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Sentencing, Judicial Discretion, and Political Prisoners in Pre-War Nazi Germany

Like most dictatorships, Nazi Germany did not draw distinctions between notions of national and regime security. For all intents and purposes, they were one in the same. Thus, according to the Nazis, the fate of the German people was irrevocably linked to that of the Third Reich; if National Socialism were to collapse, so too would—and should—Germany. As a corollary, those who opposed National Socialism were viewed equally as opponents of the German people. By drawing such a tight link between the fortunes of party and state, the Nazi regime was able to provide not only for itself but also for the nation as a whole, a rationale for the ruthless suppression of its enemies. The logic of this cold, Social Darwinist calculus of national survival, moreover, dictated that all parts of German society should reflect the political will and ideology of the Nazi state.¹

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1 For a good overview of the essence of the Nazi *Weltanschauung*, see Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (London, 2000), 20–46.

For the judiciary, the practical meaning of this injunction was that its courtrooms should be guided first by the needs of the national community (*Volksgemeinschaft*), not by legal principle. Consistent with such a worldview, a new court, named the People's Court (*Volksgerichtshof*), was established in April 1934, entrusted with the critical task of trying the regime's most serious political opponents. Yet, in the eyes of the party, it was not to be just another court but an institution that would occupy a special place in the Nazi schema. As Karl Engert, one of the Court's most prominent judges, explained, "Just as the *Wehrmacht* has to safeguard the external existence of the state, the People's Court has a similar obligation for inner security in collaboration with the Gestapo." When he resigned as president of the court in September 1942 to become Reich minister for justice, Otto Georg Thierack expressed a similar sentiment to his successor: "In no other court does it emerge so clearly that the administration of the law . . . must be in accord with the leadership of the state. It will be your main task to guide the judges in this direction." Consequently, People's Court judges were expected to act not just as jurists but as "political fighters in the rebirth of the German nation."²

Not surprisingly, given its overtly political origin and subsequent shameful history, the People's Court has become symbolic of the wanton criminality and corruption of the Third Reich. In the words of some of its post-war assessors, it was a "court in name only," a "terror court," a "blood tribunal," or "an instrument of terror in the enforcement of National Socialist tyranny." Such an entity offered scant scope for such legal niceties as judicial independence, discretion, or even due process. Although recent scholarship drawn from detailed archival research has rightly challenged an overly simplistic caricature of the Court, emphasizing instead its continuities with German legal traditions, few would contend that its judgments were impartial or that its judges were not subservient to the wishes of the regime.³

2 For the legal system in Nazi Germany, see Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, 2004), 69. The quotations come from Karl Engert, "Die Stellung und Aufgaben des Volksgerichtshofes," *Deutsches Recht*, I (1939), 485; Hannsjoachim Köch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London, 1989), 127; Otto Georg Thierack, "Aufgaben und Tätigkeit des Volksgerichtshofes," *Zeitschrift der Akademie für Deutsches Recht*, XIX–XX (1936), 856.

3 The quotations come from Bernhard Jahntz and Volker Kähne, *Der Volksgerichtshof: Darstellung der Ermittlungen der Staatsanwaltschaft bei dem Landgericht Berlin gegen ehemalige Richter*

Such a damning evaluation of the People's Court and Nazi-era legal institutions in general strongly resonates with the traditional view of authoritarian courts held by many scholars of comparative legal systems. From this perspective, dictatorships, ever-fearful of losing control of events or of providing their opposition with an avenue to express their discontent, are inherently incapable of affording meaningful judicial discretion or independence. Recent studies, however, have begun to paint a more varied picture, in which some regimes, most notably in twentieth-century Latin America and North Africa, seemed both willing and able to provide a degree of empowerment to their judiciary. Whether such empowerment is permitted to develop depends on a host of political considerations, not least among them are the relative importance to the state of bureaucratic efficiency, institutional stability, political control, and foreign investment.⁴

But what is the practical meaning of such empowerment? How, for instance, does it manifest itself in the everyday activities of the courts, as opposed to the politics of the system? As Rios-Figueroa and Staton note, judges construe empowerment as, above all, “not

und Staatsanwälte am Volksgerichtshof (Berlin, 1992), 45–47; Nürnberg Military Tribunals, *Trials of War Criminals before the Nürnberg Military Trials under Control Council Law No. 10, “The Justice Case”* (Washington, 1951), III, 19; Hinrich Rüping, “Streng, aber gerecht: Schutz der Staatssicherheit durch den Volksgerichtshof,” *Juristenzeitung*, XXXIX (1984), 815–821; *idem*, “Sind die Urteile des Volksgerichtshofes nichtig?” *Neue Juristische Wochenschrift*, XL (1985), 239. For the nuanced picture of the early People's Court as less revolutionary and more in line with German legal practices, see Klaus Marxen, *Das Volk und sein Gerichtshof: eine Studie zum Nationalsozialistische Volksgerichtshof* (Frankfurt am Main, 1994); Holger Schlüter, *Die Urteilspraxis des nationalsozialistischen Volksgerichtshof* (Berlin, 1995); Lothar Gruchmann, *Justiz im Dritten Reich 1933 bis 1940: Verwaltung, Anpassung und Ausschaltung in der Ära Gürtner* (Munich, 1988); Wachsmann, *Hitler's Prisons*, 117.

4 For examples of the traditional view, see Neal Tate, “Why the Expansion of Judicial Power?” in *idem* and Torbjorn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York, 1995), 27–37; Peter Solomon, “Courts and Judges in Authoritarian Regimes,” *World Politics*, LX (2007), 122–145. For research that suggests some degree of judicial autonomy, see, for example, Anthony Pereira, *Political (In)justice: Political Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh, 2005); Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York, 2007); Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York, 2008); for some of the potential determinants of judicial autonomy, Jennifer Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (New York, 2001); Jodi Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, 2008); Gretchen Helmke and Frances Rosenbluth, “Regimes and the Rule of Law: Judicial Independence in Comparative Perspective,” *Annual Review of Political Science*, XII (2009), 345–366; Charles Smith and Mark Farrales, “Court Reform in Transitional States: Chile and the Philippines,” *Journal of International Relations and Development*, XIII (2010), 163–193.

[having to] face undue external or internal pressure (as say from hierarchical superiors) to resolve cases in particular ways.” In other words, empowerment denotes an ability to exert some degree of autonomy over key features of a trial, especially the processes surrounding sentencing. More specifically, in term of setting sentences, it stands for judges’ freedom, even if only partial, to use their own discretion (rather than simply to impose predetermined sentences from guidelines created by the government).⁵

From this understanding, it follows that careful examination of the sentencing decisions of judges can offer rare insight into the practical realities of judicial empowerment. Such an analysis has the potential to be particularly revealing for major political trials in pre-war Nazi Germany. Despite the People’s Court’s obvious failings as a legal institution, a close reading of the historical record shows that during the pre-war years, its presiding judges may have operated with a significant degree of discretion in imposing sentences. At first blush, this claim might invite skepticism. After all, this court was designed and established by the Nazis themselves. But given the hope at the time that judicial outcomes would reflect what the regime believed to be the popular will, granting some level of flexibility to judges to move beyond legal precedent and standard practice becomes more comprehensible.⁶

5 Julio Rios-Figueroa and Jeffrey Staton, “Unpacking the Rule of Law: A Review of Judicial Independence Measures,” CELS 2009 Fourth Annual Conference on Empirical Legal Studies Paper (April 26, 2009), available at SSRN: <http://ssrn.com/abstract=1434234> or <http://dx.doi.org/10.2139/ssrn.1434234>. Three main findings emerge from the recent extensive contemporary literature about the determinants of sentencing, which focuses heavily on the impact of the Federal Sentencing Guidelines in the United States. First, although the Federal Sentencing Guidelines have either discouraged or prohibited the use of individual characteristics, they continue to be important in explaining disparities in sentence length. Second, the demographic and political composition of a court generally has little, or no, effect on disparities in sentencing, although, they can affect the discretionary tools utilized by a judge. Third, type of offense and previous criminal history are important in explaining disparities in sentence type. For an introduction to this literature, see Celesta Albonetti, “Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas and Departures on Sentence Outcomes for Drug Offences, 1991–1992,” *Law and Society Review*, XXI (1997), 789–822; David Mustard, “Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the US Federal Courts,” *Journal of Law and Economics*, XLIV (2001), 285–314; Max Schanzbach, “Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographics,” *Journal of Legal Studies*, XXXIV (2005), 57–92; David Abrams, Marianne Bertrand, and Sendhil Mullainathan, “Do Judges Vary in Their Treatment of Race?” *Journal of Legal Studies*, XLI (2012), 347–383.

6 Köch, *In the Name of the Volk*; Marxen, *Das Volk*.

Yet, even if such judicial leeway did exist, did it really make any difference? To date, whether or not judicial discretion systematically affected the sentencing behavior of Nazi-era judges is a question that has been largely left untouched. Indeed, as Zarusky noted, with the exception of Thierack and Roland Freisler, its most infamous presidents, the judges of the People's Court have attracted very little methodical scrutiny. We know, however, that the decisions of a number of People's Court trials raised concerns in official circles. Between April 1935 and August 1936, for example, the Ministry of Justice (*Reichsjustizministerium*) openly criticized no fewer than eighteen of the court's verdicts as too lenient. Adolf Hitler, too, later complained that the decisions of the People's Court "had not initially corresponded to his desired tough standards." Were these supposedly lenient sentences that had brought such high level rebukes simply random outliers, or were they symptomatic of a wider application of judicial discretion?⁷

At heart, these are, by nature, quantitative questions, or, more accurately, matters that can be resolved only by determining what was normal and what was not. This article addresses these issues by utilizing the tools of econometrics to examine in detail the sentencing patterns of a sample of 1,114 individuals convicted of high treason and treason between the start of Hitler's rule in January 1933 and the outbreak of war in Europe in September 1939. In both approach and orientation, we are indebted to prior quantitative analyses of the People's Court by Marxen and Schlüter that has laid the foundations for much of our current understanding of trends in the Court's verdicts. This article takes their research to the next level by using inferential statistics to probe what lies beneath the overall sentencing outcomes that they identified. In other words, how exactly were verdicts in the People's Court reached, and what role did judges actually play in the process? By undertaking such an analysis, we are able to determine for the first time the extent of the discretion afforded to senior Nazi-era judges in trials involving political prisoners, as well as trace any patterns in sentencing, during the pre-war period.

7 Jürgen Zarusky, "Mit einem Forschungsbericht für die Jahre 1974 bis 2010," in Walter Wagner, *Der Volksgerichtshof im nationalsozialistischen Staat* (Munich, 2011), 1018. The quotation comes from Gruchmann, *Justiz im Dritten Reich*, 965.

TREASON AND HIGH TREASON IN NAZI GERMANY In all societies, high treason and treason rank as the most serious of political offenses. High treason relates to those acts that internally undermine the power and integrity of the state, such as an attempt on the life of the head of state. Treason, by contrast, concerns itself with acts that harm the state externally, such as collusion with, or the transmission of state secrets to, a foreign power. When the Nazis took control of Germany in 1933, they began immediately to use the courts to prosecute their political opponents. Articles 80–92 of the *Reichsstrafgesetzbuch* (Federal Penal Code), first promulgated in 1871, specified three categories of high treason—(1) attacks that threatened the head of state, (2) attempts to change or alter the territory of the federal state, and (3) violations of the constitution. The Nazis, however, considered these laws as antiquated, excessively liberal and too narrow.⁸

On the night of February 27, 1933, the *Reichstag* (Germany's parliament) mysteriously went up in flames. The Nazis attributed the fire to the Communists, portraying it as a sign of an imminent armed uprising that justified on the following day the enactment of two decrees that extended the scope of political crimes and sanctions for high treason in Germany. The first, the Decree of the President against Treason and High Treasonous Activities, which aimed to neutralize political opponents of the state, especially the Communist Party of Germany (KPD), introduced the concept of *Zersetzungshochverrat* (subversive high treason)—“acts of political subversion, which obstructed the police and army from fulfilling their duty to protect the state.” Under Article 6, the manufacture, distribution, and storage of subversive writings were also, for the first time, included as acts of high treason. Article 1 of the second decree, the Decree of the President for the Protection of People and State, commonly known as the Reichstag Fire Decree, extended capital

8 For legal histories of the People's Court, see Edmund Lauf, *Der Volksgerichtshof und sein Beobachter: Bedingungen und Funktionen der Gerichtberichterstattung im Nationalsozialismus* (Opladen, 1994); Marxen, *Das Volk*; Schlüter, *Die Urteilspraxis*; Isabel Richter, *Hochverratsprozesse als Herrschaftspraxis im Nationalsozialismus: Männer und Frauen vor dem Volksgerichtshof 1934–1939* (Münster, 2001); Marxen and Schlüter, *Terror und “Normalität”: Urteile des nationalsozialistischen Volksgerichtshofs 1934–1945: Eine Dokumentation* (Düsseldorf, 2004); Wagner, *Der Volksgerichtshof*; for good overviews of criminal (and political) justice in Nazi Germany more generally, Ingo Müller, *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz* (München, 1987); Richard Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987* (New York, 1996); Wachsmann, *Hitler's Prisons*.

punishment to all high-treasonous offenses, including those that had previously carried a maximum penalty of life imprisonment. The complete political ascendancy of the Nazis was further tightened five months later by the Law against the Reestablishment of Parties of July 14, 1933, which recognized the Nazi Party as the sole legitimate political party in Germany. Thereafter, the establishment, or re-establishment, of any political party became a high-treasonous offense, punishable by a prison sentence of as many as ten years.⁹

The Reichstag fire and subsequent trial also provided the impetus for the restructuring of the German judicial system. Germany's Supreme Court (*Reichsgericht*), which had been responsible for cases of high treason and treason since 1879, conducted the Reichstag fire trial, which lasted from September to December 1933. It found Marinus van der Lubbe, the main defendant, guilty and sentenced him to death, but it dismissed the cases against the trial's other four defendants for lack of evidence. This acquittal of four defendants in a trial that had attracted worldwide attention was an embarrassment to the regime, particularly given that this crime was meant to serve as proof of a grand Communist conspiracy and as the pretext for the Reichstag Fire Decree. Hitler later described the verdict as "laughable" and the judges as "senile." Hence, on April 24, 1934, the Law Amending Provisions of Criminal Law and Criminal Procedure created the People's Court to remove high treason and treason from the domain of the Supreme Court. This law also regulated the jurisdiction of the People's Court, the composition of its senates, the appointment of its members, and several of its procedural details.¹⁰

Like its predecessor in trying cases of high treason and treason, each of the three senates of the People's Court consisted of five members for main trials, in which each member of the senate, along with the presiding judge, decided on the case before them. Unlike in the Supreme Court, however, only the presiding judge and one assessor in any major trial before the People's Court were required to be professional judges. The other three assessors were

9 Zarusky and Hartmut Mehringer (eds.), *Erschließungsband zur Mikrofiche-Edition, Widerstand als Hochverrat: 1933–1945: Die Verfahren gegen deutsche Reichsangehörige vor dem Reichsgericht, dem Volksgerichtshof und dem Reichskriegsgericht* (Munich, 1998); Wagner, *Der Volksgerichtshof*. The quotation comes from Reichsministerium des Innern, "Die Verordnung des Reichspräsidenten gegen Verrat am Deutschen Volke und hochverräterische Umtriebe," *Reichsgesetzblatt*, 28 Feb. 1933, Teil I, 85.

10 Wagner, *Der Volksgerichtshof*.

honorary, drawn from the Nazi Party and its ancillary organizations. These non-jurists, who were intended to provide “political expertise,” were praised in the founding law as being “closely attached with the politically dynamic strength of the people whose popular conception of legality they best reflect.” Hitler himself appointed the members of the People’s Court, including its president, for terms of five years. According to Wilhelm Weiß, lay member of the People’s Court and later chief editor of the *Völkischer Beobachter* (People’s Observer), the Nazi Party’s official newspaper, the purpose of the new court was to form an institution that “portrayed an essential part of the National Socialist jurisdiction, an organic creation of the National Socialist state, since the assessors formed a close personal relationship with the Party which did not exist in any other German court.”¹¹

This same new law also regulated the series of laws that the Nazis had passed and employed since 1933 to change the Penal Codes in their favor. Article 83 of the Penal Code focused on key aspects of high treason. The death penalty was permitted for the following crimes—(1) the establishment, or re-establishment, of an organization conspiring to commit high treason; (2) the subversion of police and defence forces; (3) the influencing of the masses through writings, records, pictorial images, and radio broadcasts; and (4) the attempt to import high-treasonous writings, records, or pictorial images. Incitement of others to commit high treason or the conspiracy to commit high treason carried a maximum prison term

11 The quotations of Hitler come from Henry Picker, *Hitler’s Tischgespräche im Führerhauptquartier 1941–1942* (Bonn, 1951). Although jurisdiction over cases of high treason was transferred to the People’s Court in 1934, minor cases continued to be sent to the regional *Oberlandesgericht* for trial. On the structure of the People’s Court, see Zarusky and Mehringer, *Widerstand als Hochverrat*, 30–31; Reichsministerium des Innern, “Die Vierte Verordnung zur Vereinfachung der Rechtspflege,” *Reichsgesetzblatt*, 13 Dec. 1944, Teil I, 339. The “political expertise” quotation comes from *idem*, “Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens,” *Reichsgesetzblatt*, 24 April 1934, Teil I, 345. Wilhelm Weiß, “Der Volksgerichtshof des deutschen Reiches,” *Deutsches Recht*, V (1935), 518. Hitler appointed judges to the People’s Court, whereas Paul von Hindenburg, president of the Reich, made appointments to the Supreme Court until his death in August 1934. The original personnel appointed to the People’s Court included twelve professional judges and twenty-one honorary assessors or lay judges. Of the legal members, three were senate presidents (*Senatspräsidenten*), including Fritz Rehn, the first president of the People’s Court; six presiding judges from a division of a district court (*Landesgerichtsdirektoren*); one judge of a district court (*Landesgerichtsrat*); one judge of a local court (*amtsgerichtsrat*); and one director of public prosecution (*Oberstaatsanwalt*). For more details, see Gruchmann, *Justiz im Dritten Reich*.

of ten years, although the added proviso that “under certain conditions a lifelong prison sentence or the death penalty could be imposed” made the distinction between the crimes irrelevant. In short, the judges comprising the People’s Court had absolute discretion to determine whether those on trial for treason and high treason deserved a death sentence.¹²

As of April 1934, a solitary, all-embracing law brought all decrees with respect to high treason and treason into line. The presiding judge had considerable latitude in allotting punishment; sentencing options were elastic, with respect to both their type and their severity. Indeed, there were no specific guidelines about sentencing. Judges were free to select any option, from time in a normal prison (*Gefängnis*) at one end to various degrees of hard labor, loss of civil rights in a penitentiary (*Zuchthaus*), and capital punishment at the farthest end. Lengths of imprisonment were also at the discretion of the presiding judge. Significantly, the death penalty was applicable to all crimes listed in Articles 80 to 83 of the penal code, without recourse to appeal.¹³

On August 1, 1934, the first trials took place before the three senates of the People’s Court. In November 1935, a fourth senate was created to help cope with the increasing workload. In April 1936, the Law about the People’s Court and the Twenty-Fifth Amendment to the Salary Law raised the status of the court to that of “an ordinary constitutional court, standing alongside the Supreme Court,” and Thierack, a senior Nazi Party figure at the time, was named its new president. Thierack was instrumental in shaping the fledgling court’s procedures and practices to reflect the will of its founders. More important than the personnel changes was the symbolic decision to give lifetime tenure to the president of the Court, who also presided over the first senate, the three other senate presidents and six full-time judges. The People’s Court was now to be the living, and seemingly permanent, embodiment of Nazi justice.¹⁴

12 Reichsministerium des Innern, “Gesetz zur Änderung,” 341–348.

13 *Ibid.*

14 Günther Wieland, *Das war der Volksgerichtshof. Ermittlungen-Fakten Dokumente* (Pfaffenweiler, 1989); Gruchmann, *Justiz im Dritten Reich*. The quotation comes from Reichsministerium des Innern, “Das Gesetz über den Volksgerichtshof und über die fünfundzwanzigste Änderung des Besoldungsgesetzes,” *Reichsgesetzblatt*, 20 April 1936, Teil I, 369.

SOURCES The data used in this article to analyze sentencing behavior come from the official state records of cases tried before the People's Court and Supreme Court, as collated by the Resistance as High Treason (*Widerstand als Hochverrat*) project. This project combined material stored in West German archives about resistance groups with previously inaccessible files from the former East Germany, Czechoslovakia, and Soviet Union. The microfiche series that it generated contains around 70,000 pages of court files that document the judicial prosecution of men and women charged with high treason and treason who appeared before the central courts of the Third Reich. It includes a wealth of information regarding the indictment, investigation, judgment, and sentencing of each defendant. These records enable us to reconstruct the profiles and sentences of political prisoners convicted of treason or high treason. Whenever possible, we have verified and supplemented our information with the entries for individuals found in the leading encyclopedias of German resistance.¹⁵

This study examines resistance activities in five of the most important and populous regions of Germany during the pre-war period—Bavaria, Berlin, Hamburg, Rhineland, and Sachsen. The pre-war period has been selected for study because wartime exigencies, imperatives, and frequent territorial changes after 1939 inflicted serious and regular disruptions to the German court system. A focus on Nazi judicial practice during peacetime provides a “cleaner” perspective. The regions selected for the sample lie in all parts of the country—north, south, east, and west; they include Germany's eight largest cities and industrial centers at the time, as well as a host of medium and small-sized towns, villages, and rural districts. The sample captures all of the males in these regions who allegedly committed acts of high treason and treason between 1933 and 1939, amounting to 434 cases involving 1,114 defendants—more than one-half of the approximately 2,000 individuals arraigned for high treason and treason before the Supreme Court and People's Courts during the pre-war period. Therefore, given its size, inclusiveness, and breadth of

15 For more details about the database and its contents, see Zarusky and Mehringer, *Widerstand als Hochverrat*; Geerling, Magee, and Robert Brooks, “Faces of Opposition: Juvenile Resistance, High Treason and the People's Court in Nazi Germany,” *Journal of Interdisciplinary History*, XLIV (2013), 209–234. For encyclopedias of resistance, see Peter Steinbach and Johannes Tuchel, *Lexikon des Deutschen Widerstandes 1933–1945* (Munich, 1998); *idem* (eds.), *Widerstand gegen die nationalsozialistische Diktatur 1933–1945* (Bonn, 2004).

Table 1 Sentence Received

| SENTENCE IMPOSED | NUMBER | PERCENTAGE | | |
|------------------------------|---------------------------|------------|-----|-------|
| Prison | 274 | 24.60 | | |
| Penitentiary | 816 | 73.25 | | |
| Death | 24 | 2.15 | | |
| | Mean Sentence (Months) | Min | Max | SD |
| If sentenced to penitentiary | 80.53 | 12 | 300 | 58.32 |

geographical and temporal coverage, our sample provides an accurate representation of the trials for high treason and treason in Nazi Germany for the period specified.¹⁶

The summary statistics of the sample presented in Tables 1 through 6 show that 274 of the 1,114 individuals convicted were sentenced to prison, 816 to the penitentiary, and 24 to death. The mean sentence length for those sentenced to the penitentiary was 6.7 years, with a minimum of 1 year and a maximum of 25 (Table 1). The most common convictions were for major high treason (Table 2). The mean age of those convicted was 33.7 years; those who received the death sentence tended to be slightly older (36.8 years on average). Approximately 90 percent of defendants of partial Jewish ancestry (“mixed blood”) were sentenced to the penitentiary or to death (Table 3). Convictions for major high treason or for multiple offenses (mainly treason and major high treason) received punishments more severe than did those for minor high treason (Table 4). Left-wing political leaders—around 10 percent of the sample—constituted almost 60 percent of those sentenced to death. Trade unionists were also prominent among the convicted (Table 5). Although a range of resistance groups is represented in our sample, slightly more than 65 percent of those convicted belonged to the KPD, and 79.2 percent of those sentenced to death were its members (Table 6).

Ninety-seven defendants from our sample were not convicted; sixteen had their cases dismissed; and a further eighty-one were

16 Statistical information about the regions from which our sample was extracted comes from Statistisches Reichsamt, *Statistisches Jahrbuch für das Deutsche Reich* (Berlin, 1939). As discussed in the text, the Supreme Court heard cases of high treason and treason before the creation of the People’s Court in 1934. In our sample, the Supreme Court dealt with thirty-two cases involving seventy-eight defendants (5.78% of the total).

Table 2 Convicted Offense

| OFFENSE | NUMBER | PERCENTAGE |
|--|--------|------------|
| Treason only | 12 | 0.99 |
| Major high treason only | 798 | 71.63 |
| Minor high treason only | 267 | 23.97 |
| Combination of two of the above offenses | 37 | 3.32 |
| Total | 1,114 | 100 |
| Offense with violent resistance | 76 | 6.82 |

NOTES Major high treason included membership in an illegal organization, engagement in illegal writings, participation in crimes abroad, subversion of the police or armed forces, and separatism. Minor high treason consisted of conspiracy to commit high treason, aiding and abetting, and failure to report. Of the thirty-seven individuals convicted of two offense types, all but one were convicted of treason and major high treason; the other one was convicted of major and minor high treason. No one was convicted of treason and minor high treason or major high treason, minor high treason, and treason together.

acquitted. We could not include dismissals and acquittals in our econometric analysis because the individuals involved did not generate the same trial records as those who were convicted. Qualitative analysis of these cases, however, reveals that the most common reasons for dismissals and acquittals were perceived psychological illness and/or a lack of evidence connecting defendants to the activities of their co-defendants. Acquittal or dismissal, however, did not necessarily mean release. Many individuals were taken into “protective custody” following discharge.

ESTIMATION METHODS The data reported in Tables 1 through 6 provide prima-facie evidence that demographic and political characteristics, as well as offense types, might have played a part in explaining sentencing disparities. Certain estimation methods can test

Table 3 Sentence Received, by Age and Ethnicity

| SENTENCE IMPOSED | AGE | | MIXED BLOOD | |
|------------------|-------|-------|-------------|-------|
| | MEAN | SD | NUMBER | % |
| Prison | 32.95 | 9.18 | 4 | 11.11 |
| Penitentiary | 33.87 | 8.16 | 30 | 83.33 |
| Death | 36.79 | 10.00 | 2 | 5.56 |
| Total | 33.70 | 8.48 | 36 | 100 |

NOTE “Mixed blood” denoted individuals with some Jewish ancestry.

Table 4 Sentence by Offense

| OFFENSE | PRISON | | PENITENTIARY | | DEATH | |
|--|--------|-------|--------------|-------|-------|-------|
| | NO. | % | NO. | % | NO. | % |
| Treason only | 0 | 0 | 10 | 1.23 | 2 | 8.34 |
| Major high treason only | 101 | 36.86 | 684 | 83.82 | 13 | 54.17 |
| Minor high treason only | 169 | 61.68 | 98 | 12.01 | 0 | 0.00 |
| Combination of two of the above offenses | 4 | 1.46 | 24 | 2.94 | 9 | 37.50 |
| Offense with violent resistance | 15 | 5.47 | 59 | 7.23 | 3 | 12.50 |

for these possibilities and identify the determinants of sentence type and severity.

Our analysis adopts the concept of *judicial discretion* as currently employed in the law and economics literature. The exercise of

Table 5 Sentence, by Political Status or Certain Affiliations

| POLITICAL STATUS | PRISON | | PENITENTIARY | | DEATH | |
|--|--------|-------|--------------|-------|-------|-------|
| | NO. | % | NO. | % | NO. | % |
| Left-wing political leader | 12 | 4.38 | 96 | 11.76 | 14 | 58.33 |
| Expelled from Hitler Youth/BDM | 1 | 0.36 | 1 | 0.12 | 0 | 0 |
| Member of trade union | 76 | 27.74 | 296 | 36.27 | 6 | 25.00 |
| Member of <i>Freikorps</i> or <i>Stahlhelm</i> | 18 | 6.57 | 36 | 4.41 | 2 | 8.33 |
| Member of SA/SS | 10 | 3.65 | 18 | 2.21 | 0 | 0 |
| Member of groups dedicated to protecting the institutions of the Weimar Republic | 16 | 5.84 | 54 | 6.62 | 2 | 8.33 |
| Member of NSDAP | 13 | 4.74 | 30 | 3.68 | 0 | 0 |

NOTES “Left-wing political leader” refers to members of the major left-wing political parties—Communist Party (KPD), Social Democratic Party (SPD), and Socialist Workers’ Party (SAP)—who held full-time positions or offices either within the Reichstag, a *Landtag* (state assembly), or the party organization. BDM stands for *Bund Deutscher Mädel*, or the League of German Girls, the female equivalent of the Hitler Youth. The *Freikorps* (Free Corps) were right-wing paramilitary organizations operative during the Weimar Republic. The *Stahlhelm* (Steel Helmet) was an organization that represented returned soldiers. The SA, or *Sturmabteilung*, was a Nazi paramilitary organization. The SS, or *Schutzstaffel*, was a Nazi security organization. “Groups dedicated to protecting the institutions of the Weimar Republic” were established to defend the Weimar constitution from attacks by both the extreme left and right. These organizations, the most important of which was the *Reichsbanner*, drew support from a cross-section of moderate, democratic Weimar society, including German democrats, social democrats, and trade unionists. The NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) was the National Socialist German Workers’ Party, the official name of the Nazi Party.

Table 6 Sentence, by Resistance-Group Membership

| RESISTANCE GROUP | PRISON | | PENITENTIARY | | DEATH | |
|---|--------|-------|--------------|-------|-------|-------|
| | NO. | % | NO. | % | NO. | % |
| KPD | 170 | 62.04 | 544 | 66.67 | 19 | 79.17 |
| Trotskyist | 5 | 1.82 | 12 | 1.47 | 0 | 0 |
| KPDO | 0 | 0 | 17 | 2.08 | 0 | 0 |
| Other communist splinter or communist help organization | 7 | 2.55 | 35 | 4.29 | 0 | 0 |
| SPD | 38 | 13.87 | 92 | 11.27 | 1 | 4.17 |
| SAP or other socialist organization | 10 | 3.65 | 20 | 2.45 | 0 | 0 |
| Anarchist/syndicalist | 0 | 0 | 14 | 1.72 | 0 | 0 |
| <i>Schwarze Front</i> | 13 | 4.74 | 37 | 4.53 | 0 | 0 |
| BJ | 4 | 1.46 | 3 | 0.37 | 0 | 0 |
| Catholic group | 2 | 0.73 | 3 | 0.37 | 0 | 0 |
| National-conservative | 3 | 1.09 | 3 | 0.37 | 0 | 0 |
| Member of more than one resistance group | 16 | 5.84 | 27 | 3.31 | 0 | 0 |

NOTES KPD stands for the Communist Party of Germany, the official Comintern-affiliated party in Germany. “Trotskyist” refers to communists belonging to a party adhering to the views of Leon Trotsky. KPDO stands for the Communist Party of Germany-Opposition—comprised of communists who had left or been forced out of the KPD because of their opposition to the party leadership’s embrace of Stalinism. “Communist splinter” refers to other, small communist parties not affiliated with the Comintern; “communist help organization” to organizations that provided relief to the families of victims of Nazi oppression. SPD stands for the Social Democratic Party of Germany; SAP for the Socialist Workers’ Party. “Other socialist organization” refers to small, socialist parties or groups; “anarchist/syndicalist” to membership in an anarchist or syndicalist organization. The *Schwarze Front* (Black Front) was a left-wing Nazi group opposed to Hitler that had split from the Nazi Party in 1930. BJ stands for *Bündische Jugend*, a loosely assembled association of German hiking groups with a traditionalist, nationalistic, and antidemocratic worldview. “Catholic group” refers to all organizations, most importantly the Center Party, that worked to preserve Catholic values in Germany; “national-conservative” to organizations with a conservative agenda that tended to be nationalistic, anti-semitic, monarchist, and militaristic.

judicial discretion occurs wherever and whenever the demographic or political characteristics of defendants cause disparities in sentencing (after controlling for the judge, the offense, and the prior criminal history of the defendant)—in other words, wherever and whenever extralegal factors, such as race, are involved in court decisions. The extent to which sentencing reflects racial bias is the subject of much of the U.S. literature. Discretion, however, can also be compassionate—for example, when judges impose lighter sentences due to the age of defendants. In our sample, therefore, the

exercise of judicial discretion is evident whenever the personal characteristics, political background, or resistance activities of a defendant have a significant effect on sentencing outcomes, even after we control for the sentencing judge, the offense, and the defendant's prior criminal history.¹⁷

Two separate regression models are used in our analysis. The first model relates to the determinants of sentence types. Since three sentence types were available (prison, penitentiary, or death), we employ a multinomial logit model, in which we treat penitentiary as the reference case. In the second model, we employ an ordinary least-squares (OLS) regression to examine what determined the length of stay in a penitentiary. The dependent variable is the natural log of sentence length, defined in months. To control for the myriad factors that potentially affected sentencing, we employ an extensive range of variables, a list of which is provided in Table 7. These variables cover the demographic characteristics, political backgrounds, resistance activities, prior criminal histories, and supposed offenses of the individuals. In addition, we control for whether individuals and/or their co-defendants (if any) cooperated during the interrogation process or at the trial and whether their offenses involved violent resistance, as well as for who held the presidency of the Court at the time of sentencing.¹⁸

Because we know the name of the presiding judge for each case, we can examine the effect of particular judges on sentences, controlling for everything else. We do not examine the role of specific characteristics of the judges in influencing sentencing because the judges were a largely homogenous group—white, middle-aged, middle-class, ethnically German males with conservative, nationalist, or right-wing political backgrounds, retaining their positions only at the behest of the Nazi regime.¹⁹

17 For the econometric analysis of judicial discretion, see Abrams, Bertrand, and Mullainathan, "Do Judges Vary"; Shawn Bushway and Anne Morrison Piehl, "Judicial Discretion, Legal Factors and Racial Discrimination in Sentencing," *Law and Society Review*, XXXV (2001), 733–764; Beth Freeborn and Monica Hartmann, "Judicial Discretion and Sentencing Behavior: Did the Feeney Amendment Reign in District Judges," *Journal of Empirical Legal Studies*, VII (2010), 355–378 (see also references in n. 5).

18 Multicollinearity does not pose any problems for our analysis. All pairwise correlations between independent variables are < 0.3. Apart from age and age² (as expected) and a few of the judges, all variance inflation factors are much less than 10.

19 William Sweet, "The Volksgerichtshof: 1934–1945," *Journal of Modern History*, XLVI (1974), 314–329; Wachsmann, *Hitler's Prisons*, 71.

Table 7 Characteristics of the Defendants and Trials

| PERSONAL | MEAN/SD OR % |
|---|--------------|
| Age at indictment | 33.97/8.83 |
| Education | |
| Primary | 81.17% |
| High School | 10.57% |
| Tertiary | 8.26% |
| Mixed blood | 3.06% |
| Foreign citizen or stateless | 3.31% |
| Chronic poor health | 9.08% |
| Unemployed | 31.30% |
| Married | 56.81% |
| Number of children | 0.38/0.99 |
| POLITICAL BACKGROUND | |
| Left-wing political leader | 10.57% |
| Expelled from Hitler Youth/BDM | 0.17% |
| Member of youth street gang | 0.66% |
| Member of a nonpolitical or nonreligious organization (hiking, sporting, Red Cross) | 18.25% |
| Member of trade union | 33.36% |
| Member of <i>Freikorps</i> or <i>Stahlhelm</i> | 5.62% |
| Member of SA/SS | 2.89% |
| Member of group dedicated to protecting the institutions of the Weimar Republic | 6.52% |
| Member of NSDAP | 4.29% |
| RESISTANCE GROUP | |
| KPD | 65.80% |
| Trotskyist | 1.52% |
| KPDO | 1.52% |
| Other communist splinter or communist help organization | 3.77% |
| SPD | 11.76% |
| SAP or other socialist organization | 2.69% |
| Anarchist/syndicalist | 1.26% |
| Schwarze Front | 4.49% |
| BJ | 0.60% |
| Catholic group | 0.44% |
| National-conservative | 0.53% |
| Member of more than one resistance group | 3.86% |
| CONVICTED OFFENSE(S) | |
| Treason only | 0.99% |
| Major high treason only | 71.63% |
| Minor high treason only | 23.97% |
| Combination of two of the above offense types | 3.32% |
| Offense with violent resistance | 6.82% |

Table 7 (Continued)

| PERSONAL | MEAN/SD OR % |
|-------------------------------------|--------------|
| CRIMINAL HISTORY | |
| Previous term of imprisonment | 28.90% |
| Previous major political conviction | 6.19% |
| Previous minor political conviction | 14.29% |
| Previous non-political conviction | 25.35% |
| INTERROGATION PROCESS | |
| Defendant cooperated | 83.98% |
| Co-defendant cooperated | 98.58% |

RESULTS The results of the estimations of our two models are presented in Table 8. Columns (1) and (2) of the table, which report the results for a multinomial logit model of sentence type, show that certain personal characteristics were significant in determining a sentence, even after controlling for political background, resistance activity, criminal history, and presiding judge. We included both the age at indictment and the square of this variable to allow for potential nonlinearity. The fact that for prison, the sign on age was negative and on age-squared positive suggests that, relative to being sentenced to a term in a penitentiary, the probability of being sentenced to prison exhibited a U-shaped relationship with respect to age. In other words, young and old defendants were more likely to be sent to prison—the least-severe punishment—whereas middle-aged defendants had a higher probability of receiving a penitentiary sentence.

Columns (1) and (2) also reveal that those with a tertiary education or who were married had a higher likelihood of being sentenced to prison or death, relative to being sentenced to a penitentiary. Note that the link between being married and receiving the death sentence is significant at only the 10 percent level and is likely to be more correlative than causative, reflecting the fact that senior resisters were more likely to be both executed and married. Table 8 also shows that those who were of “mixed blood” were less likely to be sentenced to prison than the penitentiary, that is, to receive the least harsh form of punishment.

Regarding defendants’ political background, affiliation, and resistance activity, being a left-wing political leader reduced the likelihood of being sentenced to prison and increased the likelihood of being sentenced to death, relative to being sent to a penitentiary.

Table 8 Determinants of Sentencing

| | MULTINOMIAL LOGIT RESULTS FOR SENTENCE RECEIVED | | (3) DETERMINANTS OF SENTENCE LENGTH IN PENITENTIARY |
|--|---|---------------------|--|
| | (1) PRISON | (2) DEATH | |
| PERSONAL | | | |
| Age at indictment | -0.319*** (-3.834) | 1.190 (1.190) | 0.046** (2.212) |
| Age at indictment ² | 0.004*** (3.888) | -0.011 (-0.917) | -0.001** (-2.208) |
| EDUCATION (REF = PRIMARY SCHOOL) | | | |
| High school | 0.594 (1.621) | -22.911 (-0.003) | 0.066 (0.841) |
| Tertiary | 0.918** (2.108) | 1.570** (2.132) | 0.181* (1.858) |
| Mixed blood | -2.558** (-2.078) | -8.409 (-0.047) | 0.030 (0.214) |
| NATIONALITY (REF = GERMAN, AUSTRIAN) | | | |
| Foreign citizen or stateless | 0.303 (0.425) | 12.477 (0.698) | 0.143 (1.069) |
| Chronic poor health | -0.273 (-0.585) | -13.030 (-0.755) | 0.101 (1.205) |
| Unemployed | -0.342 (-1.412) | -22.846 (-0.003) | -0.020 (-0.385) |
| Married | 0.952*** (3.445) | 9.283* (1.849) | -0.030 (-0.552) |
| Number of children | -0.229 (-1.533) | -0.771 (-0.520) | 0.005 (0.202) |
| POLITICAL BACKGROUND (REF = NO POLITICAL AFFILIATION) | | | |
| Left-wing political leader | -1.073** (-2.232) | 1.507** (2.302) | 0.310*** (3.945) |
| Expelled from Hitler Youth/BDM | -0.184 (-0.094) | 6.960 (0.000) | 0.278 (0.429) |
| Member of youth street gang | 1.374 (0.774) | -13.137 (0.000) | 0.003 (0.009) |
| Member of nonpolitical and nonreligious organization | 0.594** (2.208) | 2.167 (0.909) | 0.046 (0.778) |
| Member of trade union | 0.281 (1.106) | -0.650 (-0.486) | 0.009 (0.183) |
| Member of Freikorps or Stahlhelm | 0.992** (2.040) | 7.866 (0.411) | -0.051 (-0.424) |
| Member of SA/ss | 0.288 (0.389) | -14.874 (0.000) | -0.005 (-0.030) |
| Member of groups dedicated to protecting the Weimar Republic | -0.041 (-0.088) | -0.526 (-0.046) | -0.202* (-1.944) |
| Member of NSDAP | -0.233 (-0.323) | 18.079 (0.000) | -0.023 (-0.137) |

Table 8 (Continued)

| | MULTINOMIAL LOGIT RESULTS FOR SENTENCE RECEIVED | | (3) DETERMINANTS OF SENTENCE LENGTH IN PENITENTIARY |
|---|---|-----------------------|---|
| | (1) PRISON | (2) DEATH | |
| RESISTANCE GROUP (REF = NOT MEMBER OF RESISTANCE GROUP) | | | |
| KPD | -1.052 (-1.639) | -1.520 (-0.125) | 0.218 (1.632) |
| Trotskyist | -0.352 (-0.351) | -4.014 (0.000) | -0.074 (-0.331) |
| KPDO | -24.723 (0.000) | -10.645 (0.000) | 0.176 (0.875) |
| Other communist splinter or communist help organization | -0.257 (-0.296) | -24.856 (-0.001) | -0.088 (-0.517) |
| SPD | -0.577 (-0.812) | -34.487 (-0.001) | 0.107 (0.708) |
| SAP or other socialist organization | 0.184 (0.233) | -43.604 (-0.002) | 0.051 (0.270) |
| Anarchist/syndicalist | -25.766 (0.000) | -4.348 (0.000) | 0.114 (0.429) |
| Schwarze Front | 0.021 (0.022) | -54.412 (0.000) | -0.055 (-0.268) |
| BJ | 0.428 (0.299) | 19.652 (0.000) | 0.227 (0.503) |
| Catholic group | 0.177 (0.106) | -4.728 (0.000) | -0.065 (-0.177) |
| National-conservative | 25.497 (0.001) | -24.776 (0.000) | 0.143 (0.291) |
| INTERROGATION PROCESS | | | |
| Defendant cooperated | 1.419*** (3.405) | -2.652 (-0.989) | -0.194*** (-3.163) |
| Co-defendant cooperated | 0.687 (0.567) | -12.414** (-2.043) | 0.142 (0.728) |
| CONVICTED OFFENSES (REF = TREASON ONLY) | | | |
| Major high treason only | 1.821*** (7.49) | -13.425 (-1.829) | -0.426 (-1.561) |
| Minor high treason only | 2.153*** (8.751) | -43.359 (-0.003) | -0.122*** (-4.306) |
| Combination of two offenses | 1.821*** (7.144) | -1.010 (-0.238) | 0.069 (0.234) |
| Offense with violent resistance | -2.111*** (-4.665) | 2.875** (2.224) | 0.519*** (4.292) |
| CRIMINAL HISTORY | | | |
| Previous term of imprisonment | -0.060 (-0.135) | 6.720 (1.821) | -0.070 (-0.786) |
| Previous major political conviction | 0.256 (0.417) | 3.623 (1.410) | 0.114 (1.094) |
| Previous minor | 0.161 | -6.555* | 0.171** |

Table 8 (Continued)

| | MULTINOMIAL LOGIT RESULTS FOR SENTENCE RECEIVED | | (3) DETERMINANTS OF SENTENCE LENGTH IN PENITENTIARY |
|-------------------------------------|---|-----------------------|--|
| | (1) PRISON | (2) DEATH | |
| political conviction | (0.378) | (-1.849) | (2.031) |
| Previous nonpolitical conviction | -0.226 (-0.619) | -5.499* (-1.740) | 0.092 (1.306) |
| PRESIDING JUDGE (REF = THIERACK) | | | |
| Albrecht | -45.270 (0.001) | 1.071 (0.054) | 0.007 (0.025) |
| Bruner | 1.014 (0.690) | -33.825 (-0.001) | -0.628*** (-2.895) |
| Bünger | 26.744 (0.000) | 22.435 (0.000) | |
| Diester | -22.824 (0.000) | -25.482 (0.000) | -0.372 (-0.987) |
| Doorberg | 3.199 (1.399) | 8.503 (0.000) | 0.212 (0.352) |
| Driver | 4.226** (2.411) | 3.907 (0.000) | 0.077 (0.126) |
| Engert | -0.037 (-0.027) | -11.145** (-2.054) | 0.129 (0.701) |
| Greulich | 2.730 (1.608) | -58.985 (0.000) | -0.134 (-0.406) |
| Hartmann | 1.240 (0.947) | -42.688 (-0.003) | -0.200 (-1.118) |
| Jenne | 2.482* (1.86) | -46.243 (-0.002) | -0.176 (-0.886) |
| Köhler | 3.242* (1.841) | -31.195 (0.000) | -0.266 (-0.712) |
| Lämmle | 1.101 (0.851) | -24.407** (-2.190) | -0.203 (-1.100) |
| Linz | 27.545 (0.000) | 13.344 (0.000) | |
| Löhmann | -23.451 (0.000) | -9.101 (0.000) | -0.403 (-0.849) |
| Mengelkoch | 27.129 (0.000) | 45.024 (0.000) | |
| Merten | 4.578** (2.448) | -31.155 (0.000) | 0.220 (0.352) |
| Müller | 3.377* (1.706) | -11.798 (0.000) | -0.630 (-1.033) |
| Rehn | 0.034 (0.020) | -42.182 (0.000) | -0.657*** (-2.797) |
| Rheinisch | 3.295** (2.193) | -20.663 (0.000) | -0.605 (-1.597) |
| Schaad | 1.242 (0.922) | -15.670** (-1.969) | -0.161 (-0.828) |

Table 8 (Continued)

| | MULTINOMIAL LOGIT RESULTS FOR SENTENCE RECEIVED | | (3) DETERMINANTS OF SENTENCE LENGTH IN PENITENTIARY |
|-------------|---|-----------------------|---|
| | (1) PRISON | (2) DEATH | |
| Schauwecker | 1.798 (1.388) | -14.925** (-2.423) | -0.197 (-1.087) |
| Springmann | -4.227 (0.000) | -58.154 (0.000) | 0.380 (0.724) |
| Constant | -17.662 (0.000) | -10.964 (-0.551) | 3.728*** (7.136) |
| N | 1,114 | 1,114 | 816 |

***Significance at the 1% level.

**Significance at the 5% level.

*Significance at the 10% level.

NOTES Values presented are estimated coefficients. The reference case for multinomial logit is being sentenced to a penitentiary. The dependent variable for sentence length in a penitentiary is \ln (term in penitentiary in months). Z-scores (for the multinomial logit) and t -values (for the penitentiary-sentence-length regression) are given in parenthesis.

Membership in a nonpolitical and nonreligious organization like the Red Cross or a right-wing militia or veteran's group, like the Freikorps or Stahlhelm, increased the chance of being sentenced to prison.

Defendants who cooperated with authorities usually earned some degree of leniency, increasing the prospect of a prison sentence, relative to being sentenced to a penitentiary. The cooperation of a co-defendant also reduced the likelihood of a death sentence, again relative to being sentenced to a penitentiary. This finding suggests that judges during the pre-war period may have been reluctant to give death sentences purely on the basis of suspect testimony from co-defendants.

Various types of offense also had a significant effect on the punishment imposed. Relative to committing treason alone (the reference case), defendants who committed only major high treason, only minor high treason, or a combination of offenses were more likely to be sent to prison than to a penitentiary. This finding confirms that senior Nazi-era judges considered treason—the collaboration with a foreign power to undermine the state—as the most serious offense. Moreover, convictions that involved violent resistance decreased the prospect of a prison sentence and increased

the prospect of receiving the death penalty, relative to the penitentiary option. Those with previous minor political convictions and previous nonpolitical convictions were less likely (but only at the 10 percent level of significance) to receive a death sentence, compared to the reference case of no prior convictions, relative to those sentenced to a penitentiary.

Columns (1) and (2) also provide evidence of judge-specific differences in sentencing. Relative to Thierack, several judges (Marcell Driver, Ernst Jenne, Alfred Köhler, Johannes Merten, Hans Müller, and Fritz Rheinisch) were more likely to sentence defendants to prison, the lesser penalty, than to the penitentiary. Furthermore, relative to Thierack, Judges Karl Engert, Paul Lämmle, Friedrich Schaad, and Erich Schauwecker were more likely to sentence defendants to death than to the penitentiary.

Column (3) of Table 8 reveals what determined the lengths of penitentiary terms. Certain personal characteristics of defendants were significant. Age exhibited a nonlinear inverted U-relationship with sentence length, reaching a maximum at forty years of age. Relative to those whose education did not extend beyond primary school, defendants with a university education typically received 18.1 percent longer sentences. Regarding the variables depicting political background and resistance activities, left-wing political leaders received 31 percent longer sentences, whereas former members of groups previously dedicated to protecting the Weimar Republic received 20.2 percent shorter sentences.

Defendants who cooperated received sentences reduced by 19.4 percent. Defendants who committed minor high treason received sentences 12.2 percent lighter than did those who committed treason. If the offense involved violent resistance, the sentence was 51.9 percent higher. Defendants with a previous minor political conviction had the length of their sentences increased by 17.1 percent relative to those without any prior convictions. There was also some variation in sentencing between judges; Wilhelm Bruner and Fritz Rehn imposed lighter sentences than did Thierack, the reference point.

From the time of the *Machtergreifung* (seizure of power), the Nazi regime used the Supreme Court and then the People's Court as means to facilitate and expedite the prosecution and elimination of its political opponents. To that end, the new Nazi leadership

of the pre-war years, ever keen to appropriate for itself the legitimacy of Germany's inherited legal traditions and confident of its ability to control the central institutions of society, was willing to give its judges significant latitude to act. By all accounts, this trust was not misplaced. Econometric analysis of sentencing patterns in this period confirms that on the whole, the performances of the judges conformed to Nazi expectations.

The existence of this degree of judicial freedom, however, injected a distinct element of heterogeneity into the sentencing process. Not all sources of political opposition, for example, received equal treatment from the pre-war Nazi court system; the courts operated in a more nuanced manner, targeting more ruthlessly those resisters whom judges believed to pose the greatest threat. From the regime's perspective, the greatest and most imminent threat of the immediate post-Weimar years clearly lay, as previous literature about resistance and the People's Court has identified, on the left, in particular the two mass left-wing parties of the period, the KPD and the SPD. In the 1930s, these were the political movements best positioned to challenge Nazi supremacy. They were also the only parties in our sample to have their members executed. Our estimations, moreover, reveal that those holding positions of authority in a left-wing party attracted the most attention from the courts. KPD cadres, who constituted the vast majority of these left-wing leaders, were among the most likely to receive death sentences or the longest terms in penitentiaries, the two harshest treatments. Around 12 percent of KPD cadres, for example, were executed; the overall execution rate for defendants in our sample was slightly more than 2 percent. Not surprisingly, KPD leaders were also less likely to receive the least severe penalty of a prison sentence.

Rank and file members of the KPD did not fare well either. Although, statistically speaking, they were not as openly targeted for treatment as harsh as that suffered by their leaders, normal members of the KPD nonetheless faced a disproportionate chance of capital punishment. As Table 6 shows, three out of every four defendants sentenced to death in our sample belonged to the KPD. By contrast, affiliates of smaller left-wing or Catholic organizations, as well as right-wing and national-conservative groups, which were lesser threats to the state, were more likely to receive the most lenient sentence, a term in a normal state prison. Defendants with records of involvement in right-wing militias and associations with

affinities to National Socialism—particularly the Freikorps and Stahlhelm—were generally earmarked for lighter punishment.²⁰

In a similar manner, judges appear to have taken the seriousness of threats posed by the act of resistance into consideration, distinguishing between major and minor forms of treason and high treason. Compared with entering into a conspiracy to commit high treason or aiding and abetting, the more serious charges of assisting foreign powers, trafficking in illegal writings, committing crimes abroad, separatism, and subversion of the armed forces carried a greater likelihood of execution or a longer term in a penitentiary. Moreover, those who engaged, or sought to engage, in violence against the regime were also more harshly punished than those whose resistance took a nonviolent form.

Nazi-era judges, however, were not just sensitive to the level of political threat posed by defendants. Indeed, in spite of the highly political nature of the trials over which they presided, judges also routinely took personal factors into consideration. Younger and older resisters, the better educated, those active in nonpolitical and nonreligious community organizations, those who were married, and those who showed “good character” by cooperating with the authorities were all less likely to face the guillotine (the Nazis’ preferred means of execution) or long stints in a penitentiary. By the same token, judges, no doubt reflecting prevailing Nazi prejudices, tended to view those of partial Jewish ancestry less favorably.

Our findings lend weight to Marxen, Schlüter, and others whose work has advanced our once-crude understanding of the pre-war People’s Court as a mere blood tribunal and venue for mock trials. Although the People’s Court dutifully enacted the will of the Nazi state from its inception, its decisions also reveal that, at least during this pre-war interval, its sentencing was neither indiscriminate nor a *complete* farce. The Court still retained a semblance of legal procedure. Most importantly, the new econometric evidence presented in this article suggests that even in sentencing political prisoners, individual People’s Court and Supreme Court

20 For the targeting of communist resistance, see, for example, Wolfgang Benz, *Der deutsche Widerstand gegen Hitler* (Munich, 2014), 18–22; Eric Weitz, *Creating German Communism, 1890–1990: From Popular Protests to Socialist State* (Princeton, 1997), 6; Frank McDonough, *Opposition and Resistance in Nazi Germany* (New York, 2001), 5–11; Wagner, *Der Volksgerichtshof*, 107; for an overview of the major political parties in the 1930s, Weitz, *Weimar Germany: Promise and Tragedy* (Princeton, 2009), 81–127.

judges, like judges in democratic countries, took a range of mitigating personal considerations into account. Even after controlling for the political backgrounds, resistance activities, criminal histories, and personal characteristics of defendants, this analysis detects significant statistical differences between the sentencing patterns of individual judges; some were more lenient than others.²¹

At least in this period, no standard set of sentences for high treason or treason is in evidence; there were no guidelines that had to be strictly followed, regardless of context. Several of the judges often appear to have taken the opportunity to show relative leniency. Unlike in contemporary U.S. courts, where, as some have argued, the political composition of the bench affects the use of discretionary tools, political differentiation between the judges in the People's Court and in the Supreme Court was extremely narrow. All of these judges were deeply nationalistic and, if not members of the Nazi Party, they certainly sympathized with much of its ideological content. Jenne, for example, who sentenced more than 5 percent of all defendants in our sample and who had been a member of the Nazi Party since December 1930, was *ceteris paribus* more likely to deliver a prison sentence to a political prisoner (as opposed to hard labor in a penitentiary or death) than was Thierack, the longest-serving president of the People's Court. Likewise, Bruner, the first vice-president of the People's Court, gave penitentiary sentences that were, on average, 63 percent shorter. At least until the outbreak of war, judges did not mindlessly implement prearranged sentences. Nor did their decisions always meet with political approval. The Nazis' empowerment of its judges during the pre-war years had its limits; even in the most political of trials, it was not yet the complete, predetermined façade often assumed.²²

The People's Court is usually associated with notions of summary justice, execution, and the total denigration of civil and legal rights. It is difficult to disassociate the image of the ranting, merciless Freisler, who assumed the presidency of the People's Court in August 1942, from the less theatrical and bloodthirsty origins of the court. However, even though from its beginnings in 1934, the People's Court represented the political will of the state,

21 Marxen, *Das Volk*, 34–87; Schlüter, *Die Urteilspraxis*, 140–55; Gruchmann, *Justiz im Dritten Reich*, 956–968.

22 Sweet, "Volksgerichtshof," 317.

in comparison with the war years, as recent literature shows, the pre-war People's Court remained relatively moderate. Death sentences were rare, and certain vestiges of legal integrity remained—which is not to imply that this court at any time was known for its impartiality, fairness, or justice. But as the war progressed, inclining the Nazi regime to further brutality, its rulers prevailed on the nation's legal system to deliver ever-more ruthless and expeditious forms of summary justice to their enemies. Fatefully, the People's Court and its judges, especially under the presidency of Freisler, proved themselves only too willing to adapt and oblige.²³

As this article demonstrates, the relationship between authoritarian rule and judicial discretion is neither straightforward nor necessarily antagonistic. It is an association fraught with ambiguity, uncertainty, and tension. The experience of the People's Court in pre-war Nazi Germany, however, confirms that a *modus vivendi*, even if tenuous and short-lived, is at least possible. As long as it is perceived as enhancing the legal system and the legitimacy of the regime and does not become a vehicle for opposition, a modicum of judicial autonomy can sit, at least for a while, side by side with dictatorship.

23 This increased severity of the People's Court is neatly captured by its growing use of the death penalty, especially from 1942 onward. In 1941, only 8.8% of those whom it convicted received a death sentence; by 1944, that share had risen to 54%. See Schlüter, *Urteilpraxis*, 38. For a comprehensive account of the growing radicalization of Nazi terror within the legal system more generally, see Wachsmann, *Hitler's Prisons*.