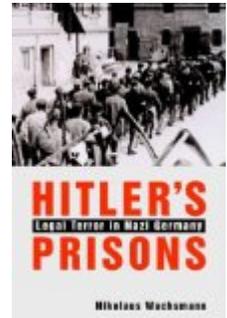


**Nikolaus Wachsmann.** *Hitler's Prisons: Legal Terror in Nazi Germany.* New Haven: Yale University Press, 2004. 538 S. \$45.00, cloth, ISBN 978-0-300-10250-5.



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#### Legal vs. Extra-Legal Terror in the Dual State

Nicholas Wachsmann, lecturer at Sheffield University, revises our commonly held perceptions of the conflict between the legal-judicial bureaucracy of the Third Reich and its SS-police system. With this revision comes the revelation that until well into the war, the regular penal system under the Ministry of Justice held far more prisoners than the SS concentration camps, serving to house and brutalize every category of victims of Nazi terror. Since the regular penal system of Nazi Germany has been largely ignored, especially outside Germany, Wachsmann's contribution is doubly significant. He writes: "[T]he legal apparatus fulfilled several vital functions in the Third Reich: it preserved a degree of legal stability in some areas, it could be blamed for the failure of the homogenous 'national community' to materialize, it legitimized the regime, and it helped in the brutal repression of 'community aliens'. For all the misgivings of the Nazi leaders, the legal apparatus was a fundamental pillar of the Nazi dictatorship and the prisons were very much Hitler's prisons.... If this contribution of the legal apparatus is over-

looked, the view of Nazi terror inside Germany will inevitably be lopsided" (p. 373). This quote constitutes the central claim of the book.

Following World War II, the legal apparatus, like the military, managed to maintain the myth of its relatively insignificant involvement in Nazi terror. Like the military, individuals involved in it even claimed some degree of victimization. Their complicity was usually dismissed as a result of the positivist legal tradition in Germany, which allegedly prevented anything like judicial "activism" to curb the growth of the Nazi police state. Until a new generation of jurists replaced the holdovers from the Weimar-Nazi eras who had written the early studies, and until historians rather than jurists attacked the issue, the relationship between the legal system, the police, and the regime remained largely unexplored. Only after the late 1980s did German scholars begin in-depth analysis of this area, and it has been largely ignored outside the field of legal history. Building on this body of scholarship, with extensive work in the vast archival and published primary sources, and exploiting most of the secondary work on the Nazi

police state, Wachsmann offers the English-speaking readership its first opportunity to balance its understanding of the entire repression and control system.

Without sacrificing either sophisticated analysis or any complexity, Wachsmann has written a book that should be accessible to general reader and specialist alike. The only thing that might stand in the way of the general reader's enjoyment is the author's occasional assay into nuanced debates with other scholars. Much of Wachsmann's contribution consists either of corrections to or expansions on other works focusing on the regular legal system--no mean achievement. The major force of his new perspective, however, is directed at those of us who ignored the regular legal system's full role in the Nazi police state and relied on unexamined traditions about their conservative resistance to the emergence of the extra-legal police state.

Although this book has a chronological format, beginning with a chapter on Weimar background and ending with the wholesale terror and the extermination of prisoners at the end of the Third Reich, a topical division is also at work. The history of each sub-theme, such as sterilization, receives its own chronological narrative. In the continuity versus aberration debate, Wachsmann comes down more on the side of continuity, repeatedly tracing the origins of Nazi criminology and penology back through the Weimar era into the Wilhelmine Empire. Yet his is no *Sonderweg* path of inevitability, for he delineates the debates over crime and punishment as being as controversial and divisive as they were in other western societies. Nor were these divisions consistently found between regressive versus modernist or left versus right worldviews. Indeed, the right-nationalist sympathies of judges and prison administrators did prevail as often as not over Weimarer prison reform efforts. Yet the double-edged complexities of modern reform movements included calls for the elimination from society of

asocials and habitual criminals--"scientific" social-management schemes that lay at the heart of later Nazi proactive crime-fighting programs. Even the SPD had been wooed by some of the arguments for "scientific reforms and practices" that became the core of Nazi terrorist law-enforcement.

Wachsmann demonstrates these points effectively, writing that "[i]mportant aspects of the Weimar prison in the 1920s clearly run counter to the evolution of social policy as depicted by historians such as Detlav Peukert" (p. 53).[1] That era's legal and penal programs exhibited tendencies toward both reform and repression. "Overall," Wachsmann claims, "despite some important changes, the structure of the German penal system was not radically transformed in the 1920s"(p. 35). Legislative drafts "envisaged the internment of non-criminal social outsiders such as alcoholics, prostitutes and the homeless" (p. 20). Sterilization was debated as the solution to the problem of "degenerates." As calls for elimination of such elements intensified, the right-wing press and politicians accused more progressive German states of turning the prisons into sanatoriums and pampering the inmates, who allegedly lived better than honest working-class citizens. Public fascination with crime and punishment and its sensationalization by newspapers and the entertainment media fueled the political polemic in which the Nazis ultimately prevailed.

The book has two main foci: the officials of the Ministry of Justice and the judiciary and their interactions with Hitler and the Nazi elite, but especially Himmler's SS and police system; and the penal system and its personnel, particularly with regard to prison conditions and the lives of the prisoners. Another theme is the wide range of categories of "offenders" prosecuted (or persecuted) by both the legal and police systems. Wachsmann analyzes each category, thoroughly describing its social composition, public perceptions, Nazi intentions, and how its fate evolved. Finally Wachsmann seeks to put the Nazi police state in per-

spective. Successor systems in the FRG and GDR are contrasted, especially with regard to the respective fates of the former officials. Brief attention is also paid to a comparison with western and Soviet systems.

Wachsmann consistently points to the significance of Hitler and his personal fixations, especially his disdain for lawyers and the courts, as the primary driving force behind National Socialist policy. Hitler backed the emergence of the SS-police state, enabling it to become increasingly ruthless and unrestrained, moving beyond the law as an instrument for fighting all "community aliens." Although he and other leading Nazis had little regard for the legal apparatus, it served several important purposes. The judiciary and prison officials were minimally purged, but then came under constant pressure to become an instrument of service to the "national community" rather than "abstract legal principles." Nevertheless, according to Wachsmann, "[t]he Third Reich did not become an all-out police state"(pp. 69, 372). The regular legal system survived to the end.

Wachsmann thus totally destroys the idea that the Ministry of Justice under Franz Guertner resisted the expansion of Himmler's SS and police state on principle, along with their corresponding ability to stand above the law and due process. Concerns that the public's faith in the legal system would be undermined aside, the conflicts over the expanding police powers were primarily a turf war. To the extent that the police never gained control over the penal system, as in some other police states, the lawyers won that war. But they won it at the expense of converting the penal system into as effective an instrument of terror as any Nazi could ever have imagined. Furthermore, jurists thoroughly collaborated with the police, conforming to every demand Hitler made of the justice system. To prevent the protective custody seizure of an accused individual if he had been acquitted by the courts or given too lenient a sentence, the judiciary escalated its conviction rates

(regardless of the evidence) and increased the severity of its sentences.

The behavior of justice officials from the ministry through the judiciary down to prison officials and warders reveals how deep the convictions of pseudo-scientific racial-biological thinking had become, even outside National Socialist circles. Even the non-Nazi jurists and prison officials reacted favorably to party pressure to get tough on the "undesirable elements of society," to the point of bending or exceeding the law. They accepted police torture of suspects, only demanding its standardization. They even saw the extralegal system of concentration camps as an appropriate measure for dealing with "true threats" to society. They collaborated with the police by turning over inmates who had completed their sentences but whom they perceived to present a continued threat. By no means were such attitudes restricted to the judges of the special courts and the People's Courts. Noting that these courts have drawn most of the historians' attention, adding to the impression that the rest of the legal system had to have been more normative, Wachsmann argues that they "should not be pictured as a 'revolutionary tribunal' that was not a 'true part of the justice system'"(p. 117). Legal-police relations were "characterized by compromise, cooperation and conflict, with the former two dominating the prewar period.... In many cases, the legal system actually helped to facilitate police detention" (p. 184). Ten charts graphically illustrate the wartime escalation of judicial action against the victims of Nazi "righteous justice" and hate.

Wachsmann also refutes the idea that the appointment of Otto-Georg Thierack as Minister of Justice in 1942 represented a turning point when the law "was finally perverted and unconditionally subordinated to the aims of the regime" (p. 216). Such arguments have provided an alibi for the rest of the legal bureaucracy--instead, Wachsmann argues, Thierack merely accelerated the process that all served, ultimately accepting an

emerging reality that left to the police "the internment of 'incorrigible' Germans and the punishment of 'racial aliens'" (p. 223). Basically, the legal system participated in police exterminations only when the police thought that a public trial would serve a purpose. Nevertheless, Thierack had to deal with many asocial elements and "racial aliens" already inside his prisons. From the date of his appointment, he began arranging for their transfer to the camp system for extermination through labor, sealing the fate of more than 20,000 prisoners, including the disabled.

Despite this stark impression, however, Wachsmann's treatment of Ministry Justice officials, judges, prison administrators and warders is appropriately nuanced. The fanatics, the sadists, the more normatively prejudiced and harsh, the dutifully diligent, the too easily pressured, the more conventionally restrained, and the occasionally humane and conscientious are all represented. The full range of motivations for getting caught up in and carried away with National Socialist excesses emerges in his analysis. The (unfortunately) rare occasions on which individuals successfully resisted escalations on principle also find their place in the story.

Wachsmann's analysis of the German penal system is a primer for anyone needing an introduction. All National Socialist normal penal institutions were carried over from the Weimar era, many even from the Wilhelmine period, and Wachsmann traces their evolution throughout. For in-depth perspective, he conducted three case studies: Untermassfeld, a former castle and one of the oldest institutions; Brandenburg-Goerden, the largest and a Weimar construction with the most modern facilities; and Aichach, an exclusively woman's facility. Going beyond institutional analysis, including the administrators and warders, he provides frequent pictures of the history, life behind bars, and the ultimate fate of a wide range of inmates based on memoirs, post-war testimonies, and inmate files.

His findings are grim. Re-education efforts were directed at inmates judged redeemable, with relatively little success. Schooling was minimal, with heavy doses of propaganda; ironically the national-conservative bent of officials led to some increased religious instruction. Nevertheless, discipline and harsh living and working conditions were seen as the real means for discouraging recidivism. Often police conducted such close monitoring of the released that they were unable to hold jobs or housing and were thus driven back to crime. Changes in the economy effected prison conditions unevenly. When police stepped up campaigns for incarcerating political and asocial "enemies," overcrowding and reduced rations led to a general decline. At first the depression retarded the use of productive prison labor, but the Five Year Plan and the increasing demands brought by the war led to maximum--and often deadly or debilitating--exploitation. Only from 1943 did internment in concentration camps (apart from death camps) exceed the population of the regular penal system. By then prison conditions had become increasingly deadly. During the war, perhaps 20,000 prisoners simply died, not counting executions. Although government policy, diminishing resources, and the breakdown of the national infrastructure were responsible, prison officials failed to mitigate the decline. At their worst, however, the regular prisons never equaled the horror and lethality of the camps. Imminent liberation of the prisons led to mass evacuations, even death marches and the murder of inmates whom their keepers could not bear to see released. Amid the chaos, however, even specific orders from above could not guarantee death. With the breakdown, individual personalities were free to emerge. Some officials acted with excessive cruelty or ideological zeal, while others, for a wide variety of reasons, spared the intended victims.

Despite all the strengths of the book, critical readers will notice that Wachsmann himself is not immune to overgeneralizations from secondary sources. For example, as part of his otherwise ap-

appropriate emphasis on Hitler's importance in setting the tone for "justice" in the Third Reich, he blames Hitler for intensifying the persecution of homosexuals. His entire basis for this judgment is Ian Kershaw's biography, which never draws such a specific conclusion.[2] He ignores differing conclusions in most of the literature on persecution of homosexuals, some of which he cites elsewhere. Given the scope of this book, he may be excused from such occasional reliance on one or two more general sources for conclusions where the specialized literature would be more appropriate. On one serious point, however, Wachsmann's book is likely to become the source of the very kind of unfortunate and misleading overgeneralizations he has so successfully refined. Here I am thinking of his conclusion: "The Third Reich did not become an all-out police state" (pp. 69, 372)--a statement that will inevitably lead to quotation out of context.

Wachsmann's attempt to put his study in perspective with the concept of the dual state does not help this issue. In order to make this case, he writes, "[t]o sum up, the picture of the police and legal system as two antagonistic and competing agencies of the Nazi state, subscribed to by numerous historians, is not particularly persuasive. Not only does this picture fail to encapsulate fully the complicity of the legal authorities in Nazi terror, it also rather misreads the work of Ernst Fraenkel." [3] Tendencies to identify the legal system with Fraenkel's "Normative State" and the SS-police-camp system with his "Prerogative State" are oversimplifications of Fraenkel's work that conform "to the popular, rather charitable image of the legal system in the Third Reich" (p. 381). In fact, "Fraenkel did not simply equate the Normative State with the legal system. True, Fraenkel did see many courts--especially in civil law--as part of the Normative State, 'responsible for seeing that the principles of the capitalist order were maintained'.... However, Fraenkel made clear that other courts actually gave explicit backing to the actions of the Prerogative State, suspending legal

rights. These courts, which based their decisions on political considerations, therefore belonged to the Prerogative State themselves.... Following Fraenkel, it is clear that the legal apparatus combined elements of the Normative and Prerogative State. It maintained some degree of social and economic order for the majority of the population, preventing the Third Reich from descending into complete anarchy. Even the Nazi leadership regarded an element of legal predictability as necessary for the functioning of the dictatorship.... Over time, the remaining normative elements within the legal apparatus became weaker, as more and more matters were defined as political." So far so good, but then Wachsmann adds, "*The Dual State gradually disappeared*" (p. 382, emphasis added).

This last statement seems to contradict his conclusion about the unachieved all-out police state. Instead we are left with a conclusion that not only begs the question of what an "all-out police state" is, but seems to obscure the full force of Wachsmann's study. Was Stalin's the only all-out police state? According to Wachsmann, in contrast to Nazi Germany, Russia had "no real tradition of abstract law," "[l]egal consciousness was poorly developed among the population," Soviet legal officials "were untrained and poorly educated party members," and "all prisons, camps and forced labor colonies were controlled by the NKVD" (p. 363). If the Nazi police state that Wachsmann describes was not "all-out," why not? Surely an all-out police state does not have to threaten every single citizen with totally unpredictable terror at all times. Our best understandings of how Hitler's system developed have made the point that Wachsmann himself fully develops--that the majority of the population accepted and even supported it because it claimed successfully to provide them the order and security they desired. Rather than threatening them, it merely reinforced their natural tendencies to conform and focus on their own affairs. "All-out, unpredictable terror" and an "all-out police state" are simply not

the same thing. As Wachsmann repeatedly argues, the survival of some modicum of conventional legality was essential to the Nazi system, and in no way impeded the veritably unlimited fulfillment of the "the Fhrer's will."

Should this fine book gain the wide-spread public attention it deserves, one wonders just how it will be received in the heated, current debates over U.S. domestic security, capital punishment, correctional policy, interrogation, and the wars on terrorism, drugs, crime, sex offenders, and illegal immigrants.

#### Notes

[1]. Detlav Peukert, *The Weimar Republic: The Crisis of Classical Modernity* (London: Allen Lane, 1993).

[2]. Ian Kershaw, *Hitler. 1889-1936: Hubris* (London: Penguin Books, 1998).

[3]. Ernst Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1941).

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