

The Life and Times of a Local Court Judge in Berlin

By Stephen Ross Levitt*

A. Introduction

In the study of comparative law and legal systems, a problem of focus and perspective presents itself.¹ Comparative scholars often examine the “important” cases decided by appellate courts of foreign nations and the writings of their most important scholars.² In Anglo-American nations, jurists are taught in law school, and then in the practice of law to look for authoritative texts, which are often the words of appellate court judges who set precedent.³ The results of these searches for the authoritative, both in national as well as comparative legal research, may be that scholars do not give enough attention to the average and the pedestrian, but rather focus upon the exceptional, the appellate, the influential and the newsworthy.

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¹ This problem of perspective and focus is found in the discipline of history as well. Social historians focus much more of their attention on the lot of the average person. See Harold Perkin, *Social History*, in THE VARIETIES OF HISTORY FROM VOLTAIRE TO THE PRESENT 430,455 (Fritz Stern ed., 1973).

² See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1997). See also Nigel Foster, GERMAN LAW & LEGAL SYSTEM xli-xlii (1993). In Foster’s book of 148 cases, 60 of these cases come from the Federal Constitutional Court and 54 from the Federal Supreme Court (both civil and criminal). Cf. Inga Markovits, *Justice in Luritz*, 50 AM. J. COMP. L. 819, 820 (2002). Inga Markovits indeed looks at the *Kreisgericht* (District Court) of East Germany in her article. She writes: “I want to know what happened at the bottom. Central decisions must be carried out by local people, and there is no reason to believe that the famous gap between law on the books and in real life did not also exist under Socialism. What did socialist justice and injustice mean to those who experienced it first-hand?” See also SYBILL BEDFORD, THE FACES OF JUSTICE (1961).

³ See Steven B. Dow, *There’s Madness In The Method: A Commentary On Law, Statistics, and the Nature of Legal Education*, 57 OKLA. L. REV. 579, 591 (2004).

For comparative law scholars and others interested in the average man and his travails in criminal court, retired Judge Rüdiger Warnstädt opened an important door in 2003. In that year, he published *Recht So (Quite Right)*,⁴ a book containing a selection of eighty decisions he penned while a judge at the Moabit Local Court in central Berlin.⁵ This book of judgments, which is the first of its kind in Germany,⁶ provides for comparative lawyers important insights into the workings and decisions of the *Amtsgerichte* (Local Courts) in criminal matters. When one considers the fact that in the year 2006, the Local Courts resolved 849,745 criminal cases in the first instance and the *Landgerichte* (Regional Courts) only 14,476, the importance of the *Amtsgerichte* as the true work horses of the German legal system can be better appreciated.⁷ At this lowest level of the court hierarchy one sees law as it is, not as it is postulated to be. It is at the level of the Local Courts that most of the interactions between the citizens and the state actually occur.

In relation to methodology one might ask the question, how representative is Warnstädt in regard to the eight thousand judges who sit on Local Courts in Germany today? In some ways, it has to be admitted he is not typical. Rüdiger Warnstädt is a unique, original⁸ and colorful (one might be tempted to say idiosyncratic) character in

⁴ RÜDIGER WARNSTÄDT, *RECHT SO*, 80 ORIGINALE STRAFURTEILE VON AMTSRICHTER RÜDIGER WARNSTÄDT AUS DEM KRIMINALGERICHT MOABIT (2003) (*QUITE RIGHT*, 80 ORIGINAL CRIMINAL JUDGMENTS BY LOCAL COURT JUDGE RÜDIGER WARNSTÄDT FROM THE CRIMINAL COURT OF MOABIT). The book has been published by Das Neue Berlin Verlagsgesellschaft mbH in Berlin in 2003. I purchased my copy of this book at the Parlaments Buchhandlung in Berlin (www.parlamentsbuchhandlung.de) (last visited on January 26, 2009).

⁵ RÜDIGER WARNSTÄDT, *HERR RICHTER, WAS SPRICHT ER?* (MR. JUDGE, WHAT DOES HE HAVE TO SAY?) 71 (2004). Judge Warnstädt writes that there are twelve *Amtsgerichte* (Local Courts) in Berlin. Eleven of them have directors and one has a president. The President of the *Amtsgericht Tiergarten*, where Warnstädt sat and delivered his judgments, is the president of all twelve local courts. In Germany there are four levels of courts: *Amtsgericht* (Local Court), *Landgericht* (Regional Court), *Oberlandesgericht* (Regional Court of Appeal), and *Bundesgerichtshof* (Federal Court of Appeal). The Judicature Act (*Gerichtsverfassungsgesetz*) sets out the names of these four courts in Article 12. It sets out the jurisdiction of the Local Courts as well as the maximum penalty they may impose in Article 24. See http://bundesrecht.juris.de/gvg/_24.html (last visited January 31, 2009).

⁶ WARNSTÄDT, *supra* note 4, at 9. Warnstädt writes, "I am not claiming too much when I say that for a Local Court judge to publish his decisions is somewhat new."

⁷ The German Office of Statistics publishes information concerning the number of cases heard by different courts in each of the sixteen states and terminated. I understand the term, terminated, to mean resolved or completed. <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Statistics/Rechtspflege/Gerichtsverfahren/Tabellen/Content75/Gerichtsverfahren,templateId=renderPrint.psml> (last visited on January, 31, 2009).

⁸ WARNSTÄDT, *supra* note 5, at 9. When the old-time wooden chairs at the Moabit Court were replaced with plastic seats, Warnstädt kept one wooden chair for his office and one for his courtroom. He considered the new plastic chairs were not only gray, but terrible.

the Berlin legal establishment. A Berlin newspaper columnist, Renate Rauch, says that when he was on the bench, “Warnstädt [had] the biggest public following.”⁹ In its March 8, 2003 edition, *Der Tagespiegel* wrote that “[T]he judge is regarded as the once uncrowned king of Moabit. The public came in droves to his courtroom; his judgments made the rounds amongst his colleagues.”¹⁰ In 2007, the well-known German magazine *Geo* published pictures of him, his former courtroom and the court building. The authors of the article asked him to expound upon the meaning of justice.¹¹ Warnstädt has been interviewed on television numerous times.¹² Even in retirement, after more than twenty-three years on the bench, he does not hide from the limelight but rather reads passages from his books at libraries, courts, bookstores and theaters.¹³

Yet, when one steps back and looks at Warnstädt’s sentencing practices and many of his ideas about law and justice in society, he is probably representative in many ways. His books reveal much about the daily workings of Local Courts and the defendants who come before these courts, even if his judgments and descriptions are more colorfully written than what might be typical. Warnstädt is also a good standard bearer for the first generation of civil servants who came to power in Germany untainted by the National Socialist past and who are now reaching retirement age.¹⁴

⁹ WARNSTÄDT, *supra* note 4, at 5.

¹⁰ *Als ungekrönter König abgedankt- als Jungliterat auferstanden*, DER TAGESPIEGEL, August 3, 2003. See also Rebecca Niazi & Caroline Labusch, *Pointen vor Gericht*, ZITTY, September 3, 2003 at 32. They write, “At Warnstädt’s [courtroom], it was always full, even if he had no sensational trials.” See also *Geschichten aus dem Moabiter Amtsgericht*, BERLINER ZEITUNG, January 30, 2006 at 29. “[He] is the most famous local court judge in the city.”

¹¹ Jutta Voigt, Sibylle Bergemann & Anne Schönharting, *Der gute Mensch von Moabit (The Good Man of Moabit)*, GEO, October, 2007 at 78, 80. A memorable quote from this interview is the following: “In the courtroom I could do nothing about the injustices of the world...but I could see to it that each [person] in front of my court would be treated fairly, not as a file, but rather as a human being. The further down one is [in society], the more he needs recognition as an individual.”

¹² RÜDIGER WARNSTÄDT IM PORTRÄT (MDR television broadcast November 7, 2007). See also

<http://www.mdr.de/riverboat/archiv/4987478.html> (last visited January 25, 2009).

¹³ His upcoming engagements are listed here: <http://www.ruedigerwarnstaedt.de/termineindex.html> (last visited January 31, 2009). It is indeed through Warnstädt’s notoriety and writings that I first got to learn about his work, life story, career and views during my sabbatical semester spent in Berlin during the summer and fall of 2003. In subsequent summers, 2004, 2005, 2006, 2007 and 2008, I traveled back to Berlin where we spoke on many occasions. Each summer I rented an apartment in Moabit.

¹⁴ Warnstädt was born in 1938. At the end of the war, he was seven years old, and too young to be exposed for any length of time to National Socialist propaganda at school. He is neither victim nor perpetrator. However, during the 1950s, some judges, who had served during the Third Reich, remained on the bench. These would be persons “tainted” by the National Socialist past. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 16 (1976). “It has been estimated that of the eleven thousand judges in the

His outspokenness permits important criticisms and concerns to come to the fore, which jurists more concerned with career and advancement might shy away from making. Through an examination of Warnstädt's writings, in addition to associated literature,¹⁵ one gains not only a handle on the *Amtsgericht* and its criminal cases, but one also learns about this judge's career and life path as well as something of the sociology of his home city, Berlin.

B. All about Rüdiger

Who then is Rüdiger Warnstädt, this well-known judge who sat for so long at the court in Moabit? He is a native of Berlin and a proud Prussian.¹⁶ Born in 1938, he was for two years with his mother and brother in German-occupied Poland, in the town of Strzygy after their family apartment in Berlin was destroyed during a bombing raid.¹⁷ He recounts that at that time everything was lost and there was no insurance money.¹⁸ When the Russian army moved into western Poland in the winter of 1945,

Bundesrepublik, five thousand were active in the courts under the Hitler regime." See also Hans-Ernst Böttcher, *The Role of the Judiciary in Germany*, 5 GERMAN LAW JOURNAL 1317, 1320 (2004), available at: <http://www.germanlawjournal.com/article.php?id=508>.

¹⁵ Another book has appeared recently that also deals with criminal cases before the Local Court at Moabit in Berlin. See RENATE RAUCH, *EINE LEICHE IM KELLER UND ANDERE GESCHICHTEN AUS DEM AMTSGERICHT* (2005). This book, written by a newspaper columnist, who covered the courts for a number of years, contains a compilation of forty-three reports, originally written about interesting cases for the Weekend Magazine of the *Berliner Zeitung*. An interesting historical view of the courts at Moabit during the Weimar period is found in the following two books, both published by Das Neue Berlin Verlagsgesellschaft mbH: See SLING, *DER FASSADENKLETTNER VOM "KAISERHOF"*, *BERLINER KRIMINALFÄLLE AUS DEN ZWANZIGER JAHREN* (Ruth Greuner ed., 1989); GABRIELE TERGIT, *WER SCHIEßT AUS LIEBE? GERICHTSREPORTAGEN* (Jens Brüning ed., 1999).

¹⁶ Interview with Judge Warnstädt in Berlin, Germany (May 26, 2005). Warnstädt explains that the German state of Prussia was dissolved after World War II in an act of retribution. However, Bavaria, which was no less implicated in the German catastrophe, was permitted to remain entirely intact after the war. Large companies moved out of a divided Berlin and Russian-occupied Prussia often to southern Germany. Warnstädt finds it ironic that Bavaria emerged after the war, occupation and reunification with great benefits, while Prussia was disbanded, divided and demonized. See also WARNSTÄDT, *supra* note 5, at 71. Warnstädt mentions that after the war Siemens went to Munich, AEG, the railway, and all the banks to Frankfurt am Main, the post office to Darmstadt, Lufthansa to Cologne, and the government to Bonn. One might look at the following historical account of Prussia: CHRISTOPHER CLARK, *IRON KINGDOM, THE RISE AND DOWNFALL OF PRUSSIA, 1600-1947* (2006).

¹⁷ WARNSTÄDT, *supra* note 5, at 75. Rüdiger writes about the fact that the family had to go to the airraid shelter because of heavy bombing. *Id.* at 76.

¹⁸ *Id.* at 77-78. Only a tea wagon and a radio were recovered from the house. Luckily, the Warnstäds were in Poland when their Berlin apartment was destroyed by bombs. Although the radio from Berlin arrived in Poland, it was useless in Strzygy because there was no electricity in the tiny village. Warnstädt writes that many of the Polish people from the area had been expelled or killed. He heard that there was a cellar in nearby Rypin where so many Polish people were executed that the blood was knee-high.

his family was forced to flee a second time.¹⁹ Like millions of other Germans escaping the Red Army,²⁰ the Warnstädt family traveled westward seeking refuge.²¹ They ended up on a relatively small island in the Baltic Sea called Poel, just off the coast of Mecklenburg between Rostock and Lübeck, near Wismar.²² This island, taken by two Canadians on May 2, 1945²³ and occupied by the Russians in July of 1945, provided the family with a place to reside. Due to the fact that Poel was largely rural and by the sea, food was readily available. Warnstädt tells that in Germany after the war hunger reigned in the large cities.²⁴

From 1945 through 1957, Rüdiger was at primary school²⁵ and high school²⁶ in the Russian zone of Germany, which became in 1949 the German Democratic Republic. After completing high school, Warnstädt hoped to go to university. He applied to the Humboldt University in Berlin and was given only a provisional acceptance. He was told that he should work for a year or two at a socialist enterprise and then the university would make a final admission decision based upon a social assessment of him from his place of employment.²⁷ Warnstädt did not want to play along with this game;²⁸ he did not want his academic future to be determined by a political assessment done by the director of a socialist enterprise. In 1957, four years before

¹⁹ *Id.* at 81-82.

²⁰ For a recent discussion in German about the flight of German civilians from the Russians see GUIDO KNOPP, *DIE GROßE FLUCHT: DAS SCHICKSAL DER VERTRIEBENEN* (2003).

²¹ WARNSTÄDT, *supra* note 5, at 81-84. "Suddenly one evening . . . Jaschu, the son of the local blacksmith, came to the house and said 'the soldiers are coming.'" The next morning, Jaschu took the Warnstädt family to the train to escape. Here the reader should note that it was a Polish citizen who came to the rescue of Rüdiger and his family.

²² *Id.* at 88. When the family was in Wismar, Warnstädt's mother remembered that a close friend of his aunt was a landowner and lived on the Island of Poel. Because the property of the aunt's friend was overcrowded with refugees already, the Warnstädt family moved in with a local fisherman's family.

²³ *Id.* at 89.

²⁴ Interview in Berlin with Judge Warnstädt (November 21, 2003).

²⁵ WARNSTÄDT, *supra* note 5, at 90-94. For five years, Rüdiger and his brother lived on Poel with his mother and attended school on the island. His father, who had returned from civil service in the Ukraine, worked on the mainland at a bank in Wismar. In 1950, the family moved to Wismar and Rüdiger attended the Gerhart Hauptmann School, which was overcrowded with refugee children.

²⁶ *Id.* at 114-115. Rüdiger went to the Goethe Oberschule (high school) in Bad Doberan. This was a boarding school. His mother died suddenly and he could not pay the fees. However, the director told him to stay and he was not obliged to bring in fees any longer.

²⁷ *Id.* at 128.

²⁸ *Id.* at 129.

the Berlin Wall would make travel impossible between the two halves of the city, Warnstädt took the “S-Bahn” (the suburban train) to the West Berlin office for education of the Federal Republic of Germany. He applied to study in the West.²⁹

Today, he says he left the German Democratic Republic and came to the Federal Republic in order to be able to study at university as this option might not have been open to him in East Germany without making political compromises.³⁰ He explains he chose to study law in the West because ideology does not play such a decisive role; in the Federal Republic of Germany, the judge is guaranteed independence to decide cases based only upon the law and his conscience.³¹ At nineteen years old, Warnstädt packed up his belongings for the third time, said goodbye to his seventy-eight-year-old father and crossed the border.³² Warnstädt proclaims, “I have been a refugee three times. Therefore, I understand and have sympathy with the plight of the foreigner and the dispossessed in German society.”³³ Judge Warnstädt has also experienced three regime types in his life: Fascism, Communism and Democracy. This makes him especially protective and appreciative of democratic freedoms.

After studying in Hamburg for two years, Rüdiger Warnstädt finally made his way back to his beloved home city of Berlin in 1959 to complete his law studies at the Free University.³⁴ In West Berlin, he completed the First State Examinations and spent three and one half years in the turbulent 1960s doing the required *Referendariat* (practical training) with the courts in order to obtain his call to the bar.³⁵ In 1968, he finished his law training by passing the Second State Examinations, and decided to take a position with the courts of West Berlin after working for an attorney for a short

²⁹ *Id.* at 129. At that time, East Germans who came to the “West” to study had to spend six months repeating the final year of high school.

³⁰ “I did not want to join in, so I left.” Interview in Berlin with Judge Warnstädt (July 26, 2004).

³¹ *Id.* at 149. “The eastern way of playing with justice was already at that time not for me.” Later he writes, “Had I been given the opportunity to study law in the German Democratic Republic in 1957, I would have refused.”

³² *Id.* at 130.

³³ Interview in Berlin with Judge Warnstädt (November 21, 2003).

³⁴ WARNSTÄDT, *supra* note 5, at 149.

³⁵ The significant components of Warnstädt’s training in the 1960s reflect the regime of education that is still largely in place today in each of the sixteen states. For a good discussion of German legal education see David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795 (1988); Haimo Schack, *Private Lawyers in Contemporary Society: Germany*, 25 CASE W. RES. J. INT’L L. 187, 190-192 (1993); Mary C. Szto, *Towards A Global Bar: A Look At China, Germany, England, And The United States*, 14 IND. INT’L & COMP. L. REV. 585 (2004).

period of time. As a *Gerichtsassessor* (probationary judge),³⁶ Warnstädt gained experience first in civil matters and later he worked at the *Wiedergutmachungskammer* (Court for Reparations) as well.³⁷ In the early 1970s, he was transferred to the State Prosecutor's Office. Warnstädt had five years' experience prosecuting cases. After a two-year stint working for the federal Ministry of Justice in Bonn,³⁸ he returned to Berlin and worked as the Press Officer for the Moabit Court. In 1978, Warnstädt became a Local Court Judge. He remained a judge at the Local Court in Moabit, a district of Berlin, for more than twenty-three years, and there he made his reputation.³⁹

C. The Court Building in Moabit

A few remarks need to be made at this point about Moabit and the Moabit Court complex where Warnstädt worked for so many years. Moabit is an area of central Berlin located just north of the Spree River and just west of the main government buildings such as the Bundestag and the federal Chancellery; today it is a part of the city district called *Mitte*.⁴⁰ The name Moabit most likely comes from the Huguenots. These Protestant refugees from France were permitted to settle in Berlin just north of the city boundaries by King Friedrich Wilhelm I at the end of the 17th and beginning of the 18th century. The Huguenots fashioned the name of their place of refuge from the reference to Moab in the Bible. Moab was the name of the last place along the journey of the Israelites after the exodus from Egypt before they reached the Promised Land.⁴¹

³⁶ WARNSTÄDT, *supra* note 5, at 166. As a probationary judge, one works for about five years as an assistant judge and a state prosecutor before being offered a life-time appointment.

³⁷ *Id.* at 167-168. Warnstädt found that the court awarding restitution and reparations to the victims of the Nazi regime, often haggled over every penny. Warnstädt said that he spent long hours with the question, "Where the stamp collection, which the German occupiers in the Government General of Poland had stolen, above all from Jewish Poles, had gone....Where the moving firm Schenker, on the orders of the German occupiers, had taken the furniture of the Greek Jews of Thessalonica, while the owners of the furniture had been sent by freight car to Auschwitz." Only if the property ended up on German soil could compensation be paid out. "I never found anyone who considered this regulation to be just."

³⁸ *Id.* at 197.

³⁹ He heard his first case in December 1978 and his last in October 2002.

⁴⁰ For a map of all 12 city districts see <http://www.berlin.de/rubrik/politik-und-verwaltung/bezirksaemter> (last visited February 1, 2009). For information about Berlin Mitte, see <http://www.berlin.de/ba-mitte/> (last visited February 1, 2009).

⁴¹ See BERLIN MITTE, DAS LEXIKON 424 (Hans-Jürgen Mende and Kurt Wernicke, eds., 2001). See also <http://www.luise-berlin.de/lexikon/mitte/m/Moabit.htm> (last visited January 25, 2007) Not available any longer due to cuts in government funding. See also <http://www.moabionline.de/12> (last visited January 29, 2009). But see Dr. Vera Bendt, *Warum heißt Moabit eigentlich Moabit?*, <http://bendt.org/pdf/Moabit-Texte%20und%20Notizen.pdf> (last visited January 31, 2009). Dr. Bendt suggests that the name may

The New Criminal Court building in Moabit today houses both a division of the Local and a division of the Regional Courts, and all criminal matters in the City of Berlin are decided here. The court building with its surrounding structures is one of the largest complexes of its kind in all of Germany, with almost two hundred judges working in the Local Court division alone.⁴² Built in 1906, this impressive Neo-baroque structure, considered one of the finest examples of architecture from the reign of Emperor Wilhelm II,⁴³ has survived almost intact throughout the course of the tumultuous twentieth century, avoiding even the bombs of World War II. When members of the public enter through the main portal, they are greeted by a twenty-nine meter high vestibule containing an impressive and ornate staircase.⁴⁴ In 1906, the government authorities had this structure built with its own power station for electricity as well as its own water supply and telephone network.⁴⁵ Even more interesting, right next door to the court is a large prison. Defendants who are incarcerated and awaiting trial can be led through a series of passages directly from prison to the various courtrooms without appearing in public.⁴⁶

actually be connected with Protestants who emigrated from the principality of Orange in 1704 as a result of the War of the Spanish Succession, rather than the first group of Protestants, the Huguenots who fled after the Edict of Nantes was revoked in 1685. There is no doubt that the Protestants who settled Moabit planted Mulberry trees, hoping to create in Prussia a silk industry. Ultimately, these plans were not highly successful. The soil was too sandy and too marsh-like. Dr. Bendt suggests that when the silk industry failed to thrive, the Protestants themselves or the King of Prussia or one of his officials used the name, "Moabit," not to signify a refuge just short of the Promised Land, but an area of agricultural wasteland.

⁴² Norbert Haase & Hans-Michael Borgas, *Bau- und andere Geschichten aus dem Kriminalgericht Moabit (eine Führung durch das "Neue" Kriminalgericht)* in DAS NEUE KRIMINALGERICHT IN MOABIT, FESTSCHRIFT ZUM 100. GEBURTSTAG AM 17. APRIL 2006 11 (Alois Wosnitzka ed., 2006) [Hereinafter: DAS NEUE KRIMINALGERICHT]. Arnd Bödeker, *Hätten Sie gedacht . . . -Das Kriminalgericht Moabit in Zahlen-* in DAS NEUE KRIMINALGERICHT at 50. Bödeker indicates that in 2005 there were 194 judges sitting in the criminal division, and of these 194 judges, 74 were women. It might help Anglo-American readers to know that Judge Alois Wosnitzka is currently the President of the Tiergarten Local Court and the book mentioned above is an anthology containing articles published in honor of the one-hundredth anniversary of the opening of the New Criminal Court building. The thirteen articles deal with the construction of the court, the history of the court, famous trials and even some current issues.

⁴³ See the Berlin City Government website concerning monuments and go to object number: 09050355 http://www.stadtentwicklung.berlin.de/denkmal/liste_karte_datenbank/de/denkmaldatenbank/index.shtml (last visited January 26, 2009) One can find wonderful photos of the court at the following address: <http://www.berlin.de/sen/justiz/gerichte/ag/tierg/lageplan.html#%20Lageplan> (last visited Feb. 1, 2009).

⁴⁴ Haase & Borgas, *supra* note 42, at 12.

⁴⁵ *Id.* at 16. Haase and Borgas write as well that some mean-spirited persons sometimes phone court offices and ask whether the telephone system from 1906 is still being used.

⁴⁶ *Id.* at 18.

The courts of Moabit have been the site of great historical trials of both famous and infamous defendants. In the period of Kaiser Wilhelm II and the Weimar Republic, trials involved Wilhelm Voigt,⁴⁷ Philipp Prince of Eulenburg,⁴⁸ the soldiers indicted for the execution of Rosa Luxemburg⁴⁹ and the artist, George Grosz.⁵⁰ During the period of the Third Reich, the most notorious court, the People's Court was not located in Moabit. As well, the Reich Military Court was located at Witzleben Strasse 4-10 in the district of Charlottenburg.⁵¹ Nonetheless, the Moabit courts and prisons have some sad connections with the darkest period of German history. Almost immediately after the National Socialists came to power, most Jewish judges lost their posts and Jewish attorneys lost their rights to practice.⁵² On three days of the week, another of the extraordinary courts created by the Nazis, the Special Court, held its hearings in the Moabit courtrooms.⁵³ Many famous political prisoners passed through the Moabit prisons pending trial or further investigations.⁵⁴ One entire wing of the prison

⁴⁷ Georg Schertz, *100 Jahre Prozesse in Moabit auch ein Spiegel ihrer Zeit*, in *DAS NEUE KRIMINALGERICHT*, *supra* note 42, at 30. For more information about this trial and its significance see Benjamin Carter Hett, *The Captain of Köpenick and the transformation of German Criminal Justice, 1891-1914*, 36 *CENTRAL EUROPEAN HISTORY* 1 (2003).

⁴⁸ Schertz, *supra* note 47, at 30.

⁴⁹ *Id.* at 31.

⁵⁰ *Id.* at 34. Also see HEINRICH HANNOVER & ELISABETH HANNOVER-DRÜCK, *POLITISCHE JUSTIZ, 1918-1933*, 250 (1987). In this case that ultimately was appealed to the Reich Supreme Court the state charged the artist George Grosz with blasphemous libel for painting three pictures, one of which portrayed Christ with a gas mask.

⁵¹ NORBERT HAASE, *DAS REICHSKRIEGSGERICHT UND DER WIDERSTAND GEGEN DIE NATIONALSOZIALISTISCHE HERRSCHAFT* 9 (1993).

⁵² Rudolf Wassermann writes that in Berlin SA men stormed the *Kammergericht* (Court of Appeal) in Kleistpark at the end of March 1933 and assaulted a judge named Friedrich Nothmann. As well, it was reported that a Nazi crowd stormed the courts at Moabit on March 31, 1933 demanding the immediate removal of Jewish judges. RUDOLF WASSERMANN, *KAMMERGERICHT SOLL BLEIBEN: EIN GANG DURCH DIE GESCHICHTE DES BERÜHMTESTEN DEUTSCHEN GERICHTS (THE COURT OF APPEAL SHALL REMAIN: A WALK THROUGH THE HISTORY OF THE MOST FAMOUS OF GERMAN COURTS)* 109, 110 (2004). See also RICHARD J. EVANS, *THE COMING OF THE THIRD REICH*, 432,437 (2003) (Professor Evans mentions attacks on Jewish judges and attorneys in courthouses as well as their dismissal from practice.)

⁵³ *Id.* at 130. Some of these trials from the 1930s are described in English. See EDITH ROPER & CLARA LEISER, *SKELETON OF JUSTICE* (1941).

⁵⁴ Pamela Pabst, *Das Königliche Untersuchungsgefängnis im Stadtteile Moabit in DAS NEUE KRIMINALGERICHT*, *supra* note 42, at 177-178. Some of these well-known political prisoners of the Nazi regime held at Moabit included Ernst Thälmann, (head of the Communist Party), Hermann Müller (former chancellor of Germany) and Marinus van der Lubbe (charged with setting fire to the Reichstag).

complex in Moabit was used for holding defendants accused of involvement with the July 20, 1944 plot against Hitler,⁵⁵ recently retold in the film, *Valkyrie*.⁵⁶

After the end of the Hitler regime, the British occupation authorities used some of the courtrooms for de-Nazification hearings.⁵⁷ Other rooms functioned again as regular courts in a *Rechtstaat* (society bound by the rule of law).⁵⁸ In the 1960s, Hans-Joachim Rehse, a former judge of the notorious People's Court of the Nazi era was put on trial.⁵⁹ Other famous trials from the period of a divided Germany involved the six defendants in the Lorenz/Drenkmann trial,⁶⁰ and the five defendants in the La Belle Disco Bombing trial.⁶¹ After reunification, a number of personalities from the East German regime have been brought to trial at the Moabit courts including: Erich

⁵⁵ ALBRECHT HAUSHOFER, MOABIT SONNETS 181 (M.D. Herter Norton trans., 1978); Arvid Brodersen, Epilogue to ALBRECHT HAUSHOFER, MOABIT SONNETS 165, 176 (M.D. Herter Norton trans., 1978). Albert Haushofer wrote the beautiful Moabit Sonnets while imprisoned from December 1944 until his extrajudicial execution on April 23, 1945, barely one week before Soviet troops reached the Reichstag. As a word of explanation, it must be remembered that the JVA Moabit (*Justizvollzugsanstalt*) (correctional facility) comprised a number of buildings, which officials administered as one unit. The oldest building called the *Zellengefängnis* (a prison built with single person cells) located at Lehrter Strasse 1-5, was opened in 1849. In 1906, a new prison was added when the new court was built. The distance between the old prison at Lehrter Strasse 1-5 and the new prison on Alt-Moabit Strasse was about one kilometer. During the Third Reich, parts of the old prison, the *Zellengefängnis*, were used by the army and/or the Gestapo for housing political prisoners. See <http://www.berlin.de/sen/justiz/justizvollzug/moabit/historie.html> (last visited February 1, 2009). The Berlin city officials had the *Zellengefängnis* torn down in the 1950s. Recently, the land on which the old prison sat has been converted to a park honoring the memory of the political prisoners who passed through the jail, in particular Albrecht Haushofer. For visitors to Berlin today, the Moabit Prison Memorial Park is located only one minute's walk away from the new and quite impressive Main Train Station. See <http://www.moabitonline.de/600> (last visited February 1, 2009).

⁵⁶ VALKYRIE (United Artists 2008). See also <http://valkyrie.unitedartists.com> (last visited February 1, 2009).

⁵⁷ KARSTEN STROSCHEN, HERBERT SPÄTH & PETRA KLEIN, TIERGARTEN MAI 45: ZUSAMMENBRUCH, BEFREIUNG, WIEDERAUFBAU 35 (1999).

⁵⁸ Schertz, *supra* note 47, at 39. Georg Schertz tells us that this occurred in October 1945 and that visitors and court officials sat in winter coats by candle light. Many of the windows were boarded up.

⁵⁹ *Id.* at 40. In 1967, the state prosecutor charged Rehse, who had been an associate judge on the notorious People's Court during the Nazi period, with aiding and abetting murder in three cases and aiding and abetting attempted murder in four cases.

⁶⁰ *Id.* at 42. This trial lasted two years and twenty-one defense attorneys were involved. Drenkman had been killed in his apartment by the Red Army Faction. Terrorists also kidnapped Lorenz, who had been head of the Christian Democratic Party in Berlin.

⁶¹ *Id.* at 18. See also *Five Go on Trial in Berlin over 1986 Bombing of Disco*, N.Y. TIMES, Nov. 19, 1997 at A5. See also Philipp Hoffmann, *Terror and Law: The sentencing of a terrorist bombing under the German Penal Code: The La Belle Trial*, 6 GERMAN LAW JOURNAL 667 (2005), available at: <http://www.germanlawjournal.com/article.php?id=582>. This trial lasted 281 days and the court called more than 170 witnesses.

Honecker, former Secretary General of the Socialist Unity Party, Heinz Kessler, former Minister of Defense and army general, and Erich Mielke, former Minister of State Security.⁶²

D. Courtroom Procedure

Warnstädt did not participate in the famous trials that occurred in the building. Instead he presided over many unreported trials involving the average person in the Local Court. In Germany, under the Civilian Legal system, courtroom procedure is very different from that of the Common Law.⁶³ The judge is given the written accusation⁶⁴ and the police files ahead of time and she reviews them. Using this information, she decides which witnesses will be called and what evidence will be presented in what order.⁶⁵ As well, it is primarily the responsibility of the presiding judge during the trial to question the defendant and witnesses.⁶⁶ When the judge's questions are finished, the attorney for the defendant and the state attorney may also pose questions.⁶⁷ Even the defendant has a right in Germany to pose questions to witnesses.⁶⁸ Because the court procedure is not bifurcated into guilt and sentencing phases, evidence

⁶² Schertz, *supra* note 47, at 45-46. The trial of Erich Mielke went on for 87 days. On October 26, 1993, he was not convicted for the crimes he committed as Minister for State Security in the German Democratic Republic, but rather for the murder of two policemen in August of 1931.

⁶³ See JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY 1* (1977); MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS 180-191* (1985); RUDOLF B. SCHLESINGER, HANS BAADE, MIRJAN DAMASKA & PETER E. HERZOG, *COMPARATIVE LAW 473-491* (5th ed. 1988).

⁶⁴ I have decided to use the more general term "written accusation" in this sentence. In the United States a "written accusation" might be a complaint, an information or an indictment depending on the circumstances, whether the charge is a felony or a misdemeanor, and whether or not a grand jury is involved. For a quick discussion of the history of the grand jury as well as the use of the information and the complaint at the state level, see Richard E. Shugrue, *The Grand Jury In Nebraska*, 33 CREIGHTON L. REV. 39, 39-40 (1999).

⁶⁵ GERHARD SCHÄFER & GÜNTHER M. SANDER, *DIE PRAXIS DES STRAFVERFAHRENS: AN HAND EINER AKTE 285-286* (6th edition 2000).

⁶⁶ See Volker F. Krey, *Speech: Characteristic Features of German Criminal Proceedings - An Alternative to the Criminal Procedure Law of the United States?*, 21 LOY. L.A. INT'L & COMP. L.J. 591, 603 (1999) See also DR. KLAUS HALLER & KLAUS CONZEN, *DAS STRAFVERFAHREN 153* (2003). See also LANGBEIN, *supra* note 60, at 164. Langbein has translated § 238 Section 1 of the Code of Criminal Procedure: "The presiding judge conducts the trial, examines the accused, and takes the evidence (Beweis)."

⁶⁷ HALLER & CONZEN, *supra* note 66, at 154.

⁶⁸ KARL EDMUND HEMMER & ACHIM WÜST, *STRAFPROZESSRECHT: DIE WESENTLICHEN GRUNDZÜGE, ABLAUF DES STRAFVERFAHRENS, RECHTSBEHELFE IM STRAFPROZESS 75* (6th edition, 2004). Hemmer publications summarize the law to help prepare students for the first and second state examinations. On page 75, reference is made to § 240 of the Code of Criminal Procedure. If there are lay judges sitting with the presiding judge, they too have a right to pose questions.

concerning the personality, circumstances (work, education, and family history) and character of the accused is adduced at trial.⁶⁹ At the end of the proceedings, the prosecutor may address the court concerning guilt and sentence; then the defendant's attorney also will have her turn to speak one last time to the court.⁷⁰ Finally, the defendant has the right to the last word; he is given the privilege to address the court one final time before it considers its verdict and possible sentence.⁷¹

When the main proceedings are completed, the court breaks for a recess.⁷² After this recess, the court reconvenes and the judge will read out a brief version of the decision of the court on guilt and sentence. Normally within five weeks, the judge will write and file with the court, whether the defendant is convicted or acquitted, a full judgment discussing the facts of the case and the application of the law.⁷³

A judge on the Local Court will often sit alone and conduct the trial alone.⁷⁴ However, depending on the severity of the charge, sometimes she is joined on the bench by two lay judges.⁷⁵ The two lay judges, persons representing the community at large without formal legal training, get to hear all of the evidence; however, they do not

⁶⁹ LANGBEIN, *supra* note 63, at 71-72.

⁷⁰ HALLER & CONZEN, *supra* note 66, at 154-155. Haller and Conzen state that the final statements are made pursuant to the requirements of § 258 of the Code of Criminal Procedure. As well, they note that if there is an attorney representing the victim, known as the *Nebenkläger* (additional private prosecutor or intervener), this person may address the court at the end of the proceedings as well.

⁷¹ *Id.* at 155. § 258, Section 2 of the Code of Criminal Procedure sets this out. See also SCHÄFER & SANDER, *supra* note 65, at 449.

⁷² SCHÄFER & SANDER, *supra* note 65, at 451. If the judge is sitting alone, she will have to decide the issue of guilt and sentence. If there is a penal panel consisting of two lay judges and one professional judge constituting the court (*Schöffengericht*), there will be a discussion and vote taken on the issues of guilt and sentence. Schäfer and Sander point out that the discussion concerning verdict and sentence is held in secret. The only person, aside from the judges, lay or professional, who may attend the discussion, is the *Referendarin* (legal apprentice), if she is being mentored by the presiding judge.

⁷³ PROF. DR. LUTZ MEYER-GÖRNER & DR. EKKEHARD APPL, DIE URTEILE IN STRAFSACHEN 5 (27th ed. 2002). § 275 Section 1 of the Code of Criminal Procedure sets out that the full written judgment must be filed five weeks after the main proceedings have been completed, unless the main proceedings lasted longer than three days.

⁷⁴ See Gerichtsverfassungsgesetz (GVG)(Court Organizational Statute) § 25.

⁷⁵ SCHÄFER & SANDER, *supra* note 65, at 6. There is a possibility under §29 Section 2 of the GVG for the State Attorney to request in certain criminal matters that a second judge be added to the *Schöffengericht*. This is called in German *Erweitertes Schöffengericht* and on this court one will find two professional judges and two lay judges. A good discussion concerning lay judges in German courts comes from Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972).

have access to the files.⁷⁶ During the proceedings, lay judges may ask the witnesses and defendant questions, should they wish to do so. During the recess after the main proceedings are finished, the lay judges will also get to vote on the outcome of the trial, helping to determine both the issues of guilt and sentence. The judgment incorporating the decision of the court, however, must be written and signed by the professional judge alone.⁷⁷

Although he followed all the procedural rules, Warnstädt's court was always a little different from the other courtrooms of the *Amtsgericht* in Berlin. His proceedings were more often attended by visitors because they tended to be more interesting and dramatic.⁷⁸ Warnstädt made it a point to make a connection with each of the defendants, and to engage in dialogue with them.⁷⁹ Some commentators said that his court was like opera.⁸⁰ This author suggests that his court cases involving disputes between neighbors, attacks on minorities or foreigners, thefts by foreigners, breaking and entry, violations of the immigration regulations, drunken and disorderly conduct, exhibitionism, and altercations among riders on the underground were not opera, but rather the theater of everyday life.⁸¹

⁷⁶ See HEMMER & WÜST, *supra* note 68, at 82-83. The files are restricted to the possession of professional judges. In fact, it constitutes an error according to § 261 of the Code of Criminal Procedure if any lay judge has access to the court's files. According to the principle of orality, all evidence, which will be considered when the judges arrive at a decision concerning guilt and sentence, must be adduced in open court during the main proceedings.

⁷⁷ MEYER-GÖßNER & APPL, *supra* note 73, at 804.

⁷⁸ WARNSTÄDT, *supra* note 5, at 248. Warnstädt explains that "much depends upon the judge." If he is not interested, then the case will not be interesting for everyone. However, if he is interested, then even the most brittle case will blossom. For an example of Warnstädt's ability to reach defendants in court, see *infra* note 79. See also *infra* note 81.

⁷⁹ *Id.* at 225, 226. In the case concerning a Russian woman who had married a German man and moved to Eastern Germany, who was accused of stealing a winter coat at Woolworths Department Store, the defendant did not want to speak at all. Judge Warnstädt got her attention and made her smile when he addressed her, not as Mrs. Schulz, her legal name, but instead according to her Russian name, Tamara Wladimirowna.

⁸⁰ WARNSTÄDT, *supra* note 4, at 5. Renate Rauch uses specifically this word in the introduction.

⁸¹ Voigt, Bergemann & Schönharting, *supra* note 11, at 83. The reader needs to know that Judge Warnstädt is a great lover of theater and opera. In fact, "from very early on the theater made him aware of the various kinds of people . . ." Warnstädt writes in his text also that "criminal proceedings and theater have much in common . . ." WARNSTÄDT, *supra* note 5, at 236.

E. The Style and Tenor of the Judgments

Before addressing some of the more interesting judgments in the book, one must register a word of caution. Warnstädt says that his judgments are special and they are indeed different from the standard fare in many ways. The prose, in German, is often deceptively simple and yet very beautiful. Warnstädt describes himself as a *Literat*,⁸² a man of letters. In the original German, one finds a rich subtext to the prose; sometimes this subtext provides sarcastic commentary on the law, legal system, or events in general. Sometimes, the subtext elaborates upon the underlying political or social conditions that facilitated or enabled the criminal act. As well, this interesting judge does not follow religiously the normal or typical structure and tenor of the standard decision of the Local Court in criminal matters.

To put this in context, one must understand that German judgments in criminal matters are highly structured affairs.⁸³ A number of sections of the Code of Criminal Procedure speak directly to what must be contained in the judgment and the order in which these statements must appear.⁸⁴ A decision that fails to follow the prescriptions of the Code of Criminal Procedure can be appealed and set aside. In addition to the explicit prescriptions of the Code of Criminal Procedure, there is a series of court enunciated errors that can be made in the writing or the construction of the judgment that can lead as well to the judgment being vacated.⁸⁵ On the first page of the introduction to a leading German text concerning the writing of judgments in criminal matters, one finds the statement that a significant part of a judge's labor in first instance matters is used in the crafting of judgments.⁸⁶

⁸² *Id.* at 8.

⁸³ LANGBEIN, *supra* note 63, at 56. "A German judgment is a highly stylized and impersonal document. There are elaborate judicial conventions (as well as statutory requirements: StPO §§ 260, 267, 275) about judgment writing. Law students, apprentices, and young judges spend years learning to master the techniques..." In the Langbein text one finds a full translation of a "highly stylized" 1959 case from the *Landgericht* (Regional Court) of Karlsruhe. *Id.* at 39-56.

⁸⁴ MEYER-GÖBNER & APPL, *supra* note 73, at 5. Professor Meyer-Goßner and Judge Appl also make reference to §§ 260, 267 and 275, as well as § 268 Section 1 of the *Strafprozeßordnung* (StPO) (Code of Criminal Procedure) concerning the content of judgments. A number of examples of judgments are found at the end of the text. An entire judgment from a Local Court, with a judge sitting alone following closely the typical style for the writing of opinions, is found on pages 270 to 274. An interesting judgment from a *Schöffengericht* concerning drug smuggling is found on pages 275 to 278.

⁸⁵ *Id.* at 5. "Statutory provisions are not exhaustive; they are supplemented in many ways through established judicial practices."

⁸⁶ *Id.* at 3.

Furthermore, the book warns that the author of a judgment will be very annoyed if the decision is later set aside on appeal for an error that could have been avoided.⁸⁷

According to the Code of Criminal Procedure as well as practice, all judgments must contain five sections. These are the heading or title, the operative part of the judgment, a list of applicable statutes, the statement of reasons for the decision and signature.⁸⁸ The operative part of the judgment is a short statement directly beneath the title concerning verdict and sentence. The statement of reasons for the decision is by far the longest section of the written judgment. Most judges divide this discussion of reasons or grounds into at least five subsections, using Roman numerals. These five subsections might be most easily described as answering, one by one, the following five questions: who is the defendant; what has he done; how does the court know this; what provisions of the criminal code has he violated; and what are the legal consequences that are to be imposed upon him and why.⁸⁹

Warnstädt's judgments all conform to the technical requirements in that each contains a title, an operative part, the enunciation of the applicable statutes, and a signature. What makes his judgments somewhat different is that the section concerning reasons for the decision, instead of being split into five distinct subsections, which is often the norm, is unified into one narrative whole. This narrative often paints a vivid picture of the parties, and describes clearly what happened to them. Then Warnstädt applies the law and explains how he arrives at his decision. He leaves no questions remaining as to his thinking about the situation of the parties in the case, the statutory regulations and what constitutes justice. For Warnstädt clear speaking and clear writing are reflections of clear thinking.⁹⁰

However, to provide complete disclosure, I must reveal that when the President of the Local Court of Berlin visited Warnstädt's court to conduct the standard five-year

⁸⁷ *Id.* at 3.

⁸⁸ SCHÄFER & SANDER, *supra* note 65, at 509. In German these are listed as: "*Urteilstkopf, Urteilsformel, Strafvorschriftenliste, Urteilsgründe, Unterschriften der Richter.*" A typical judgment from the *Amtsgericht* is found on pages 543 to 546.

⁸⁹ MARTIN SCHMEHL & WALTER VOLLMER, *DIE ASSESSORKLAUSUR IM STRAFPROZESS* 155-157, 162, 172, 175 (7th ed. 2003). In the Schmehl and Vollmer book, concerning writing the second state examinations in the field of criminal procedure, these questions are also reduced to single words: *persönliche Verhältnisse* (personal circumstances), *Sachverhaltsschilderung* (description of the facts of the case), *Beweiswürdigung* (evaluation of the evidence), *rechtliche Würdigung* (legal consideration), and *Strafzumessung* (assessment of penalty). See also MEYER-GÖBNER & APPL, *supra* note 73, at 81. The authors of this text name a sixth division of a judgment, the decision concerning court costs. The authors state that these "groups are to be distinguished strictly from one another."

⁹⁰ WARNSTÄDT, *supra* note 4, at 222.

evaluation,⁹¹ he said to Warnstädt upon taking his leave that Warnstädt did almost “. . . everything differently than he [was] used to.”⁹² Nonetheless, he had “. . . spent an interesting day.”⁹³ In the written certificate, the President wrote that Warnstädt’s judgments did not conform to the conventional mold; that on account of their colorfulness and insight, they had a style that was less juristic than journalistic.⁹⁴

Clearly, Warnstädt’s judgments do not follow the advice of Professor Dr. Lutz Meyer-Goßner and Dr. Ekkehard Appl concerning tenor of judgments.⁹⁵ This should give rise to some questions in the reader’s mind. How can this be and to what extent can Warnstädt be regarded as unique, even renegade? I posed these questions to Dr. Uwe Frommhold, presently a judge in Nuremberg-Fürth. He answered that judges in Germany certainly are bound by statutory law. However, case law or judicial statements and the pronouncements by leading authors in treatises or commentaries are not necessarily binding, but instead only guiding or instructing. Dr. Frommhold said further that Warnstädt, as a Local Court Judge, may not be so far from the norm. Following the practices of higher courts and learned scholars is important, if not critical, for those judges who want to be promoted. Some Local Court judges know that they will never be promoted and others do not even want to be promoted. “For these people,” Judge Frommhold states, “there is hardly a profession that is as free as being a Local Court judge.”⁹⁶

To illustrate the journalistic or literary qualities of Warnstädt’s decisions, consider the following lines that introduce the reasons for judgment in the case concerning the troubled defendant who had set fire to his own apartment:

The accused, who has had six children with various women, became surprised in the past year by the fact that he fell in love with a young man named Franz.

⁹¹ WARNSTÄDT, *supra* note 5, at 48. Warnstädt was actually on the bench for ten years before the court officials made the first evaluation that occurs normally after five years.

⁹² *Id.* at 50.

⁹³ *Id.* at 50.

⁹⁴ *Id.* at 50. See also MEYER-GOßNER & APPL, *supra* note 73, at 75, 80 concerning the standard tenor of a judgment. It is stated that judgments should not be amusing or satiric. As well, the criminal judgment should not be “drafted like a criminal novella.” The authors say that the reasons must be set out according to a “well thought-out plan” with clear development and divisions.

⁹⁵ Niazi & Labusch, *supra* note 10, at 32. The authors write that his judgments were “artistic pieces of literature” rather than “dry legalese.” See also *supra* text in note 94.

⁹⁶ Telephone interview with Dr. Uwe Frommhold, a judge at Nuremberg-Fürth, Germany (March 31, 2007). See also *infra* Section H herein of this article concerning “Anpassung and Advancement.”

When Franz in any event did not declare himself unconditionally for the defendant, the defendant fell into a [terrible] state of despair...⁹⁷

The reasons in judgment number 36 start with this vivid description:

The defendant, a member of one of the many different ethnic groups from the former Yugoslavia, has lived here for seven years with her three children dependent upon public assistance. [She] speaks no word of German, suffers from a kind of dwarfism, and is also a bit handicapped; her husband, the father of her children, is dead. To make the misfortune complete, she takes to stealing, so it appears, from time to time.⁹⁸

There are eighty wonderfully colorful and insightful decisions to be found in Warnstädt's collection entitled *Recht So*. Obviously, all eighty cannot be discussed, nor is this necessary. The next sections of this article, Parts F and G, will deal thematically with those cases that are the most interesting and illustrative of German law and society today. As well, the reader may look at a translation of three entire judgments in the appendix to this article.

F. Discussion of Key Cases

What would an American find interesting or surprising about these eighty cases? First and foremost, the punishments for the crimes seem *prima facie* surprisingly mild.⁹⁹ The defendants are often not sentenced to prison, but put on probation, and in the

⁹⁷ WARNSTÄDT, *supra* note 4, at 218. The defendant was convicted of arson and sentenced to one year's imprisonment because Warnstädt feared that in the defendant's current fragile condition, he might commit further criminal acts. *Id.* at 219. The reader needs to know that completed judgments are put in the court file and also sent to the defendant. They are not public. Therefore, the names in *Recht So* have been changed to protect the dignity of the defendants and comply with the *Datenschutz* (Protection of Data) legislation, both state and federal. As well, protection of personal information, and prohibitions against its dissemination, is grounded in constitutional cases. See GERHARD KNERR, DIE VERÖFFENTLICHUNG VON NAMEN IN GERICHTLICHEN ENTSCHEIDUNGEN 71 (2004).

⁹⁸ WARNSTÄDT, *supra* note 4, at 104. The defendant, caught stealing a pair of gloves and children's pants as well as a child's jacket at Woolworths, was sentenced to prison for one month and two weeks, suspended to probation.

⁹⁹ Some Germans would find American punishments draconian. See Cornelius Nestler, *Model Penal Code: Sentencing: Sentencing in Germany*, 7 BUFF. CRIM. L. R. 109, 110 (2003). "The United States has reached a level of punitiveness in criminal law which is so much higher than the German level that many German criminal law scholars consider the strongly punitive nature of the American system to be out of proportion and unacceptable."

cases where a prison sentence is imposed, it is exceedingly short, often only a few months in length.¹⁰⁰ Second, one learns by reading the eighty cases that there are a few acts which do not constitute felonies or misdemeanors in the jurisdictions of the United States, which are treated as crimes in Germany. Third, comparative lawyers often characterize Anglo-American judges trained in the Common Law as being more activist and more independent-minded than judges on the continent of Europe who are trained in the Civilian tradition.¹⁰¹ This assessment may no longer be as true as it was sixty years ago. Americans reading these judgments will be surprised by the fact that Judge Warnstädt's decisions are quite "activist" in a number of ways.¹⁰² He may not strike down legislation, because this is the exclusive task of the Federal Constitutional Court; however, he will flatly refuse to convict a defendant who is technically guilty, when such a conviction leads to injustice. He is very hesitant as well to convict on circumstantial evidence. Fourth, in a number of judgments, Warnstädt provides biting criticisms of the police, the state attorney's office, youth courts, and the actions and policies of government officials. In addition, during the course of his career, when writing criticism in judgments was not effective, he took his views to the newspapers.¹⁰³

I. Sparing Use of Prison Sentences

Prima facie, the penalties meted out to convicted defendants seem mild according to American conceptions of crime and punishment. Of the eighty cases in the book,

¹⁰⁰ *Id.* at 121. "The imposition of sentences to imprisonment of less than six months has been strongly discouraged since the reform, and courts must provide additional justification for refraining from a suspension of punishment and grant of probation in the case of a sentence of less than one year." See also *Strafgesetzbuch* (StBG) (Criminal Code) § 47. "(1) A court may impose imprisonment for less than six months only when special circumstances exist, either in the act or the personality of the perpetrator, which make the imposition of imprisonment indispensable to exert influence on the perpetrator or to defend the legal order." A translation to English from the German language of Section 47 is found online at: <http://www.iuscomp.org/gla/statutes/StGB.htm#47> (last visited February 1, 2009).

¹⁰¹ Karl Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419, 432 (1947). Loewenstein writes, "[t]he German judge worships the written law and slavishly follows its letter. He is unaffected by intellectual doubts as to the intrinsic justice of the legal rule he has to apply, provided it is enacted by the authority of the state, and he does not question whether the authority is legitimate or not."

¹⁰² See discussion *infra* Part F III.

¹⁰³ This occurred on at least two occasions. The first occasion concerned the immigration of Jewish citizens from the Soviet Union. See *infra* note 140 for more details. The second time occurred in 1998 when the city authorities in an austerity measure closed the Metropol Theater. In an act of protest, Warnstädt wrote an obituary notice for the theater, which was published on the theater advertisement pages of *Der Tagesspiegel*. WARNSTÄDT, *supra* note 5, at 44-45.

some involving violent conduct, Warnstädt imposes prison in only twenty-four.¹⁰⁴ Many defendants walk away with a fine,¹⁰⁵ and in at least twenty-eight of the cases the prison sentences are suspended in favor of probation.¹⁰⁶ The sparing use of prison by Warnstädt, at least according to American conceptions, however, is not in any way atypical for German judges. Rather the penalties he imposes correspond generally to German views of the proper use of prison and punishment for positive general prevention¹⁰⁷ and also for the rehabilitation of the defendant.¹⁰⁸ Warnstädt states that the length of sentence is not as significant as the fact that criminals learn that there are immediate consequences for their actions.¹⁰⁹ To him, speedy incarceration is much more important than lengthy prison sentences.¹¹⁰ In Warnstädt's book, one sees evidence to support the proposition that German courts assess length of imprisonment at a rate equal to only about one or two month's prison time for every year that might be assessed by courts in the United States.¹¹¹ The growing disparity between German sentencing practices and American has not escaped prominent commentators.¹¹²

¹⁰⁴ WARNSTÄDT, *supra* note 4, at 12, 25, 38, 44, 61, 71, 73, 79, 90, 93, 128, 142, 149, 151, 155, 161, 169, 172, 174, 191, 194, 201, 210, 218. In the case on page 93, there are two defendants. While both are sentenced to prison, the prison sentence of the second defendant is commuted to parole.

¹⁰⁵ Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 706 (2005). Dubber states, "The primary sanction in German criminal law is not imprisonment, but the fine. . . ."

¹⁰⁶ WARNSTÄDT, *supra* note 4, at 22, 29, 31, 36, 41, 49, 52, 54, 56, 64, 76, 86, 93, 97, 101, 104, 112, 122, 137, 144, 153, 158, 167, 174, 177, 187, 189, 205, 212. On page 93 the sentence against one of the defendants, Kuchenbecker, is suspended in favor of probation.

¹⁰⁷ See Dubber, *supra* note 105, at 699-703.

¹⁰⁸ Professor Dr. Franz Streng, *Sentencing in Germany – Basic Questions and New Developments*, 8 GERMAN LAW JOURNAL 153 (2007) available at: <http://www.germanlawjournal.com/article.php?id=801>. Streng writes, "One of the principal aims of sentencing is therefore the rehabilitation of the offender."

¹⁰⁹ WARNSTÄDT, *supra* note 5, at 39. "Although it should be quite clear, I want to state explicitly, that the trial serves in the first place [the purpose] of education. The accused should learn in the proceedings that his conduct will not be tolerated and is not worthwhile."

¹¹⁰ WARNSTÄDT, *supra* note 4, at 81. "It is not strict punishments that stop crime but rather the immediate prosecution of criminal acts." See also *Id.* at 103. In case 35, Warnstädt mentions that the release of the defendant immediately after arrest was the "birth defect" of the case and a subsequent incarceration of the defendant for one year and six months, which was demanded by the prosecutor, would not cure this defect.

¹¹¹ See discussion *infra* notes 112, 116, 117, 118.

¹¹² JAMES Q. WHITMAN, HARSH JUSTICE, CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 57 (2003). Whitman writes, "[i]ndeed, we have now reached the point where American convicts...serve sentences roughly *five to ten times* as long as similarly situated French ones; and almost certainly even longer by comparison with German convicts [footnote omitted] [italics in original]." See also Nestler, *supra* note 99, at 110. See also Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of*

A few examples from his book illustrate vividly the more sparing imposition of prison sentences. For example, case 10 involves a postal clerk who stole six hundred thousand marks. With this money he went on a spending spree for five months across the nation from Hamburg to Dresden, from the Island of Sylt to Berlin, staying at the best hotels and gambling frequently. Ultimately, when the postal clerk was arrested and came to trial, he confessed his crimes. His sentence of one year and four months was suspended in favor of probation. Judge Warnstädt took into account that the defendant had already sat for four months in jail awaiting trial, and according to the judge, that was sufficient prison time for the defendant to contemplate his deeds. Instead of prison, Rüdiger Warnstädt said it is time for the defendant to return to his entirely unhappy life.¹¹³

Case 47 concerns an Algerian drug dealer who was observed selling drugs on the Hardenbergplatz (a square near the zoo). When police officers went to arrest him, he threw one of them on the ground, and took out a knife and tried to stab the other. After evading capture for two years, the defendant was brought to trial before Warnstädt. Warnstädt writes, "This deed is very very ugly... Above all, such an act in the milieu of drugs and in relation to the police cannot be tolerated." Judge Warnstädt imposed a sentence of one year and two months.¹¹⁴

Case 57 concerns a man from Poland who was spotted by two policemen in the central Berlin district of Schöneberg rather quickly and suspiciously entering a garage, apparently to avoid their gaze. At first the police officers only asked for identification, which under German law is permitted. Since the defendant and his friend did not have proper papers, they attempted to flee. The attempted flight made the police even more suspicious, and a search of the garage yielded a stolen automobile and a machine gun with eighteen cartridges as well as a silencer. Due to the fact that the accused had already been convicted for theft of an automobile under another name,

Humane Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111, 113, 161 (2007). Nilsen writes, "[d]uring the last quarter century, American punishment has become degrading, indecent, and undeservedly harsher despite a Constitution designed to protect people from infliction of excessive punishment [footnote omitted]." Then later in the article it reads, "[i]n Germany, where human dignity is enshrined as the first principle of its constitution, imprisonment is a last resort. Prison sentences, when imposed, are short. Prison administrators are expected to govern under a principle of normalcy, which means that prison life should, as much as possible, approximate life on the outside."

¹¹³ WARNSTÄDT, *supra* note 4, at 36-37. The court considered a number of factors in determining its sentence including the fact that the accused had never been convicted of a crime previously and this action was completely out of character. Also, the defendant was required to pay back the amount of money he stole in monthly payments, to the best of his ability. This civil judgment will follow him a very long time. Interview with Judge Warnstädt in Berlin, Germany (August 9, 2004).

¹¹⁴ *Id.* at 128-129.

and because “a violation of the Law on Weapons is no small matter,” Warnstädt imposed a prison sentence of one year and six months.¹¹⁵

In comparison to Warnstädt’s sentencing, which corresponds generally to German patterns, an American court when faced with a postal theft of about three hundred thousand dollars would not likely grant a suspended sentence and probation, even if the accused had sat in prison for four months awaiting trial.¹¹⁶ An American court when faced with a violent drug dealer would not impose a sentence of only one year and two months.¹¹⁷ It would be hard to imagine that an American court when faced with two counts of auto theft and possession of a machine gun would sentence the defendant to only one year and six months.¹¹⁸

II. Crimes Generally Unknown in American Law

While in many instances Americans would find German criminal court sentences lenient, there are instances when German Courts punish defendants for acts that do not generally constitute criminal offenses in the United States. One such crime, known in Germany but not America, is insult (*Beleidigung*).¹¹⁹ Three cases amongst

¹¹⁵ *Id.* at 157.

¹¹⁶ Email from Roger H. Stefin, Assistant United States Attorney, sent to Spencer Gaines and Judge Jeffrey R. Levenson answering a question posed by Stephen Levitt concerning the sentence that would be imposed on a postal worker, without a prior criminal record, who stole a bag of money containing three hundred thousand dollars. Gaines forwarded the email answer to Stephen Ross Levitt. (April 2, 2007, 15:38:24 EDT). Stefin writes that “[u]nder US sentencing guidelines, specifically sections 2B1.1 and 3B1.3, the defendant would be facing about 24-30 months incarceration if he pled guilty and around 33-41 mo[nth]s if convicted after trial. This would be followed by a term of supervised release of 2-3 years.”

¹¹⁷ Compare the sentence of fourteen months for the drug dealer in Germany, who resisted arrest and pulled out a knife on a police officer, with the sentence of thirty years imposed upon Bryan R. Bailey in Delaware. Bailey was convicted for selling 3.04 grams of cocaine to an undercover policeman. Superior Court Judge James T. Vaughn Jr. sentenced Bailey to such a long sentence because the defendant had a prior conviction. At 18 years of age, Bailey had been convicted of selling \$10 worth of cocaine. To be fair, it must be noted that, “Superior Court Judge James T. Vaughn Jr., who sentenced Bailey, was not convinced a 30-year term was in society’s best interest. But the law [creating minimum mandatory sentences] gave him no choice.” See J.L. Miller, *Mandatory drug sentence debate renewed* in THE NEWS JOURNAL, (WILMINGTON, DE) at A1-A2 (March 5, 2007).

¹¹⁸ Stealing cars is not uniformly punished with long prison sentences in the United States. See, Sam Skoknik, *Car Thieves Setting Records*, SEATTLE POST-INTELLIGENCER (WA) EDITION at A1 (August 11, 2005). “In fact, under current state sentencing laws, adult car thieves can expect, at worst, to spend 60 days in jail after their first offense.” See *United States of America v. Terrance Ross Willaman*, 2006 U.S. App. LEXIS 3993, 437 F. 3d 354 (2006). The appellate court upheld Willaman’s conviction for possession of a machine gun and punishment to “a custodial term of 27 months to be followed by a three-year period of supervised release.”

¹¹⁹ Strafgesetzbuch (StGB) (Penal Code) § 185 states, “[i]nsult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for

the eighty illustrate poignantly the crime of *Beleidigung* and its application by the Local Courts against defendants.

Case 5 concerns a Kurdish man from Lebanon who likely sought refuge in Berlin in the 1990s. In August of 1998, he parked his car illegally in a bus lane and became rude and insulting when the parking police came to notify him of his traffic infraction. Ultimately, he became so obstreperous that the parking police called the regular police to come to the scene. When the Kurdish defendant saw that one of the regular police officers arriving at the scene was a woman of Turkish origin, he commented on this fact and stated further that she should not even speak to him. In this case, the court held that calling the police woman a “Turk” constituted the misdemeanor of insult according to German law because it was meant as a “put down” and this statement made the police officer feel insulted or belittled. Judge Warnstädt imposed a prison sentence of one month for the crime of *Beleidigung* in this case because he believed that prison was the only way to reach this defendant. After all, this defendant had already been convicted of five previous offenses and was on probation at the time he committed the offense in question. Furthermore, Warnstädt states in the judgment that one should be able to expect decent conduct of a person receiving social assistance from the German state, in fact so much social assistance that the recipient can afford to operate a car.¹²⁰

Case 80 dramatically illustrates the contours of the crime of *Beleidigung*. In this case, an agitated exhibitionist in the *Tiergarten* insisted on showing his “hard digit” to two prostitutes who were waiting on the side of the road for customers to drive by.¹²¹ When the two women told the exhibitionist that he should shove off because he was interfering with their business, he became abusive and called them “whores” and “pieces of dung.”¹²² The fact that the two women were indeed sex workers did not constitute a defense to the charge of insult. The purpose of calling the women these names was to make them feel bad about themselves, and the truthfulness of the statement was not a complete defense. Warnstädt convicted the defendant of insult in this case, but imposed a fine of only 240 DM (German Marks) because the accused had already suffered grievously on account of his interference in the women’s business adventures that evening; immediately after the disruption, the reputed

not more than two years or a fine.” <http://www.iuscomp.org/gla/statutes/StGB.htm#185> (last visited February 6, 2009).

¹²⁰ It might help the reader to know that Judge Warnstädt does not own a car and he relies upon public transportation, walking, and his bicycle to get around Berlin.

¹²¹ WARNSTÄDT, *supra* note 4, at 220.

¹²² *Id.* at 220.

pimp of the two women had beaten the exhibitionist viciously to within an inch of his life.¹²³

Police or public officials can also commit and be convicted of insult. Case 41 illustrates this. A taxi driver came into dispute with a police officer at Tegel Airport in Berlin. The officer seeing that the taxi driver was a foreigner asked for his residency papers in addition to his driver's license. The taxi driver, a Frenchman with some African roots, said that since he was from France¹²⁴ he did not need to show a residency permit. The policeman responded angrily, "Again and again, there are these tramps, who all need a permit." For calling the taxi driver a "tramp" the police officer was fined 900 DM.¹²⁵

Americans are often surprised that the offense of insult is not only on the criminal law books, but actively prosecuted. While in Berlin, I asked Judge Warnstädt specifically to address this issue. He replied that no person would consider the offense of battery (for example, hitting someone) to be unusual. In a battery offense, the victim is hit and feels pain. Judge Warnstädt explained that pain can be caused physically and this is battery or it can be caused by emotional torment and this is the German crime of insult. Insult hurts the feelings or emotional well-being of the victim just as much as a kick or hit would.¹²⁶ A prominent attorney in Berlin was surprised upon reading a draft of this paper that there is no equivalent offense of insult in the United States.¹²⁷

III. Refusing to Enforce the Letter of the Law

In a number of the cases Judge Warnstädt has refused to enforce the letter of the law. Case 14 provides one such example. A Kurd from Lebanon stayed in Germany for ten years without legal permission. Ultimately, the German authorities hoped to get rid of him by giving him a temporary border crossing certificate, with which he could travel legally to the Netherlands or Poland and seek asylum. When the Dutch refused to permit him to stay and deported him back to Germany, the German authorities took another tack, and charged him with residing in Germany without permission. A

¹²³ *Id.* at 221.

¹²⁴ A citizen of France, like a citizen of Germany, is a citizen of the European Union.

¹²⁵ WARNSTÄDT, *supra* note 4, at 115.

¹²⁶ Interview with Judge Rüdiger Warnstädt in Berlin, Germany (August 9, 2004).

¹²⁷ Interview with Dr. Ulrich Thölke, an attorney (currently a partner at Salans) in Berlin, Germany (July 16, 2006). The American commentator, James Q. Whitman, writes: "'Respect' matters over the whole landscape of law and society in Germany and France." James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1282 (2002).

conviction of residing without permission might have justified his deportation to Lebanon. In this case, Warnstädt understood clearly that the defendant had remained in Germany without a permit and this clearly violated the explicit provisions of the Aliens Act. However, he writes “the facts of the case are such that the accused cannot be punished.”¹²⁸ In fact, the accused was acquitted. Warnstädt reasons that because the Aliens Authority has failed to deport him for a period of ten years, his presence in the country should be tolerated.¹²⁹ Also Warnstädt says that the personal circumstances of the defendant need to be taken into account. Because the defendant is a Kurd, and he has no homeland to which he can return or to which he can be deported, his presence in Germany will have to be allowed. Warnstädt concludes: “Politicians have to cope with the problem caused by open borders and the differences in living conditions between countries. Tiergarten Local Court is not the right forum.”¹³⁰

Case 38 also involves immigrants. Sayad Makbar was from Palestine and he lived for many years in Berlin. He worked as a taxi driver, and was busy with his doctoral studies at the university. Although married in 1996 in Bethlehem, his wife, Dinah had stayed in Palestine. In 1999, she showed up at his door one day and wished to stay in Germany with him. The couple tried to get the proper permits, which ultimately they did secure. However, she was charged with illegally entering Germany, and illegally residing in Germany for the period between the time she entered illegally and the time she obtained an official allowance to remain. Her husband was charged with aiding and abetting this violation of the Aliens Act. Warnstädt in this case is outraged. One sees this in his judgment. First, although he does find the wife guilty of the charge of entering and remaining illegally, he sets her punishment at a warning.¹³¹ Second, he adamantly refuses to convict the husband, despite the evidence, of aiding and abetting the violation. Warnstädt writes, “If one reads correctly, he should have removed her from the threshold of the house, because she did not have proper papers. His own wife! That is really going too far; even under the most obnoxious bureaucratic view of things this is not to be given countenance.”¹³²

IV. Warnstädt's Criticisms

¹²⁸ WARNSTÄDT, *supra* note 4, at 47.

¹²⁹ *Id.* at 47.

¹³⁰ *Id.* at 48. See *infra* Appendix-Translated Decisions for a complete translation of this case.

¹³¹ *Id.* at 108.

¹³² *Id.* at 109.

In the eighty decisions, there are interesting and often biting criticisms of the police, courts, prosecutors, as well as government officials and policies. In Case 27, involving the theft of a book by an unemployed stage hand, who had lost his job after a theater closed pursuant to austerity measures, Warnstädt comments: "The closing of a theater is not only an artistic, but also a human catastrophe."¹³³ When it was revealed in another case, that immigration officials searched a house and even rummaged through the bed linens and laundry to establish evidence of an immigrant husband's failure to cohabit with his German wife, Warnstädt says: "This trial violates taste and decency. These were not real investigations, but rather sniffing around. The State Attorney's Office is urgently requested to keep its fingers out of such affairs."¹³⁴

Warnstädt is particularly vocal about his criticism of Germany's laws regarding immigrants and foreigners. In Case 71, concerning an Egyptian who claimed to be a Palestinian refugee seeking asylum, the judge writes: "Every nation, to a greater or lesser degree, is a nation of immigrants, in particular the great industrial nations. . . . Only Germany has no rules for immigration. The Aliens Act has rules only for the deportation of immigrants. . . . So people know that one can get into Germany either illegally, or if one pretends to be a tourist, or if one is an asylum seeker."¹³⁵

As already stated, Warnstädt does not believe that the length of the prison sentence is as important a deterrent to criminals as their immediate prosecution and incarceration. In the case of a robber, he comments, "It is not draconian punishments which stop crime, but rather the immediate prosecution of criminal acts."¹³⁶ In the case of the attempted rapist, he comments that the State Attorney has mentioned that such "criminal acts should not be tolerated."¹³⁷ This is "beautifully spoken. . . . However at the beginning of the criminal proceedings there occurred something different . . . the defendant was . . . released." Judge Warnstädt continues, "The immediate release of the defendant from jail was a birth defect of this proceeding which cannot be redeemed by the lovely speech and subsequent incarceration, which comes in an untimely manner."¹³⁸

¹³³ *Id.* at 82.

¹³⁴ *Id.* at 84.

¹³⁵ *Id.* at 194. In regard to recent changes to both the Immigration Act and the Nationality Act, see *infra* note 155.

¹³⁶ *Id.* at 81.

¹³⁷ *Id.* at 103.

¹³⁸ *Id.* at 103.

G. A Certain Kind of Sadness

In light of the Nazis, World War II and the Holocaust, it is difficult for Anglo-Americans to view Berlin today as a place of refuge and opportunity for immigrants. Despite the dark years from 1933 to 1945, Berlin was historically a safe and wonderful haven for many political, economic and religious refugees¹³⁹ and it is becoming such a place again.

In the 18th century, Moabit was the land loved by the Huguenots.¹⁴⁰ At the turn of the last century, this area of Berlin, just north of the Spree, housed many Jewish families.¹⁴¹ After World War II, German refugees from the lost territories of Eastern Prussia, the Sudetenland and Silesia made Berlin their home.¹⁴² Today Moabit is an area of the city where one finds many Turkish, Middle Eastern and Eastern European immigrants residing.¹⁴³

The cases in Warnstädt's book reflect the increasingly multicultural and diverse complexion of Berlin. They also betray a certain type of sadness and yearning. This is, however, not a sadness and yearning borne of German-authored war, persecution, or political division, but rather feelings resembling those of the Huguenots, who lived in Moabit in the eighteenth century, on the north side of the Spree River, and longed to become part of the mainstream of society.¹⁴⁴

¹³⁹ "There were Dutch builders and farmers and engineers, Jewish businessmen and bankers and thinkers, French Huguenots, other Protestant refugees from Poland, Italy and southern German states, soldiers from Switzerland and Sweden, Jacobite rebels from Scotland, and finally, poor immigrants from all over Eastern Europe." ANTHONY READ & DAVID FISHER, *THE FALL OF BERLIN* 18 (1992).

¹⁴⁰ According to Dr. Bendt, it may have been the *Orangeois* (Protestants expelled from the principality of Orange) and not the original Huguenots who had difficulties with Mulberry trees and establishing the silk industry in Moabit. See Bendt, *supra* note 41.

¹⁴¹ The Moabit Hospital located not more than a few blocks away from the Moabit Justice Complex was a place where many Jewish doctors practiced and held leading positions during the Weimar Republic. See NICHT MIßHANDELN, (Christian Pross & Rolf Winau eds. 1984.) In the district of Tiergarten in 1933 there were 5,658 Jews. STROSCHEN, SPÄTH & KLEIN, *supra* note 57, at 65.

¹⁴² Otto Stammer, *The Berlin Situation as a Socio-political Problem*, in *BERLIN-PIVOT OF GERMAN DESTINY* 110 (Charles B. Robson trans. & ed., 1960). Stammer states, "Between 1945 and 1950, there was an influx of 537,000 people." He mentions that the number of "refugees" and "expellees" in the population "from areas beyond the Oder-Neisse" is "not less than 7.2 per cent."

¹⁴³ The webpage of the city district of Mitte states that of the 69,122 inhabitants living in Moabit today, at least 19,439 or 28.12 % are not of German heritage. See <http://www.berlin.de/ba-mitte/bezirk/ortsteile/moabit.html> (last visited January 31, 2009).

¹⁴⁴ See *supra* discussion in Part C. See also *supra* text of note 41.

One learns of the case of the Albanian from Kosovo who fled the civil war in his native land to the safety of Germany in March of 1993. The police find him sitting around playing cards for money; this constitutes gambling. He is charged with a violation of the Aliens Act because with legal standing as a refugee, he is not permitted to engage in any type of gainful activity.¹⁴⁵

Two Bosnians, a married couple, were permitted to reside in Germany temporarily as refugees. After eight years they come before Warnstädt's court on charges of fraud against the Aliens Act, because they engaged in the buying and selling of thirteen automobiles to supplement the money they received on public assistance.¹⁴⁶

In his Moabit courtroom, Warnstädt hears the case of the Russian girl, "now a Ukrainian citizen," who followed her boyfriend, the father of her child, from the Ukraine to Berlin.¹⁴⁷ She has been charged with having entered and remained in the country without a permit. As well, when refused asylum the first time, she has applied again under another name, not her own, which constitutes fraud.¹⁴⁸

A Russian soldier has remained in Berlin long after his comrades have departed. He fears that if he returns to Russia, he will be forced to go to fight in Chechnya. To put off this fate, he remains in Berlin without a residency permit and without employment, and he takes to petty crimes. In Warnstädt's court he is charged and later convicted with attempted theft, for he was caught with a crowbar attempting to break into a newspaper store in Moabit. Although his prison sentence of three months and two weeks has been suspended and probation granted, and the parole officer knows him from visiting him in jail awaiting trial, what ultimately will happen to the reluctant soldier, whether he will find refuge and comfort in Berlin, remains unknown.¹⁴⁹

Presently, there are about four hundred and sixty-seven thousand foreigners officially registered in the City of Berlin.¹⁵⁰ Unofficially, this number is likely much higher.¹⁵¹

¹⁴⁵ WARNSTÄDT, *supra* note 4, at 27.

¹⁴⁶ *Id.* at 177-179.

¹⁴⁷ *Id.* at 64.

¹⁴⁸ *Id.* at 64-66.

¹⁴⁹ *Id.* at 187-188.

¹⁵⁰ See STATISTISCHES LANDESAMT BERLIN, DIE KLEINE BERLIN-STATISTIK 2006 4 (2006), http://www.statistik-berlin.de/kbst/kbst-2006_d.pdf (last visited February 2, 2009).

¹⁵¹ Mechthild Küpper, *Viele Fälle für "rheinische Lösungen"*, FRANKFURTER ALLEGEMEINE ZEITUNG, December 24, 2003, at 3. Küpper writes that according to estimates done by the Catholic Church there may be as many as

The Jewish community, which was decimated during the Holocaust, is reviving, both in Berlin and Germany.¹⁵² Although some Germans oppose accepting more foreigners into their midst,¹⁵³ and there are sometimes acts of violence perpetrated against foreigners,¹⁵⁴ greater ethnic and cultural diversity in Berlin is a fact. The cases in *Recht So* illustrate a yearning on the part of many persons to come to live on the banks of the Spree, like the Huguenots did three hundred years ago. The fact that the law for a long time neither viewed Germany as a land of immigrants nor facilitated foreigners moving to Germany and becoming citizens was something that Warnstädt criticized in his judgments and in the newspapers.¹⁵⁵

one million persons in Germany without a legally valid residency permit. In Berlin alone, this number may be two hundred to three hundred thousand persons.

¹⁵² See Roger Cohen, *Former Soviet Jews find uneasy peace in Germany*, NEW YORK TIMES, August 6, 2000 at 1, 6. This article states that the Central Council of German Jews has more than eighty-five thousand members, up from twenty-nine thousand in 1990. In Berlin there are now twelve thousand Jews. On its website, the Central Council of German Jews states that there are currently (i.e. 2008) more than one-hundred thousand Jews in Germany. <http://www.zentralratjuden.de/de/topic/21.html>. For a map showing the 107 communities where Jews live see <http://www.zentralratjuden.de/de/topic/5.html> (last visited January 31, 2009).

¹⁵³ The Federal Statistics Office reports that for 2006 unemployment in the five new states and Berlin averaged between 15.5 and 19.5 per cent monthly. See <http://www.destatis.de/indicators/d/arb230ad.htm> (last visited March 31, 2007). Malcolm McLaren writes, "With nearly 4 million Germans unemployed, the general public is unclear as to why foreign job-seekers are automatically better than domestic." Lastly, as nearly one-third of Germany's prison inmates are foreigners, there is in many minds a direct link between immigrants and crime. In short, Germans describe themselves as "afraid - for their jobs, their homes, their security, their very identity." Malcolm McLaren, *Framing the Debate over the German Immigration Bill: Toward Reasoned Policymaking*, 2 GERMAN LAW JOURNAL 16 (2001), available at: <http://www.germanlawjournal.com:80/print.php?id=102>.

¹⁵⁴ For a poignant example of such an act of violence see *infra* the second case translation found in the Appendix concerning a violent attack on two students from Cameroon. In Warnstädt's book of eighty cases, there are four other cases that concern violent attacks on foreigners. A bus driver is sentenced for failing to assist or protect an Indian passenger who was threatened by a group of young men intent on assaulting him. WARNSTÄDT, *supra* note 4, at 49. A *S-Bahn* (suburban train) driver of German origin was punched because the defendants thought he looked Russian or Jewish. *Id.* at 76. An altercation on the subway leads to the defendant hitting a Turkish victim with a hammer. *Id.* at 158. A violent altercation in the *S-Bahn* occurs between three Germans, two men and a woman, and three foreigners, one from Portugal, one from Croatia, and one named "Kusch" born in Berlin but possibly of Southeast European extraction. *Id.* at 212.

¹⁵⁵ *Id.* at 194. See also WARNSTÄDT, *supra* note 5, at 45-46. In September of 1980, the Soviet Union permitted a number of its Jewish citizens to emigrate to Israel. Some wished to stay in Europe and attempted to settle in Berlin. Shockingly, the Minister of Interior of West Berlin issued an order forbidding this. Warnstädt was outraged. He wrote a letter that a number of the newspapers published: "For years, sacred words were spoken, because it concerned dead Jews. Now, when live ones come, everything appears different. . . . Berlin became great through the Jewish spirit. Since their annihilation we have the current-day provinciality." Recently there have been some significant changes to Germany's laws concerning both citizenship and immigration. For a good discussion of these new rules, see Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT'L L.

H. *Anpassung* and Advancement

During one of our many discussions, Rüdiger Warnstädt mentioned two key words that explain at least partially why such a talented individual remained a Local Court judge for more than twenty-three years, and why he did not seek either promotion or advancement. The first word, surprisingly enough, comes from the world of automobiles. It is in German, *stromlinienförmig*, which means in English “streamlined.” The second word is *Anpassung*, which means in English “conformity.” The connection between these two explains something about his philosophy of life, as well as his view of the nature of the hierarchy found in legal practice as well as in corporations, the courts, the bureaucracy and government.

Warnstädt mentions that as a student, one must try to please the teacher. This involves some level of conformity to the opinions of the teacher. In university, again, the student must conform to a certain extent to the views of the professors in order to advance. While working at the courts, the young *Referendar* as well as the probationary judge has to learn to conform to the views of the president of the courts, or whoever is his direct superior responsible for his training. A Local Court judge has to make his judgments conform to the opinions of the courts of appeal and the commentaries so that he has a good chance of being promoted.¹⁵⁶

Warnstädt found that once he was appointed a Local Court judge, he did not have to conform any longer. He could decide cases based upon his conscience and the law. He could write judgments, not in the bureaucratic German that was customary, but using elegant and descriptive prose. He could speak up about political issues that concerned him both in his judgments and in the newspapers. In his life-long appointment as a judge at the Local Court in Berlin, he found a wide berth of freedom. As long as he did not apply for promotion, or ask for a favor from the court system, he did not need to keep any superior pleased or compromise his views.

Warnstädt also explains the compromises that others made. In order to advance, they conformed more often. They “created no waves.” If one is “streamlined” in his

330 (2006). An updated copy of the Nationality Act translated into English can be found at the following web address: http://www.bmi.bund.de/cln_028/nn_122688/Internet/Content/Common/Anlagen/Gesetze/Gesetze__Sprachen/Staatsangehoerigkeitsgesetz__englisch,templatelD=raw,property=publicationFile.pdf/Staatsangehoerigkeitsgesetz_englisch.pdf (last visited on January 31, 2009).

¹⁵⁶ WARNSTÄDT, *supra* note 5, at 19-20. Warnstädt relates a discussion he had with a smart young *Referendarin*. She said, “The deadly enemy of independence is conformity, and conformity paves the path of jurists. The longer the path is, the longer lasts the conformity, and the person who has conformed for a long time, will not find his way back to independence.” However, she mentions that the Local Court judge has just a short path back and could be able to accomplish this.

approach to his work, Judge Warnstädt explains, he leaves as few air currents behind him as possible.¹⁵⁷ There is no turbulence. The superiors find him agreeable and not troublesome. In Warnstädt's view, the persons who can conform best and be "streamlined" are often those who advance most easily in bureaucracies, corporations, court systems and government.¹⁵⁸

I. Conclusion

Sitting around the wooden dining room table in the apartment on Helmstedter Strasse in Berlin, I asked Warnstädt about the role of the judge in Germany as compared to that in the United States. He answered that in both traditions (Civilian and Common Law) it is possible for the intelligent judge to decide cases in a way that furthers justice.¹⁵⁹ "What is most important [also] is that the judge must be fully free to make a decision based upon the law and the dictates of her conscience."¹⁶⁰ Having independence of thought and arriving at a just decision have been indeed the hallmarks of Warnstädt's career.

The two books, which he published in 2003 and 2004, provide the reader with wonderful insights about the Local Courts in Germany in criminal matters. As well, one learns about the life and times of this colorful Berlin judge, who was born during the period of National Socialism, reared in an occupied Germany, and schooled in a

¹⁵⁷ Telephone Interview with Judge Warnstädt (January 23, 2007).

¹⁵⁸ See WARNSTÄDT, *supra* note 5, at 18-20. This theme of the relationship between conformity and promotion is discussed in Warnstädt's text as well.

¹⁵⁹ At first glance, I thought that this comment seemed too particular to Germany and too influenced by Warnstädt's training in the Civilian legal tradition. However, upon reflection, when one considers this comment in terms of "small" cases, it is surprisingly accurate and applicable to both sides of the Atlantic. First, in the U.S. many misdemeanor trials are heard by a judge sitting alone. Second, while the U.S. often has a system of judge and jury, in Germany an *Amtsgericht* judge may be assisted in his or her decision by two lay judges. These two lay judges vote on the determination of guilt and sentence and may even outvote the presiding judge. See *infra* note 160.

¹⁶⁰ Interview with Rüdiger Warnstädt in Berlin, Germany (December 9, 2003). See also *Grundgesetz* (GG) (Basic Law) Art. 97, "Judges shall be independent and subject only to the law." One of my former students, Jack Marino, is now an administrative law judge at the Pennsylvania Labor Relations Board. He writes me, after reading a draft of this article, that "While in criminal cases, the adversarial system operates very differently than the investigatory system...in administrative hearings there are some similarities. . . . [I] sometimes ask the witnesses questions, [I am] responsible for fact finding. . . . [and I] write a decision for each case that comes before the board." Email from Administrative Law Judge Jack Marino, Pennsylvania Labor Relations Board to Stephen Levitt, (November 7, 2007, 17:36:10 EST). Brenda Cox-Graham says after reading the article: "On the bench, he was a teacher; he showed the people what the face of justice looked like." Telephone Interview with Brenda Cox-Graham, retired attorney in Ancaster, Canada (February 10, 2009).

Communist state. He attended university, served as a prosecutor, and sat as a judge in the free part of a divided Germany; he continued to sit on the bench after reunification for more than twelve years. Rüdiger Warnstädt's life mirrors that of many of the first generation of Germans who reached adulthood after the war, and experienced during their adult years a stable and enduring democracy as well as the full flowering of the *rechtstaatliche Tradition*.¹⁶¹

A refugee on three occasions, Warnstädt fought on the bench always for the fair treatment of the foreigner and the outsider in German society. He has dedicated his life and career to the proposition that each case is unique and every defendant is entitled to a full and fair hearing.¹⁶² Today in retirement, he remains active speaking to the public and publishing¹⁶³ about important matters related to law and justice.

¹⁶¹ The standard definition of "Rechtstaat" is "a state governed by the rule of law." *DICTIONARY OF LEGAL AND COMMERCIAL TERMS* 612 (2d ed. C.H. Beck'sche Verlagsbuchhandlung, Munich, 1985) (Part II, German-English). However, this may not be a complete enough definition. Craig T. Smith writes (footnotes omitted): "A *Rechtstaat* is thus a state bound in its every activity by law, a state whose law and its guardians protect the people rather than abandon them to the caprice of rules, as the Nazi justice system abandoned Germans to Hitler's grand designs. As such, it is both one of the Federal Republic's primary tools of self-definition – the constitutional requirement that the Federal Republic be such a state is a "fundamental structural principle" – and one of the key terms of German unification." Craig T. Smith, *Imperfect Justice: An East-West Diary*, 11 *EMORY INT'L REV.* 771, 783-784 (1997) (book review).

¹⁶² GG Art. 1(1), "[h]uman dignity shall be inviolable." Judge Warnstädt strongly upholds and affirms human dignity by treating each defendant in his courtroom with the greatest care and concern.

¹⁶³ Judge Warnstädt has just completed writing a third book entitled *Ortstermine* that is available since March 2007. See RÜDIGER WARNSTÄDT, *ORTSTERMINE* (2007). More information on this latest text is found at: <http://www.ruedigerwarnstaedt.de/buchindex3.html> (last visited January 31, 2009).

Appendix – Translated Decisions¹⁶⁴**A. Decision Number 7: The Terrible Neighbor¹⁶⁵**

Tiergarten Local Court¹⁶⁶

In the Name of the People

The accused is sentenced to a compounded prison term of two months on account of insult and damage to property.

The sentence is suspended and probation granted.

The defendant shall bear the costs of the proceedings.

§§ 185, 303, and 53 of the Criminal Code apply.

Reasons:

The 28 year old accused lives in a *Plattenbau* apartment building¹⁶⁷ in the Marzahn district of Berlin. The walls are thin, and if one is not particularly considerate, one can easily disturb the neighbors with noise. The accused is not particularly considerate; indeed, he is quite inconsiderate. He plays the television very loudly, so that his neighbors, pensioner Jürgen Stein, born in 1931, and Helga Sanft, born in 1942, feel

¹⁶⁴ WARNSTÄDT, *supra note 4*, at 29-30, 47-48, 71-72. Translation by Stephen Ross Levitt, revised by Dr. Peter Teupe, and Rhodes Barrett, sworn translator to the Berlin judiciary. All rights in German and in English remain with Judge Warnstädt and Das Neue Berlin Verlagsgesellschaft mbH, Berlin, Germany. The reader should note that the case found in Warnstädt's text on pages 71 and 72 is presented second, and the case on pages 47 and 48 is presented last.

¹⁶⁵ According to German law, the name of the defendant(s) and the file number cannot be published. However, Judge Warnstädt agreed with my suggestion to provide the reader with a title for each case related to its subject matter. As well, the decision number refers to the order that this judgment is found in Warnstädt's text of eighty judgments. Email from Judge Rüdiger Warnstädt to Stephen Ross Levitt. (March 2, 2009, 5:39 EST).

¹⁶⁶ Tiergarten is a district in Berlin.

¹⁶⁷ A *Plattenbau* is a "panel construction building." Some background knowledge is necessary here to give this case context. In the centrally planned German Democratic Republic, the housing authorities built many pre-fabricated apartment buildings, mostly in vast housing estates. This technique cut down cost and saved time in construction. Today, in a unified Germany, these buildings are considered to be of inferior quality and some of the housing estates have become notoriously deprived areas. After unification in 1990, many people moved away from these housing estates. Those persons, who remain now, are often those who do not have the financial means to go elsewhere.

downright terrorized by him. When it gets too bad, Stein and Sanft take a hammer and bang on the wall; which does not, however, curb the defendant but only makes him aggressive. According to the credible testimony of Helga Sanft, this is the background to the two criminal offenses that are the subject of the present proceedings. According to the credible testimony of Jürgen Stein, the two criminal offenses took place as follows. On January 6, 1996 the accused encountered Stein in the elevator. The accused said to Stein: "Asshole,¹⁶⁸ no-good rat, swine." On January 7, 1996, the accused repeatedly kicked at the apartment door of his neighbors Stein and Sanft, partly demolishing the lock and bending the strike plate.

During the main proceedings the accused has disputed committing the two offenses, insult pursuant to § 185 of the Criminal Code, and damage to property pursuant to § 303. He based his defense on the fact that his mother could testify that on the days and times in question, on January 6 at 2:15 pm., and on January 7 at 1 pm., he was not even at home. The mother, Grete Zimmich, as witness in the main proceedings, did indeed duly confirm the statements of her son, though it was quite apparent that she would have said whatever her son wanted her to say. However, she firmly believes she was out shopping with her son at the times and dates in question.¹⁶⁹

During the main proceedings the accused attempted to give an impression of aggrieved harmlessness; [this was] in vain, for what Sanft and Stein said in the main proceedings was unfortunately accurate.

The accused can no longer be reached by fining, as in a previous incident on May 25, 1995 the accused kicked in the apartment door of Stein and Sanft and was sentenced to a fine of ten day rates.¹⁷⁰ Now he will receive a prison sentence of one month and two weeks, for each criminal offense, and for both together a compounded sentence of two months. If he acts decently from here on in, he does not have to go to prison; however, if he continues with this conduct, he will end up in jail.

¹⁶⁸ In German, this word is tremendously insulting.

¹⁶⁹ Dr. Uwe Frommhold comments that Warnstädt likely wrote this paragraph in this manner so that the mother of the accused could not be prosecuted for false statements under oath according to § 153 of the German Criminal Code. Email from Judge Dr. Uwe Frommhold to Stephen Levitt. (April 9, 2007, 15:27 EST).

¹⁷⁰ Fines in Germany are set in *Tagessatzsystem* (daily units). The minimum fine is 5 daily units the maximum 360 daily units unless there are other legal provisions. The amount of the daily unit (day rate/day-fine) is set by the court taking into account the offender's personal and financial situation. It is normally based on the net income that an offender could earn in a day. See Gary M. Friedman, Comment, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 287-289 (1983).

The costs of the proceedings are calculated pursuant to § 465 of the Code of Criminal Procedure.

B. Decision Number 23: A Violent Attack at the Train Station

Tiergarten Local Court

In the Name of the People

The defendant is sentenced to six months imprisonment on account of causing grievous bodily harm.

The shoes which were seized by the police are forfeited.

The defendant shall bear the costs of the proceedings.

§§ 223, 224, 21 and 74 of the Criminal Code apply.

Reasons:

On the evening of May 12, 1999, the 22 year old defendant was loitering in the Berlin-Lichtenberg train station in a somewhat inebriated state. There he noticed two Black men speaking with a white woman. The men, George Namba Medjuli, born on August 15, 1975, and Wamba Duba, born on May 25, 1970, both from Cameroon, are currently students in Dresden. This disturbed the defendant, who is one of the brutal kinds of Neo-Nazi. He butted in on the conversation, and when no one paid any attention to him, he became more and more unpleasant and insistent. Finally, he attacked Medjuli, punching and kicking him, then throwing a beer can in his face with such force that Medjuli's lower lip was severely cut, so that Medjuli had to be taken to hospital, bleeding heavily.

During the main proceedings, the very credible testimony of both students and the white woman establishes clearly that the defendant committed grievous bodily harm according to §§ 223, 224, 21 and 171 of the Criminal Code.

The accused, who has made a very bad impression in the past, and who has even been sentenced to juvenile detention – which is quite something – gets off lightly

¹⁷¹§ 21 of the StPO concerns diminished capacity, § 223 concerns causing bodily harm, and § 224 of the StPO concerns causing grievous bodily harm.

with a sentence of only six months imprisonment.¹⁷² But he is to serve the six months right away. An order for his release (exceptionally, one must say, the accused was not released immediately after the crime - - perhaps he was believed to be a Russian because of his name, and they tend to be kept in custody)... an order for his release, sought by both defending and prosecuting counsel, will thus not be issued, which can only be for the good of the accused.¹⁷³ Nothing is worse than “out today, in again tomorrow.”

The costs of the proceedings are calculated pursuant to § 465 of the Code of Criminal Procedure.

C. Decision Number 14: The Kurdish Immigrant

Tiergarten Local Court

In the Name of the People

The accused is acquitted.

The costs of proceedings and any necessary expenses of the accused fall upon the treasury of the state.¹⁷⁴

Reasons:

The accused has been charged with violating § 92, Subparagraph 2, Part 1b of the Aliens Act because he has resided since May 3, 1997 “without permission in the territory of the Federal Republic, contrary to the provisions and stipulations of § 8, Subparagraph 2, Part 1 of the Aliens Act.”

In the main proceedings the following facts were established through the testimony of the accused as well as an official of the Berlin Aliens Authority, who was invited as a witness and appeared at the proceedings: the accused is an alien, at any rate he

¹⁷² WARNSTÄDT, *supra* note 4, at 73-75. One reads in *Recht So* that although Judge Warnstädt had sentenced this defendant on July 5, 1999 to six months in prison, the Regional Court in Berlin commuted the sentence on October 29, 1999 to parole. Therefore, the defendant actually served a little less than four months of the six-month sentence.

¹⁷³ In the original text in German, Judge Warnstädt begins the discussion about temporary release, gets sidetracked, and then returns to this theme at a later point in the sentence. This verbal style has been kept in the translation.

¹⁷⁴ Here “state” refers to the State government of Berlin, one of the sixteen *Länder* (states) in the Federal Republic of Germany

does not possess German citizenship; he resides in Germany, and the Aliens Authority has not given him permission to reside.¹⁷⁵ Nonetheless, the facts of the case are such that the accused cannot be punished, and for the following reasons.

The defendant, who is now 28 or 29 years old, has been in Germany for more than ten years. During this time, the Aliens Authority has failed to get rid of him. There is no cause to go into detail at this point on why this is so. Whoever proves incapable for ten years of dealing with a situation that needs to be dealt with in effect tolerates that situation. In any case, the situation must then be accepted as inevitable.

Over and above the inability of the authorities, the personal circumstances of the defendant need to be considered. The defendant is a Kurd and stateless twice over. First, he is stateless because there is no Kurdistan, and, second, because Lebanon, which, like Iraq, Syria, and Turkey, has appropriated a portion of the area settled by the Kurds, and within whose territory he was born, does not regard him as a citizen. So the defendant has no idea at all where he should go. After all, he has to stay somewhere, and that is presently Germany, where he happens to be and where he appears to have ended up more or less by chance. The "border crossing certificate" issued by the Berlin State Residents' Registration Office is of little use to him. The defendant was recently in the Netherlands: they lost no time in putting him back across the border into Germany. It is unlikely that Austria, Poland, let alone Switzerland would be enchanted by the arrival of the accused or give him permission to stay.

The politicians have to cope with the problem caused by open borders and the differences in living conditions between countries. Tiergarten Local Court is not the right forum.

The costs of the proceedings are calculated pursuant to § 467 (1) of the Code of Criminal Procedure.

¹⁷⁵ The reader should ask himself why the Authority did not give him the permit.