



THE PSYCHOPATH WHISPERER: THE SCIENCE OF THOSE WITHOUT CONSCIENCE

BY KENT A. KIEHL

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Reviewed by Christopher Faille

Kent Kiehl, an executive at the Mind Research Network in Albuquerque and a professor at the University of New Mexico, believes that people—laypersons and psychology professionals alike—often use the term “psychopath,” and the synonymous phrase “antisocial personality disorder,” far too loosely. In *The Psychopathic Whisperer*, he contends, for example, that the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* of the American Psychiatric Association defines psychopathy mistakenly on the basis of a quite moderate level of the pertinent symptoms.

“If you are a clinician,” writes Kiehl, “working in the community and you complete an interview with your client and he or she meets the *DSM* criteria for an antisocial personality disorder, you know you are dealing with someone with a difficult personality,” but you don’t know you are dealing with a psychopath. For that you must use the more rigorous standards of the “Hare Psychopathy Checklist Revised,” a list of symptoms drawn from the seminal work of Dr. Robert Hare.

Two Assassins

As examples of who is, and who is not, a psychopath, Kiehl discusses two 19th-century assassins: John Wilkes Booth (who of course shot and killed President Lincoln in Ford’s Theatre in 1865) and Charles Guiteau, who fatally wounded President Garfield at a railroad station in 1881. Booth was not a psychopath, on Kiehl’s understanding of the term. He was an ideologically driven murderer, but his actions made sense and had an understandable motive, in a way that truly psychopathic killings do not.

Booth, for example, demonstrated none of the need for stimulation and proneness to boredom that is an element on the Hare

checklist. In his theatrical career, in particular, Booth “played the same roles over and over again, something that would be very difficult for individuals with high levels of this trait.” Guiteau, on the other hand, was classically psychopathic in this regard, wanting “to live an exciting life, full of travel, status, and fame, but [refusing] to put in the work to earn it.”

Another item from the checklist: Booth lived a rich emotional life (and not just in playing roles in stage). For example, he maintained close relations with family members, even those who expressed Unionist sympathies. Guiteau, on the other hand, had no close or lasting attachments and even few acquaintances.

Bed-Wetting and an Oddball Pitch

Related to these concerns about the proper, and properly narrow, use of the clinical term “psychopath,” Kiehl also wants to rescue the reputation of bed-wetters.

Back in the early 1960s, psychiatrist J.M. MacDonald asserted that three childhood behaviors function as good predictors of psychopathic adult behavior, particularly serial killing: bed-wetting beyond the age of five, cruelty to animals, and pyromania. Kiehl thinks that MacDonald’s hypothesis is out of date. Bed-wetting in particular is a lousy predictor.

Nonetheless, MacDonald’s inclusion of it in his list wasn’t baseless. There are four distinct neuronal paths that can contribute to loss of control over the bladder. One of these four, but only one, has some connection with the peculiar neurology of psychopathy. “My hypothesis is that it’s the amygdala bladder circuit that is abnormal in youth who go on to commit homicide as adults. If that is the case,” he writes, “we need to revise the MacDonald Triad to indicate that the risk for future violence is present in chronic bed-wetting youth only if the circuit responsible is the one that passes through the amygdala, something that can be tested using modern neuroscience techniques.”

That last point brings us to the basic thesis of this book, which is that neurology, with the help of contemporary instruments of quantification and imaging, is a very suc-

cessful predictor of psychopathic behavior.

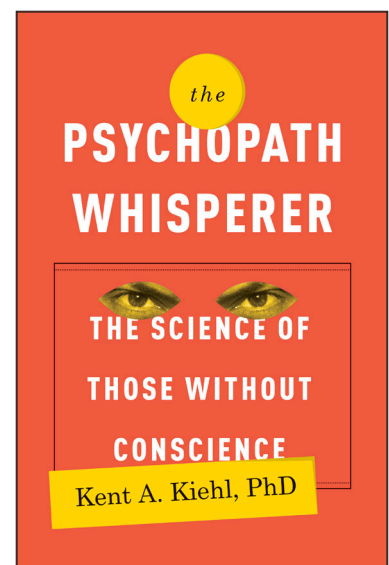
Kiehl devotes a good deal of attention to what he calls the “Oddball Task,” an experiment in which subjects are asked to listen to a series of tones. Most of the tones are of the same pitch, but one of them is the oddball, notably higher. Participants are asked to press a button when they hear the oddball.

Electrodes allow the experimenters to study the responses of the brain over the one-second period right after the subject hears the oddball sound. The pattern of the waves over that second, typically broken down in milliseconds, constitutes what is known as an event-related potential (ERP). Psychopaths typically have a very distinctive ERP in response to the Oddball Task.

Fascinating and Disturbing

Kiehl, experimenting with prison inmates, assigned this task to 81 of them (41 independently categorized as psychopaths, the other 40 not). He then gave the 81 plots to a research assistant to sort. The research assistant didn’t know which members of the group had been classified as psychopaths, and she was asked to sort the plots on the basis of what is known as the P3 wave, a distinctive feature of some responses to the task that, Kiehl had hypothesized, would diagnose psychopathy.

Her sorting confirmed his hypothesis. She had sorted 40 of the 41 psychopaths as possessing the distinctive P3. She hadn’t sorted *any* of the 40 non-psychopaths as



possessing that particular wave. “It was a fascinating result,” he writes.

For me, it is as much a source of disturbance as of fascination. For the research reminds me of the movie “Minority Report,” and I fear that if Kiehl’s line of research is taken seriously by policymakers, then brain-wave plots may end up replacing due process, and predictions of hypothetical future violence may displace inquiry into what the subject of the prediction has (or hasn’t) actually done.

Case in point: Kiehl tells us that an assistant of his once brought him an unexpected Oddball/ERP chart. Assuming it was an inmate’s plot, Kiehl studied it, saw the weird P3, and congratulated his student “on his first psychopathic brain wave.”

The student turned white and admitted, “It’s from my roommate.”

“My first thought,” Kiehl says, “was my assistant better get a new roommate as soon as possible. My second thought was that we couldn’t disclose anything about this plot to his roommate; it would be a serious breach of ethics.” He doesn’t appear to have thought one way or another about discussing it with other people with whom the roommate would be coming in regular contact.

But we’re told that the roommate hadn’t done anything wrong or suspect. “The guy seemed nice enough, was very talkative. ...” And we’re told that the assistant moved out.

In this case, the wave plot led to nothing more than a little social isolation. Someone was left in the room alone, apparently paying full rent although he had moved there expecting to pay half rent. Should the next person whom he may elicit to share the room and expenses also be told of this wave? So long as the weird-wave possessor isn’t told why he is being shunned, is the shunning unobjectionable?

I would have liked to see more probing of the implications of this sort of research beyond Kiehl’s almost random and selective remarks on the subject. ☉

THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE

EDITED BY ALAN E. STEINWEIS AND ROBERT D. RACHLIN

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Reviewed by Jon M. Sands and Felicitas Rieger

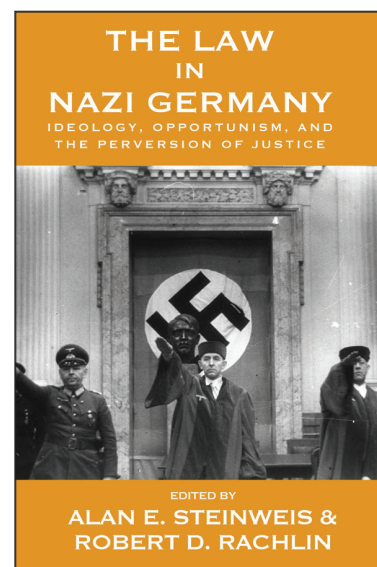
A reproduction of a publicity poster for the fifth annual meeting of the League of National Socialist German Jurists—the “Day of German Law”—follows the introduction to this collection of scholarly essays. The poster is vibrant, showing a waving flag that features a huge swastika and overshadows a stately court of law. The event took place in Leipzig from May 16 through May 19, 1936, one year after the enactment of the anti-Semitic Nuremberg Laws and 11 years before the Nuremberg trial that targeted the legal profession for its role in drafting and enforcing such laws.

The role of the legal profession in Nazi Germany has not been heavily studied. The focus has been on other facets of the Nazi regime: political, economic, social, and cultural matters. As evidenced by this collection of essays, the result of a symposium, historians are now turning their attention to the legal profession’s support of and complicity with, as well as its resistance against, Nazi ideology and governance. This examination is especially critical given that Germany’s reputation was of a nation of laws (*Rechtsstaat*) with a long tradition of jurisprudence and a highly skilled and trained judiciary. The failure of judges and lawyers not only to prevent the descent into lawlessness, but also to actively further the deprivation of property, liberties, and lives, begs for closer study. *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* is an excellent beginning.

As the book recognizes, law in Nazi Germany presents an exercise in contradiction. On the one hand, the Nazi regime was characterized by lawlessness. Hitler and the Nazi party overrode legalities with impunity. On the other hand, the administration of law and the courts continued to function. Indeed, the Nazis specifically used law to achieve their policy goals. The Nuremberg Laws, defining race and imposing restrictions upon Jews, is but one exam-

ple. Using intimidation and advancement, the Nazis ensured that judges, prosecutors, and lawyers would hew to the party line, but allowed them to continue to practice the legal profession otherwise unaffected. “The argument was not over whether Germany should function as a racist dictatorship, but rather over whether the authoritarian, racist order should be maintained by law or by the arbitrary exercise of power.” For most of the Third Reich, the legal profession first dirtied, and then bloodied, its hands in helping maintain the racist order. Only toward the end of the war did the façade of law crumble.

The first essay, by Konrad H. Jarausch, asks how so many in the legal profession could have become complicit. Yes, each decision was unique, and we have to understand the lawyers and judges as individuals, but Jarausch also believes that the study of the profession as a whole can yield insights. He focuses on how lawyers and judges responded to discrimination against Jewish lawyers. Turning first to lawyers, he first examines the “war youth generation” born between 1900 and 1910. These young men (and they were overwhelmingly men) “experienced the First World War in school, where they were subjected to an incessant stream of patriotic propaganda.” Imbued with nationalistic sentiment, they came of age during the insecurities and turmoil of the Weimar Republic, viewing Germany’s defeat in the war as a result of betrayal. They were beset by nagging fears of a decline in wealth and in the prestige of the legal profession as a result of competition from “outsider” Jewish lawyers. The rise of discrimination against Jews gave these



German lawyers a chance to advance, and the need for skilled lawyers and judges to carry out Nazi policies gave them prestige in the new order.

Judges, who were already of a conservative bent as a result of the judicial appointment process, justified their enforcement of the law as doing the state's work, however distasteful. Unblinkered fidelity to law, without considering its morality, was required. Jarausch parcels lawyers and other professionals into three groups, from the largest to the smallest: "passive facilitators, active supporters, and killing professionals. ... Resistance and dissent did take place, but was infrequent." The passive facilitators just did their jobs, which, of course, furthered the Nazi regime. Active supporters provided "intellectual expertise for ethnic resettlement and racial cleansing." The last group used legal means to achieve its dark ends.

Lawyers who became professional killers are the subjects of several essays. One example is Wilhelm Stuckart. Intelligent, well educated, diligent, and well versed in Nazi ideology, Stuckart was a civil servant who drafted the Nuremberg Laws and other anti-Semitic legislation. A participant in the Wannsee Conference in 1942, where the laws and regulations framing the Final Solution were set, Stuckart's ambition vaulted him quickly through a usually staid civil service bureaucracy. Although Hitler railed against lawyers—in a 1942 Reichstag speech, Hitler exclaimed that he would "not rest until every German understands that it is a disgrace to be a lawyer"—the Nazis nevertheless needed them to implement the laws that were indispensable to the state-sanctioned discrimination and genocide. Stuckart was ready. He drafted rules and orders by which millions would be deported and killed—not only non-Aryans, but people with mental and physical disabilities. He even handed over his own son with Down Syndrome to be euthanized. His career was capped in the waning days of the war by his being appointed as Reich Minister of the Interior and Education. Tried after the war, he was convicted and given time-served. The Court found mitigation in the fact that his regulations as to who was a Jew eligible for deportation spared half-Jews, whom he would have had sterilized instead of murdered.

Another lawyer who became a professional killer was Roland Freisler, chief justice of the People's Court, a specially estab-

lished tribunal with jurisdiction over treason and national defense. An accomplished law student and an early and ardent Nazi supporter, he earned his stripes defending Nazis charged in criminal offenses. After the Nazis seized power, Freisler was appointed state secretary in the Prussian Ministry of Justice, and then state secretary in the Reich Justice Ministry. In 1942, he was appointed to head the People's Court. Freisler dispensed with any pretense of impartiality or procedural regularity and instead used the bench not only to secure convictions and death sentences, but also to humiliate, belittle, and break defendants. The court handled such cases as a failed plot to assassinate Hitler, and it handed down thousands of death sentences to people accused of dissent or of undermining morale. Defendants could be tried for actions that had not been determined in advance to be illegal; the notion that judges should be bound by written criminal law Freisler denounced as un-German. Freisler's justification for this was that the nation was in peril, and that the law's protections should therefore not apply. The People's Court followed Joseph Goebbels' declaration "that the object of a judgment was not obtaining recompense for a wrong or the rehabilitation of the criminal, but for the preservation of the state." Freisler did not survive the war; he was killed in a bombing raid, dying in his chambers.

As indicated above, most lawyers went about their business. They of course facilitated the regime, but someone had to enforce the laws, resolve disputes, and see that crime was punished. Most of these lawyers continued their careers even with the fall of the Reich and de-Nazification. The Allies and then West Germany realized that someone had to enforce the laws, resolve disputes, and see that crime was punished. It would not do to pry too deeply into individual decisions.

Still, some faced war crimes trials. One such trial was the Justice Case, the subject of the 1961 film "Judgment at Nuremberg," in which 16 judges, prosecutors, and civil servants were accused of having "perverted the legal system, emptying it of all content and meaning, and then us[ing] the remaining shell, or façade, to bring about atrocities." These trials are examined by several scholars in this book, including Harry Reicher, who looks at the justifications that lawyers and judges offered in their defense, which relied on the claim that "they had

been accountable not to positive law but to the will of the Führer, and had had no free choice of their own to interpret the law." The judgment at Nuremberg recognized that the legal responsibilities of lawyers and judges cannot trump their individual responsibility to humanity. To the extent that the judges had been enforcing the law, the law was a façade. In a word, the defendants had committed "judicial murder."

Carefully studying two cases, both involving judges who rendered death verdicts, Reicher skillfully demonstrates the challenges that the Nuremberg prosecutors faced. The judges' defenses—variations of following orders or following the law—were found wanting when their judicial actions were shown to have had a preordained result. One of the death sentences had been for a Jew accused of stealing eggs, the other for a Jew accused of having had a sexual relationship with a non-Jew. In the latter case, charging "race defilement" of an "Aryan" woman, the "victim" testified that nothing intimate happened, and that the defendant was simply acting as a mentor to her, at her request. The judge had her charged with perjury and found her guilty. He could therefore disregard her testimony and find guilty the defendant accused of defiling her.

Almost half a century later, the German judiciary again grappled with the issue of judicial responsibility—this time after German reunification and efforts to deal with members of the East German military who had shot unarmed fugitives on the border between East and West Germany. East German law permitted these killings. The German Supreme Court concluded that a law cannot justify a crime that constitutes a violation of fundamental human rights.

The voices of victims are also heard in this book. Douglas Morris looks at how Jewish lawyers responded to their fate in his essay, "Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism." Morris, who has written a biography of Max Hirschberg, a prominent Jewish lawyer in the Weimar Republic (reviewed by Jon Sands in the July 2006 issue of *The Federal Lawyer*), tells how Jewish lawyers, primarily in Berlin, fought or succumbed to discrimination. One of us (Jon Sands) knows Mr. Morris, who is a practicing federal defender in the Eastern District of New York. Morris' essay begins with the increased opportunities presented to Jews

to enter law with the Weimar Republic. They did so in large numbers and quickly became prominent. But, then, starting with Hitler's rise to power in 1933, the Jewish legal profession was destroyed. The process of its destruction is revealing. The Nazis began by physically intimidating Jewish lawyers. They beat, humiliated, and degraded them. They isolated them by preventing their membership in associations, institutes, and academia, and leaned on non-Jewish lawyers to abandon their Jewish partners. Finally, the Nazis barred Jews from the legal profession and the judiciary. This last act actually consisted of several steps. First, Jewish judges had to retire, whereas Jewish lawyers could reapply to the bar, but would face restrictions on their representation of non-Jews. The Nazis also allowed only Jews who were veterans of World War I to reapply. The exception for war veterans was insisted upon by then President Paul von Hindenburg, the venerated World War I general. This exception presented a problem to Nazi jurisprudence and was soon ended. (Raphael Gross discusses such conundrums of Nazi jurisprudence and legal theory in his essay, "Guilt, Shame, Anger, Indignation: Nazi Law and Nazi Morals.") By 1938, the legal profession had been "cleansed."

Many Jewish lawyers emigrated and many became despondent enough to commit suicide. In his influential book of 1941, *The Dual State: A Contribution to the Theory of Dictatorship*, German-Jewish legal scholar Ernst Fraenkel, in exile in New York, analyzed the law under the Nazis. He identified what he called a "normative state," consisting of laws carried out in the traditional manner, and a "prerogative state," in which the Nazis wielded arbitrary power. The Nazis acted in both spheres: genocide and other crimes were a result of the prerogative state, acting through prerogative actors, such as the SS. The normative state, however, was also infused by Nazi ideology, and it shaped laws to reflect Nazi policies. The Nuremberg Laws, for example, were products of the normative state, and normative state actors, such as judges, carried out normative duties that were anti-Semitic. Fraenkel's book provides an invaluable heuristic device, well used by Morris, to examine the tension between German law and the Nazi usurpation of such law. Fraenkel used his analysis to justify a practical type of legal resistance. He refused to lose faith in the law, even when it was

subverted. Morris brings Fraenkel and other Jewish lawyers to life, adding personality to the book.

The Law in Nazi Germany ends with an essay by Kenneth F. Ledford titled "Judging German Judges in the Third Reich: Excusing and Confronting the Past." Ledford grapples with the efforts of the German judiciary to address its inhumane decisions, not just in Nazi Germany but in East Germany. The essay reminds us that history judges, and judges harshly, decisions made through normative means but influenced by inhumane prerogative ideologies.

Contemporary German legal education has sidestepped the role of law and the responsibilities of lawyers for the horrors of the Nazi era. Among law students, the perception is that a state of lawlessness dominated the Third Reich. Understanding that the opposite is true is not only of great importance for historical research, but is crucial for legal education in Germany. Of course, various aspects of the Nazi regime are discussed in German law schools. Law students learn, for example, that the German Constitution has to be interpreted with the events of the Third Reich in mind, and that some constitutional provisions aim at making comparable developments impossible in today's Federal Republic of Germany. The provision of irrevocable fundamental rights is only one of them. However this knowledge is incomplete without also bearing in mind the role that law played for the Nazi regime.

Laws secured the legitimacy of the Nazi government and provided a systematic and consistent approach to its goals. This was true not only the laws that the Nazis enacted, but of previous laws that they interpreted to comply with the principles of the regime. Some of these laws are still in effect—the German Criminal Code and the German Civil Code are the most prominent. The profession's role in reinterpreting laws and regulations, and carrying out new laws, made it complicit in the Nazi crimes. The individual acts of non-Jewish German lawyers in dissolving partnerships, shunning friends, and taking advantage of discrimination made them actors in the Holocaust. The essays in *The Law in Nazi Germany* provide a thorough understanding of the threats that come along with reinterpreting laws to take account of a society's changed principles. This should be emphasized not only in German legal education, but in every law school, everywhere. The profes-

sion must remember.

A closing photograph in the book depicts another judicial conference, again in Leipzig, in October 1933. It shows hundreds of assembled jurists swearing an oath to the Nazi regime. It is easy to look at the photograph and think that, of course, it could not happen here. We swear an oath to a Constitution; we have judicial independence; we have traditions and precedent. Remember, though, that, in 1944, as the United States was fighting the Nazis, the U.S. Supreme Court affirmed the confinement of Japanese-Americans in detention camps. ☉

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