many professionals and officials in the army, the medical profession, science, and the economy were also instrumental

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*letzten: Tagebücher, 1942–1945* (Berlin, 1995), p. 272. There is no mention of any public reaction to these speeches or any other aspects of the transfer in the reports of the *Sicherheitsdienst* on public opinion; H. Boberach, ed., *Meldungen aus dem Reich, 1938–1945*, vols. 11–17 (Herrsching, 1984).

<sup>138</sup> For the concept of “working toward the *Führer*,” see I. Kershaw, *Hitler, 1889–1936: Hubris* (London, 1998), pp. 529–31.

<sup>139</sup> Burleigh (n. 2 above), pp. 97, 111–13; Friedlander (n. 2 above), p. 285.

<sup>140</sup> For a discussion of the view that Hitler did not give an order, see, e.g., M. Broszat, “Hitler und die Genesis der ‘Endlösung’: Aus Anlass der Thesen von David Irving,” *Vierteljahresshefte für Zeitgeschichte* 26 (1977): 739–75.

<sup>141</sup> See Browning (n. 13 above), pp. 113–14; Gerlach (n. 14 above), pp. 160, 285.

in the extermination of “community aliens.”<sup>142</sup> The state penal authorities should be added to this list as well. This conclusion calls into question the strict division made by many historians between the “normative” judicial service and the “prerogative” SS state. Of course, despite the many organizational similarities, there cannot be any doubt that conditions in state penal institutions were less appalling than in SS concentration camps.<sup>143</sup> But this does not mean that the prison service can be described in any meaningful way as “normative.” State penal institutions were not safe havens for the inmates. Those inmates classified as “community aliens,” in particular, were increasingly treated by prison officials without regard to any legal norms: they suffered greatly due to excessively hard labor, neglect, malnutrition, physical abuse, and eventually “annihilation through labor.” For them, the “normative state” was no more than a myth.

Furthermore, prison governors closely cooperated with the police in the persecution of “community aliens,” an aim that united both agencies. The competition between the two systems of punishment has often been exaggerated.<sup>144</sup> In fact, the boundaries between them became increasingly blurred. Prison officials reported the release dates of certain suspect inmates to the police. Without this active support, it would have been impossible for the police to take into custody many of the state prisoners coming up for release.<sup>145</sup> This form of cooperation finally culminated in the transfer of “asocial” state prisoners to the police before the end of their sentences, a policy supported by the vast majority of prison governors.

As we have seen, the transfer of certain state prisoners was part of Thierack’s attempt in 1942 to clarify the role of the judiciary as opposed to the SS and police. The SS was to be responsible for “incorrigible” prisoners and the state penal institutions for “reformable” ones. But rather than reestablishing the fa-

<sup>142</sup> See, e.g., H. Heer and K. Naumann, eds., *Vernichtungskrieg: Verbrechen der Wehrmacht 1941 bis 1944* (Hamburg, 1995); Burleigh; G. Aly and S. Heim, *Vordenker der Vernichtung* (Frankfurt am Main, 1993); Herbert (n. 2 above).

<sup>143</sup> For these organizational similarities, see K. Drobisch, “Konzentrationslager und Justizhaft: Versuch einer Zusammenschau,” in *Die Normalität des Verbrechens: Bilanz und Perspektiven der Forschung zu den nationalsozialistischen Gewaltverbrechen*, ed. H. Grabitz, K. Bastlein, and J. Tuchel, Deutsche Vergangenheit series, no. 112 (Berlin, 1994), pp. 280–97.

<sup>144</sup> For instance, Gruchmann, *Justiz im Dritten Reich* (n. 16 above).

<sup>145</sup> The administrative apparatus of the Gestapo was not as large as has been suggested in many postwar historical studies. Recent research has shown that the enforcement of Nazi policy relied to a large extent on information passed on from sources outside the police; K.-M. Mallmann and G. Paul, “Omniscient, Omnipotent, Omnipresent? Gestapo, Society, and Resistance,” in *Nazism and German Society*, ed. D. F. Crew (London and New York, 1994), pp. 166–96; R. Gellately, *The Gestapo and German Society: Enforcing Racial Policy, 1933–1945* (Oxford, 1990).

cade of the “normative state,” the prison service under Thierack in some ways slowly came to resemble the concentration camp system itself. Some leading state prison officials looked to concentration camps for inspiration. Karl Engert visited camps in Auschwitz, Mauthausen, Ravensbruck, Dachau, and Oranienburg.<sup>146</sup> On the occasion of a visit to Auschwitz in June 1944, a member of Engert’s commission noted with satisfaction that in regard to forced labor “nothing was shown [to us] in the camp Auschwitz which surpasses state prison labor in terms of intensity, rational work methods and productivity.”<sup>147</sup> By November 1944, Thierack was apparently planning another restructuring of the prison service, arguing that after the war a “synthesis” should be created between incarceration in the concentration camps and incarceration in the state penal institutions.<sup>148</sup> Thus, “normative state” and “prerogative state” would finally become one. It was probably only Nazi Germany’s defeat in war that prevented this final plan from being realized.

<sup>146</sup> IFZ, MB-1, interrogation Karl Engert, 5.1.1949; *ibid.*, interrogation Otto Gundner, 12.3.1948, 13.3.1948, 15.3.1948, 16.3.1948, 17.3.1948.

<sup>147</sup> ZStL, Verschiedenes, 301 Cz, Nr. 184, Bl. 124–31: Reisebericht von Ministerialrat Muller und Erstem Staatsanwalt Dr. Gundner über eine Besichtigung des Konzentrationslagers Auschwitz am 28.6.1944. ..

<sup>148</sup> *Ibid.*, Bl. 226–36: Niederschrift über die Tagung bei der Generalstaatsanwaltschaft in Bamberg vom 16.11.1944.