Closing the Courtroom: Press Restrictions and Criminal Trials in Late Nineteenth Century Germany

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The unification of Germany in 1871 marked the start of an important era of legal codification. A new Imperial Criminal Code (*Reichsstrafgesetzbuch*) was derived directly from the former Criminal Code of the North German Confederation, which in turn had been based largely on the earlier Prussian Criminal Code of 1851. The Imperial Code of Criminal Procedure (*Reichsstrafprozessordnung*), which contained the practical guidelines for prosecutions along with the rights of defendants, was created in a longer process after unification and finally enacted along with a new Code of Civil Procedure (*Zivilprozessordnung*) as part of the German Justice Laws of October 1879. All of these law codes were deeply influenced by liberal views about crime and punishment that had been dominant in Germany since the middle of the nineteenth century, and they were designed to move the country solidly on the path toward becoming a *Rechtsstaat:* a nation whose administration was based on values of uniformity, regularity, and certainty in decision making.[1] In this new *Rechtsstaat,* the administration of justice would be governed by the "rule of law," which

1. Benjamin Hett, *Death in the Tiergarten: Murder and Criminal Justice in the Kaiser's Berlin.* (Cambridge, MA: Harvard University Press, 2004), 19; and Richard Wetzell, "From Retributive Justice to Social Defense: Penal Reform in Fin-de-Siècle Germany," in *Germany*

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would ensure that all citizens would not only be equal before the law, but that they would also have rights that protected them against governmental caprice and the influence of traditional landed elites.[2]

On the surface, then, these new law codes appeared to signal a triumph of liberal bourgeois principles that aimed at a broader inclusion of the general public in the justice system as a bulwark against state power and the influence of aristocratic elites. The most prominent of these were the principles of *Öffentlichkeit,* a requirement for most court proceedings to be open to public viewing and participation, and *Mündlichkeit,* a reliance on oral rather than written testimony in the courtroom. From the beginning of the century onward, liberal legal reformers had pursued both greater public participation in the justice system—including the adoption of a system of jury courts—and greater openness for criminal trials themselves. These twin meanings of legal *Öffentlichkeit,* public participation and an open courtroom, were viewed as essential reforms in that they could prevent abuses of power by a judiciary composed mostly of landed elites. A public trial proceeding could also potentially serve an educative function: many liberal legal theorists argued that opening criminal trials to public observation (and reporting by daily newspapers) could serve to morally educate ordinary citizens by demonstrating both the inner workings of a courtroom and the potential consequences of violating of the law.[3]

The new law codes, however, enjoyed very little of what we might call a "honeymoon" period. They were fiercely attacked by a wide variety of critics almost from the moment they were first enacted. Some of these attacks, as one might expect, came from the extreme left and right wings of the political spectrum. Conservatives viewed particular reforms as far too radical, as risking a dangerous weakening of state power, or as violations of sacred and well-worn Prussian legal traditions. This was especially true in areas in which the framers of the new law codes had made compromises to accommodate the various legal traditions of formerly independent German states.[4] Socialists, on the other hand, considered the legal reforms of the 1870s as half-measures at best, which promised equality before the

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at the Fin de Siècle: Culture, Politics, and Ideas, eds. Suzanne Marchand and David Lindenfeld (Baton Rouge: Louisiana State University Press, 2004), 59.

2. Kenneth Ledford, *From General Estate to Special Interest: German Lawyers 1878–1933* (New York: Cambridge Univ. Press, 1996), xxvii.

3. See Alexandra Ortmann, *Machtvolle Verhandlungen: Zur Kulturgeschichte der deutschen Strafjustiz 1879–1924* [Powerful proceedings: On the cultural history of German penal law] (Göttingen: Vandenhoeck and Ruprecht, 2014), 109.

4. See, for example, the complaints of the Prussian Justice Minister, Heinrich von Friedberg, to Chancellor Otto von Bismarck quoted in Uwe Wilhelm, *Das Deutsche Kaiserreich und seine Justiz: Justizkritik, politische Strafrechtsprechung, Justizpolitik*

law but in reality merely provided a thin facade for a system of "class justice." This kind of argument would first be implied by the Socialist leader Wilhelm Liebknecht as he stood trial for treason in 1872, and then made even more forcefully and systematically by his son Karl Liebknecht in a famous speech 35 years later.[5]

Which of these interpretations is accurate? Was the criminal justice system in Imperial Germany, built on the liberal principles of public participation and an open courtroom, the core of a modern *Rechtsstaat*? Or did this system, despite all the rhetoric of equality before the law, remain a tool of political and social oppression? Not surprisingly, historical interpretations over the last century have been as diverse as views within the *Kaiserreich* itself.

In recent years, scholarly interpretations of criminal justice system in Imperial Germany have undergone a paradigm shift, one that parallels important changes in how historians have viewed the general development of German political culture, and especially the achievements of German liberalism during this era. Until relatively recently, most historians described the development of German liberalism during the *Kaiserreich* as a story of weakness, "ideological and strategic emptiness," and hypocrisy.[6] Hans-Ulrich Wehler's classic 1975 work, *The German Empire,* for example, described the efforts of the liberal bourgeoisie to achieve meaningful democratic reforms during this period as largely a failure. Despite new unified law codes and the granting of universal manhood suffrage for elections to the German Parliament (*Reichstag*), Wehler argued that the German bourgeoisie failed to push for further democratization, and instead compromised key liberal principles in order to assure government support. This failure, he argued, not only helped to preserve archaic and authoritarian institutions in Imperial Germany (including elements of the criminal justice system), it also put Germany on a *Sonderweg* or "special path" toward an eventual fascist dictatorship.[7]

[The German Empire and its justice: Judicial criticism, political trials, and legal policies] (Berlin: Duncker und Humblot, 2013), 242.

5. Hett, *Death in the Tiergarten,* 19. See also Karl Liebknecht, *Rechtsstaat und Klassenjustiz: Vortrag, gehalten zu Stuttgart am 23. August 1907* [The rule of law and class justice: Lecture held in Stuttgart on August 23, 1907] (Stuttgart: Singer, 1907). Liebknecht claimed that in Germany, there was a thin facade of a system of laws (*Rechtsstaat*) that only partially covered the police state (*Polizeistaat*) underneath. In reality, he suggested, Germany was perhaps three quarters or even nine tenths police state.

6. See a brief summary of the historiography on German liberalism in Dennis Sweeney, "Liberalism, the Worker and the Limits of Öffentlichkeit in Wilhelmine Germany," *German History* 22 (2004): 37. The quoted phrase itself Sweeney has taken from James Sheehan's *German Liberalism in the Nineteenth Century* (Chicago: University of Chicago Press, 1978), 272–73.

7. See Hans–Ulrich Wehler, *The German Empire* (New York: Berg, 1997).

Wehler's powerful critique of German liberalism was countered just a few years later in a landmark study by David Blackbourn and Geoff Eley. Blackbourn and Eley challenged Wehler's portrayal of the German middle class as being weak and ineffective; more specifically, they accused Wehler of being too focused on legislative and electoral successes in estimating the success of German liberalism, and they pointed instead to significant transformations in German culture as evidence of the *embourgeoisment* of German society. Even if the German bourgeoisie never achieved an actual political revolution, the hegemony of liberal values itself constituted a kind of "silent revolution."[8]

More recently, Margaret Anderson has argued in her exceptional book *Practicing Democracy* that even in the political realm, this revolution was far from silent. Anderson argued that although Imperial Germany was far from what one might call a modern democracy, the practice of voting by universal manhood suffrage helped to build a diverse and powerful grassroots political culture; as she puts it, Germans were busy "rapidly transforming a segmentary, authoritarian, and communal culture that professed to abhor partisanship of any kind into a nationalized, participatory, public culture, one in which partisan loyalties organized expectations and structured much of public life."[9] Thus, despite the institutional advantages still enjoyed by government officials and conservative elites (including an unelected executive and a lack of ministerial responsibility), this electoral process provided real room for political dissent and reinforced new cultural norms, especially greater public awareness of legal rights and guarantees of fair election procedures.[10] If the institutions of German democracy were not yet fully developed, Anderson argues, at least the rules of democratic procedure could still be used to challenge the will of the government and to delimit the possible government responses to political opposition.

Interestingly, at the same time as a historical consensus has grown around the idea that Imperial German society was in the process of a thorough political and social transformation and that political influence could

8. See David Blackbourn and Geoff Eley, *The Peculiarities of German History* (New York: Oxford, 1984). There has been an enormous array of scholarship since Blackbourn and Eley's landmark study that generally supports and extends their argument in various directions. For examples in English, see Dieter Langewiesche, *Liberalism in Germany* (Basingstoke: Macmillan, 2000); David Blackbourn and Richard Evans, eds., *The German Bourgeoisie: Essays on the Social History of the German Middle Class from the Late Eighteenth Century to the Early Twentieth Century* (New York: Routledge, 1991); and Jonathan Sperber, *The Kaiser's Voters: Electors and Elections in Imperial Germany* (New York: Cambridge University Press, 1997).

9. Margaret Lavinia Anderson, *Practicing Democracy: Elections and Political Culture in Imperial Germany* (Princeton: Princeton University Press, 2000), 20.

10. Anderson, *Practicing Democracy,* 17.

be exerted there both as a "top-down" and "bottom-up" process, many scholars have begun to take a more critical look at the growing ambivalence of German liberals to the very political and legal institutions that their own values had helped to create.[11] Perhaps the most interesting of these works, especially for the purpose of this article, is Alexandra Ortmann's 2014 book, *Machtvolle Verhandlungen* (Powerful Proceedings).[12] In this book, Ortmann argues that liberal enthusiasm toward both direct public participation in the criminal justice system and the openness of court proceedings had begun to wane as early as midcentury, and had reversed itself decisively by the end of the century. In part, this growing disillusionment had to do with "professional" concerns. *Öffentlichkeit*, in the sense of public participation in the finding of criminal verdicts, had originally been seen as an assertion of the voices of members of the liberal bourgeoisie against more reactionary landed elites who dominated the legal system. By the 1870s, however, members of the bourgeoisie had thoroughly infiltrated both the Parliament and judiciary. If the principle of public participation was still viewed by jurists as an essential protection against government power and caprice, it was now also seen as potentially opening the door to members of society outside either the landed elites or the bourgeoisie, including the lower classes, women, and Jews. These "outsiders," it was suggested, lacked the education, experience, and moral character to properly execute their duties and reach fair verdicts in a courtroom setting. Many liberal jurists had become convinced, therefore, that it was now more appropriate to place important matters of the law in the hands of experts rather than leaving them to laypeople who lacked sufficient training and cultivation to apply the law in an appropriate manner.[13]

A change of heart toward the other meaning of *Öffentlichkeit*, public access to the courtroom, followed for similar reasons. Again, the notion of "the public" had gradually come to describe a population beyond the bourgeoisie, whose education and level of civility was incomplete, and who were

11. Dennis Sweeney cites Geoff Eley, Dagmar Herzog, and Pieter Judson as scholars who described concerted attempts within German (and Austrian) liberalism to secure their narrow social and political hegemony against social "outsiders" who were gradually becoming empowered by democratic reforms. According to Eley, German liberals "favoured definitions of citizenship and schemes of political representation which were always qualified by possession of property, education, and a less tangible quality of moral standing and actively constructed in opposition to expressions of popular democracy." See Dennis Sweeney, "Liberalism, the Worker and the Limits of Öffentlichkeit," 39.

12. There are several other recent works that provide insight into important changes underway within the legal professions and within a wider German legal culture. See for example, Ledford *From General Estate to Special Interest* and Hett *Death in the Tiergarten.*

13. Ortmann, *Machtvolle Verhandlungen*, 12, 20–21.

therefore naïve, vulnerable, and easily corrupted.[14] This included not only men from the lower classes, but potentially women and children as well. This broader public required guardianship by their social betters, the teaching of Christian values, and also a rigorous protection from the corruption of socialist propaganda, lewd art and literature, and a sensationalist and manipulative press. Left vulnerable to dangerous influences, this public could easily turn into a mob capable of undermining German society. In other words, this impressionable and malleable public now needed to be protected from the salacious details of sensational trials, just as the integrity of the courtroom needed to be protected from corruptive "outside" influences as well.

Growing fears about the potential malleability of "the public" were exacerbated by the explosive growth of the political press during the first few decades after German unification. Although the press had played an important role in many German states before 1870, the dramatic growth in the number, variety, and circulation of political newspapers after unification made their influence felt as never before. It is true that until perhaps the 1890s, no one newspaper could really claim to have a mass circulation; long before then, however, political newspapers were widely available at inns and restaurants, and "extra" editions were commonly sold on the streets to deliver especially urgent or sensational news. Moreover, political newspapers often engaged in running debates with one another, and editorial opinions of even the most insignificant paper could thus gain wide attention when they were supported or attacked by larger organs.[15] This growing cacophony of journalistic voices can to some extent be considered an extension of lively political debates within the new German *Reichstag*. Political journalists, however, did not simply reflect the opinions of specific political factions; they often sought to drive particular issues for their own independent ideological, personal, or pecuniary reasons. Attacks on political and journalistic rivals were thus grounded as much in competition for potential readers as in competition for potential voters.

Not all Germans greeted the growing power and reach of the press with unmitigated enthusiasm. On the one hand, most liberals tended to view a vibrant free press as a bulwark that ensured individual rights and protected citizens against government authority. German Catholics and Socialists, whose journalists had faced a wave of prosecutions for libel and lèse-majesté beginning in the mid-1870s, also came to view the defense of press freedoms as a crucial part of their own political struggle. Alongside the notion that newspapers were a powerful counterbalance against

14. See Gary Stark, *Banned in Berlin: Literary Censorship in Imperial Germany* (New York: Berghahn, 2009), xxiii–iv.

15. See Barnet Hartston, *Sensationalizing the Jewish Question: Antisemitic Trials and the Press in the Early German Empire* (Leiden: Brill, 2005), 24–25.

government power, however, there was also a growing concern that modern journalists often tended to violate traditional notions of honor, not only in their willingness to slander political opponents or government officials, but also in their tendency to seek out or even manufacture scandal. The most successful newspapers in Germany during the 1870s and 1880s tended to be liberal in orientation, and they were saddled by their rivals with pejorative labels such as the "gutter press" (*Revolverpresse*) or more pointedly, the "Jew press" (*Judenpresse*): epithets that were intended to emphasize their corruptive effect on German morals and social institutions.[16] Whereas most journalists tended to portray themselves as "gentlemen"—responsible men who reported objectively in the interests of society—they portrayed their rivals, and especially liberal journalists, as rogues who sought to create and exploit scandals simply to benefit their own political and financial goals.

The dramatic growth of the press in Imperial Germany also had a substantial impact on the criminal justice system. The new emphasis on openness and oral proceedings in the courtroom helped to turn sensational political and criminal trials into perfect fodder for newspapers to attract potential readers while also scoring political points. Political newspapers of every stripe dedicated significant column space to covering trials, and editorials about the most controversial cases would often devolve into angry exchanges with rival papers that could last for weeks after a verdict had been delivered. The sensationalizing and politicizing of criminal cases was a matter of growing concern during the first decades of the German Empire, and scandal-mongering by the press was criticized not only as a potential threat to public decency, but also as a potential threat to the justice system itself.[17] Especially beginning in the 1880s, complaints about

16. There are several excellent scholarly works that touch on sensational trials and the press in Imperial Germany, including Hett, *Death in the Tiergarten*; Alex Hall, *Scandal, Sensation, and Social Democracy* (New York: Cambridge, 1977); Philipp Müller, *Auf der Suche nach dem Täter: Die öffentliche Dramatisierung von Verbrechen im Berlin des Kaiserreichs* [In search of a suspect: The public dramatization of crime in Imperial Berlin] (New York: Campus, 1985); Martin Kohlrausch, *Der Monarch im Skandal: Die Logik der Massenmedien und die Transformation der wilhelminischen Monarchie* [The monarch in scandal: The logic of the mass media and the transformation of the Wilhelmine monarchy] (Berlin: Akademie Verlag, 2005); Norman Domeier, *Der Eulenburg-Skandal: Eine politische Kulturgeschichte des Kaiserreichs* [The Eulenburg scandal: A cultural history of politics in the German Empire] (Frankfurt am Main: Campus Verlag, 2010); and my own *Sensationalizing the Jewish Question*.

17. For a brief overview of the German press during the time of Bismarck, including examples of the newspapers commonly labeled pejoratively as part of the *Judenpresse*, see the appendix to my book *Sensationalizing the Jewish Question*. A more comprehensive survey of the German press during this era can be found in Kurt Koszyk's classic work

the corruptive power of the press on the legal process became increasingly common among justice officials, jurists, journalists, and politicians, even from many people who otherwise vigorously defended both freedom of the press and the principle of legal openness.

In this article, I will examine debates surrounding the impact of the press on criminal trials during the *Kaiserreich*, especially the changing attitudes of both politicians and jurists toward the general concept of *Öffentlichkeit*. The main focus of this article will be two particular criminal trials in late 1885 and early 1886, against the artist Gustav Graef and against the Danish spy Christian von Sarauw. These cases provoked an especially spirited debate on these issues and would spur the German government to propose new laws to restrict press coverage of trials that posed a potential danger either to public decency or to national security. As I will show, these new law proposals would run into substantial resistance in the *Reichstag*, and contentious debates would persist over several years. On the one side, members of the Conservative and Free Conservative parties tended to support the government without reservation, whereas on the other side, left-liberals and Socialists tended to distrust government motivations and oppose the legislation in its entirety. Meanwhile, two parties with different constituencies and motivations, the National Liberals and the Catholic Center Party, were caught between their genuine desire to protect the principle of openness and the sincere belief that the scandal-driven modern press posed a real threat to society. Although the Imperial German government would eventually get significant new legislation passed to limit press and public access to certain trials, this victory would come only with substantial compromises and in an entirely unexpected form. Despite intense government pressure, then, the legislative debates surrounding the issue of legal *Öffentlichkeit* were as much a story of political resistance as they were a story of compromise.

An important side note before I turn to the two sensational trials and their legal aftermath: one must be careful not to draw too sharp a distinction here between "internal" juristic debates within a sphere of legal experts and "external" political debates about *Öffentlichkeit* within the *Reichstag* or in the political press. In Imperial Germany, these spheres often tended to overlap to a substantial degree, especially during public discussions of sensational trials. As will be discussed, a significant number of *Reichstag* deputies were also practicing jurists (and sometimes journalists as well). When each political party selected representatives to speak for them on the *Reichstag* floor or to join special committees to negotiate

Deutsche Presse im 19. Jahrhundert [German press in the nineteenth century] (Berlin: Colloquium Verlag, 1966).

potential legislation, in the vast majority of cases, those selected were practicing judges or lawyers. It cannot be concluded that these few voices somehow represent an accurate sample of all jurists within the *Kaiserreich,* but neither should their opinions be considered separately from strictly "internal" legal debates solely because their arguments were delivered in a political arena, and in a manner designed for public consumption.

The Graef Trial and Public Morality

For several weeks in late September and early October 1885, the trial of the artist Gustav Graef became a public obsession in Berlin and across Germany. The trial involved a prominent painter accused of both committing perjury and having affairs with two underage models, and the proceedings included the reading of salacious poems and letters, the recounting of sordid details of the alleged affairs, and dramatic confrontations between various witnesses and the defendant. Technically, the Graef trial was closed to the public. However, at the start of the case, held at the Berlin Regional Court, Judge Boguslaw Müller made the rather controversial decision to close the courtroom to a general audience and yet still allow a variety of people to attend, including government officials, people with a "scientific" interest in the case, and representatives of the press, who were allowed to record detailed trial transcripts for publication in daily newspapers. Judge Müller would quickly come to regret this ruling.

Boguslaw Müller was not an idiot. As he took great pains to explain in open court during the Graef trial, he believed he had sufficient legal grounds to close the courtroom to a general audience and still allow press representation. Müller had ordered the general public to be excluded under Paragraph 173 of the German Court Organization Law (*Gerichtsverfassungsgesetz* [GVG]), which gave judges the discretion to close trial proceedings in cases in which public order or public morality were threatened.[18] Paragraph 176 of the same code, however, granted the lead judge discretion to allow specific individuals access to a closed courtroom, with no specific guidance on how broad or how limited those

18. The term *Gerichtsverfassungsgesetz* does not have an obvious English translation. Scholars have used a variety of terms, including "Constitution of the Courts," "Judiciary Act," or "Court Organization Law," and I have chosen the latter for the sake of clarity. This law, passed in 1877, set out the hierarchy of courts, and such things as the qualifications and presiding powers of judges, and the rules for jury trials. It was distinct from the Codes of Criminal and Civil Procedure. For an explanation in English, see Kenneth F. Ledford, "Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877–79," *Central European History* 26 (1993): 165–93.

exceptions should be. Therefore, Müller apparently decided to close the courtroom as a matter of decorum; however, he allowed entry to journalists in the general interest of openness and transparency. In a long speech delivered in the presence of the jury, Müller claimed that he had made this ruling because he believed that press coverage of high-profile criminal cases was essential to protect public confidence in the justice system (*öffentliche Rechtsbewußtsein*), and also because he had trusted that these reporters and editors would act professionally. It was, he claimed, the improper behavior of individual reporters that was responsible for any public controversy generated by the trial, not his own decision to admit those reporters into the courtroom.

Ultraconservative newspapers such as the *Kreuzzeitung,* which were otherwise quite supportive of Judge Müller, suggested after the trial that he had been extraordinarily naïve about the consequences that might result from allowing press access. As this newspaper put it:

> This exclusion of the public was purely a symbolic measure, at least compared to what we would ordinarily assume such an exclusion to mean. Regular exceptions were made. . . not simply for people against whom one could hardly raise any objection, such as those who had a scientific or psychological interest in the proceedings, or even a few carefully chosen upstanding gentlemen for whom an exposure to the sexual filth of such a trial would not pose a real danger. No! Exceptions were made for exactly the kind of people who make a living by spreading things that should normally be kept behind closed doors: namely, court reporters employed by the press.[19]

Several prominent jurists also weighed in publicly and echoed the sentiments of the *Kreuzzeitung*. Otto Mittelstädt, a judge at the Supreme Court in Leipzig, ridiculed Müller's decision in a long critique of the trial published in the prominent journal *Preußische Jahrbücher.* Common sense, Mittelstädt suggested, would demand that if any class of people were restricted from the courtroom, it should be members of the

19. *Kreuzzeitung,* "Ausschluß der Oeffentlichkeit [Exclusion of the public]," October 2, 1885, #230, 1. The *Neue Preußische Zeitung*, or *Kreuzzeitung*, had a long and complicated history. In the years after its founding in 1849, the newspaper voiced the frustration of arch-conservative Junkers—including a young Otto von Bismarck—against the Prussian Prime Minister, Otto von Manteuffel. After Bismarck's accession to the German chancellorship, the *Kreuzzeitung* turned its criticism against him during periods when he cooperated with liberal parties and tended to moderate its tone when he tacked politically to the right. After 1884 (and especially after 1887), when Bismarck looked to build a "Kartell" of National Liberals and Moderate Conservatives, the paper once again viewed Bismarck with hostility. See Meinolf Rohleder and Burkhard Treude, "Neue Preußische (Kreuz-) Zeitung," in *Deutsche Zeitungen des 17. bis 20. Jahrhunderts* [German newspapers from the seventeenth to twentieth centuries], ed. Hans-Dietrich Fischer (Pullach bei München: Verlag Dokumentation, 1972), 209–10.

press: "They desired absolutely nothing more or less than to carry out the profession by which they live; they wanted to quickly turn what they heard in court into readable newspaper articles, and then through the daily press to scream out their accounts, just as a trader in the marketplace or as a call to prayer from church towers, urbi et orbi, in a manner best designed to attract the most attention possible. If this kind of publicity was acceptable and innocuous, then why all the secretiveness and the closing of the courtroom?"[20]

It was especially ridiculous, according to Mittelstädt, for Müller to suggest that he had relied on reporters to self-edit the most salacious testimony. Such editing, he suggested, could be even more dangerous than verbatim transcripts, because any gaps, euphemisms, and circumlocutions would only provoke readers to rely on conjecture and their own lecherous imaginations. Of course, these kinds of critiques tended to adopt a particular reading of the nature of the "public" (*Öffentlichkeit*) and "public opinion" (*öffentliche Meinung*), which emphasized naïveté and vulnerability to moral corruption. For both Mittelstädt and the *Kreuzzeitung,* then, the journalists who should ideally be serving as potential educators of the public were now acting as dangerous mis-educators of public opinion. Left vulnerable to this scandal-hungry press, "the public" could easily fall victim to its worst instincts.

The most trenchant criticism was focused primarily on several prominent liberal newspapers in Berlin, which were accused of appealing primarily to the emotions of their readers and thus violating traditional notions of manliness that emphasized honor, self-control, and the absence of emotional expression. The editors of the Catholic *Germania,* for example, suggested that their own newspaper had refrained from commenting on the proceedings while they were underway and even to some extent once they had ended. This restraint was contrasted with the behavior of liberal authors such as Paul Lindau, whom *Germania* accused of seeking to sway political opinion and even attempting to influence the jury itself through

20. Otto Mittelstädt, "Strafjustiz und öffentliche Meinung [Criminal justice and public opinion]," *Preußischer Jahrbücher* 56 (1885): 501. Similar opinions were voiced by Carl Fuchs, a judge at the Higher Regional Court (*Oberlandesgericht*) in Jena, who suggested that the Graef trial demonstrated the acute need for explicit new laws to restrict press reports on closed trials. See Carl Fuchs, "Zum Prozess Graef [On the Graef trial]," *Goltdammer's Archiv für Strafrecht* 33 (1885): 403–30. Mittelstädt was a fascinating character. Although he identified as a liberal, he is occasionally characterized by historians as an arch-conservative because of his controversial call for a renewed emphasis on corporal punishment in prisons rather than a focus on rehabilitation. For more detail on his career, see Warren Rosenblum, *Beyond the Prison Gates: Punishment and Welfare in Germany* (Chapel Hill: Univ. of North Carolina Press, 2008), especially 34–40.

melodramatic reporting on the case.[21] The *Berliner Börsen-Courier* and the *Nationalzeitung* were also singled out for their "feuilletonistic" coverage of the Graef trial, with "feuilleton" referring to the section of newspapers generally reserved for entertaining feature stories or serialized fiction.[22] This kind of trial coverage, it was argued, encouraged the worst instincts of the public, something the arch-conservative *Kreuzzeitung* compared to spreading poison into the German soul. The *Kreuzzeitung* accused the *Börsen-Courier* of filling their reports on the trial with sentimental coquetry about alley prostitutes and fallen women, and then attempting to "cover up the moral abyss uncovered by the trial with flowery rhetoric."[23] According to the ultraconservative *Reichsbote,* the *Nationalzeitung* was even worse:

> It is already a sign of confused moral principles for a newspaper to describe an ugly and scandalous trial held behind closed doors as a "gripping drama." The smarmy praise heaped on the leading figures of the trial is also absolutely disgusting. The "patient and humane" lead judge, the "warm-blooded" prosecutor, and the "pre-eminent jurist and eloquent advocate" Simson—how embarrassing this flattery must seem to an earnest and conscientious judge. One has to ask: what is this newspaper's goal?. . .Such behavior on the part of the press must be protested in the interests of public law and morality.[24]

Both during and after the trial, leading Catholic and Conservative newspapers continued their assault on these "ungentlemanly" liberal newspapers, which they portrayed as muckraking scandal sheets engaged in a headlong rush for readers and profits. "Instead of working to lead and nurture the general public, as one might expect," the *Kreuzzeitung*

21. See *Germania*, October 9, 1885, #231, Erstes Blatt, 1. Although occasionally referred to as a semiofficial organ of the Catholic Center Party, the editors of the *Germania* often found themselves in conflict with more moderate or liberal-leaning Catholic leaders. The paper was fairly consistent in its militant anti-Bismarckian, anti-liberal, and anti-Semitic rhetoric, and on these issues it often found common ground with the ultra-conservative *Kreuzzeitung.*

22. The *Berliner Börsen-Courier*, founded by George Davidsohn, was generally regarded as a left-liberal or *freisinnig* newspaper. Davidsohn fostered ties to artists, writers, and musicians, and the paper quickly became an influential force in Berlin culture. The newspaper was also one of Richard Wagner's earliest and most enthusiastic supporters in the German press. The *Nationalzeitung*, edited by Friedrich Dernberg, was generally aligned with the National Liberal Party. After the weakening and splitting of the National Liberal Party in the early 1880s, the newspaper wavered in its political loyalties and its number of public subscriptions dropped. See Walther Oschilewski, *Zeitungen in Berlin: im Spiegel der Jahrhunderte* [Newspapers in Berlin: A reflection of the centuries] (Haude & Spener, 1975), 88 and Jürgen Kahl, "*National Zeitung*," in *Deutsche Zeitungen des 17*, 177–90.

23. *Kreuzzeitung,* October 4, 1885, #232, 3.

24. *Reichsbote,* "Ein Protest [A protest]," September 30, 1885, #228, 1.

complained, "they have instead become an obedient servant to their basest instincts."[25]

For many observers, the sensationalized coverage of the Graef trial seemed to be a threat not only to the moral fabric of the public, but also to the very functioning of the criminal justice system. In an article immediately following the verdict, the National Liberal *Grenzboten* complained that the lure of favorable press coverage had now turned serious trials into theater pieces, and judges into fellow actors. As the *Grenzboten* complained: "It seems as if the robe has become just another theatrical prop in the courtroom, as if instead of judges we had actors in front of us who could not rest comfortably until they had surpassed the fame of all other virtuosos."[26] Judges, prosecutors, attorneys, and even witnesses, it seemed, might now see the courtroom as an opportunity to seek public adulation rather than to assist in an impartial search for justice and truth.[27]

Even many liberal newspapers that ordinarily defended freedom of the press and the principle of legal transparency now suggested that scandalous trials such as the Graef case should be held completely outside the public eye. The *Frankfurter Zeitung*, for example, a successful paper affiliated with the fringe left-liberal German People's Party, was very critical of trial coverage in the press.[28] On the one hand, the newspaper argued that the principle of openness was an essential feature of the modern criminal justice system because it "placed an additional judge above the presiding judge in the case—namely, the conscience of the people."[29] However,

25. *Kreuzzeitung*, "Der Prozeß Graef und die liberale Presse [The Graef trial and the liberal press]," October 18, 1885, #244, 1.

26. "Der jüngste Berliner Skandalprozess [The most recent Berlin scandal trial]," *Grenzboten* 44 (1885): 145.

27. Perhaps the most infamous example of posturing in court for public consumption came a few years later during the spectacular Heinze murder trial of 1891, in which two defense attorneys, Alfred Ballien and Richard Cossmann, directly challenged judges and prosecutors and used repeated motions to delay the trial, all while ostentatiously sipping champagne at the defense table. See Hett, *Death in the Tiergarten* for more on the Heinze case and the changing culture of lawyers, 82–95.

28. A diversity of liberal reactions should not be surprising, as German "liberals" were themselves a diverse group. As Michael Gross points out, Leopold Sonnemann, editor of the *Frankfurter Zeitung,* and his People's Party, had been staunchly against the anti-Catholic *Kulturkampf* legislation of the 1870s, which many other liberals had supported. Despite this position, the *Frankfurter Zeitung* was commonly lumped in with other liberal newspapers as part of the "*Judenpresse*." See Michael Gross, *The War Against Catholicism: Liberalism and the Anti-Catholic Imagination* (Ann Arbor: University of Michigan Press, 2005), 272–73.

29. See *Frankfurter Zeitung,* October 11, 1885, Morgen in Bundesarchiv Berlin–Licherterfelde, Germany (hereafter BA-L), R3001/4776, Vol. 1, 2; The *Germania*'s perspective is available in its front page article on October 10, 1885, #232, Erstes Blatt, 1.

the paper also concluded that especially salacious trials should always be closed to the public. This, the paper claimed, must necessarily mean both banning a local audience and forbidding detailed press reports on the trial, especially in cases in which the principle of legal *Öffentlichkeit* could still be protected by a panel of lay jurors who would decide the question of guilt or innocence.[30] Apparently, for the *Frankfurter Zeitung*, the potential benefit provided by public oversight of the legal process in such cases could not outweigh the potential damage caused by the public exposure to the indecent subject matter.

Not everyone believed that the exclusion of court reporters would be in the public interest, even for cases as salacious as the Graef trial. The left-liberal *Berliner Börsen-Courier,* for example, claimed that allowing reporters inside the courtroom was not only constitutionally protected, but also in the best interests of the nation. An open courtroom, they asserted, had often aided in the search for truth, and press coverage had long proven useful in explaining convoluted legal questions to the public, encouraging a better understanding of the legal code, and even serving as a deterrent to criminal behavior. "The newspapers could do without transcripts of trial proceedings," the *Börsen-Courier* claimed, "and they would do without them if the government insisted on restricting or controlling them… it is rather the interests of the state which cannot be served without such publically available trial transcripts."[31]

The Sarauw Trial: National Security under Threat

Certainly German justice officials were attuned to these debates; however, it is not entirely clear that formal legislation on this issue would have been forthcoming if another legal crisis had not come along. In late 1885, Christian von Sarauw, a military historian and former captain in the Danish Army, was arrested and charged with treason for allegedly bribing German military officers for sensitive documents that he then passed on to the French. Sarauw was tried and convicted in February of 1886 and sentenced to 12 years of hard labor. The press coverage of the Sarauw trial had greatly concerned Otto von Bismarck and his son Herbert, who at the time was serving as the state secretary of the Foreign Office. In a letter to Hermann von Schelling of the Imperial Justice Office, Herbert von Bismarck complained that although that the Sarauw proceedings had been closed to the public, detailed reports on the evidence had still

30. *Frankfurter Zeitung,* October 11, 1885 Morgen in BA-L, R3001/4776, Vol. 1, 2.
31. *Berliner Börsen-Courier,* October 17, 1885, #527, Morgenausgabe, 2.

appeared in the press after the trial. The published information was specific enough that a key witness, who had testified only on condition of anonymity, was easily identifiable even without his name being explicitly mentioned.[32]

The source of the problem was a loophole in §174 of the German Court Organization Law (GVG), which explicitly required that all trial verdicts be delivered publicly. When this law was first proposed, there had been a debate about whether it should pertain only to the simple trial verdict itself, or also to the legal grounds (*Gründe* or *ratio decidendi*) for the decision: a long written summary of the evidence and all relevant legal paragraphs. Despite the fact that most German states had previously only required the publication of the simple verdict form, after contentious negotiations during the 1870s, the *Reichstag* had insisted that in the interests of transparency, the new law should make the grounds for a verdict part of the public record. At the time, the *Reichstag* Committee suggested that individual judges should be able to compose the *ratio decidendi* in a clever enough manner to avoid releasing any sensitive information. It was not the job of lawmakers, they concluded, to sacrifice a basic principle in order to account for the potential lack of skill of individual judges.[33] Therefore, even in closed proceedings, judges had a legal obligation to make some detailed information about the trial evidence public; if the judges happened to include sensitive information divulged during the trial, that information was now in the public domain and journalists could obviously not be prosecuted for printing it.[34] Although §17 of the Imperial Press Law (*Reichspressegesetz*) forbade the publishing of court documents from closed trials, this law could not apply to documents that the court was obliged to release publicly.

This situation was obviously unacceptable. Herbert von Bismarck advised Schelling that new legislation should be quickly drafted that closed this loophole. He advised that the new law should also remove judicial discretion about attendance of "outsiders" in closed trials, require the

32. Bismarck singled out an article from the *Frankfurter Zeitung* as an example. Letter from Herbert von Bismarck to Schelling on February 14, 1886 in BA-L R3001/4776, Vol. 1, 4–5.

33. Hermann Jastrow, "Der deutsche Gesetzentwurf, betreffend die unter Ausschluss der Öffentlichkeit stattfindenden Gerichtshandlungen [The German draft law on court proceedings that are closed to the public]," *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft im deutschen Reiche* [Yearbook for legislation, administration, and political economy in the German Empire] X (1886):1109–34, included in BA-L, R3001/4776, Vol. 1, 45. The proposal for this wording of the 1877 law had been made in committee by the Center Party Delegate, August Reichensperger. It was adopted against the strong initial opposition of Bundesrat representatives.

34. Legal scholars also pointed to §266 of the Code of Criminal Procedure, which spelled out what must be included in the legal rationale for a verdict.

appointment of specially approved lawyers for defendants in cases of treason, establish an oath of secrecy for all participants in a trial involving state secrets, and hold out the threat of severe punishment for any press reports on such cases. Bismarck believed these changes were a matter of national security, and he instructed Schelling to push new legislation through the *Reichstag* as quickly as possible.[35] Schelling, however, worried that some of Herbert von Bismarck's proposals were either unnecessary or would provoke too much opposition within the *Reichstag*. Eliminating a defendant's choice of counsel in cases of treason, for example, or excluding the defendant's family from the entire proceedings, might be perceived by some legislators as too heavy handed. Finally, Schelling also pointed out one way that the restrictions on the press should be *expanded.* As he saw it, this was an opportunity to make headway not just against irresponsible press reporting on trials that involved military secrets, but also in cases in which sensational trial reporting could violate a sense of public shame and decency as well, especially proceedings such as the Graef trial.[36]

After some additional tinkering, Schelling shepherded a package of legal reforms entitled "The Law Regarding Court Proceedings Closed to the Public" through the Bundesrat and sent it to the *Reichstag* on May 18, 1886.[37] This proposal sought four major changes:

1. It would now be required that judges make the simple verdict form (*Urteilsformell*) public, but not the detailed grounds for the verdict. (Change in §174 GVG)
2. Judges could now require participants in trials that involved a danger to national security to swear an oath to keep the proceedings (or portions of the proceedings) secret. Violation of this oath was punishable by fines of up to 1000 Marks or up to 6 months in jail. (Addition to §175 GVG and a new free-standing Article II)
3. Judges would no longer have an explicit right to make any exceptions for the attendance of nonparticipants in a closed trial, although a specific exemption was made for government officials who had supervisory responsibility for judges and prosecutors. (Change to §176 GVG)

35. Letter from Bismarck to Schelling on February 14, 1886 in BA-L, R3001/4776, Vol. 1, 4–5.

36. See the letters from Schelling to the Foreign Office on March 2, 1886 and from Herbert von Bismarck to Schelling on March 8, 1886 in BA-L, R3001/4776, Vol. 1, 6–10, 11–13.

37. It was noted during internal discussions that Elsaß-Lothringen already had a law in place (dating from 1828) which sentenced journalists who report on closed trials to a fine of 2000 Francs. See BA-L, R3001/4776, Vol. 1, 36–38. Alexandra Ortmann reports that the original proposal sent to the Bundesrat also included provisions to hold all slander trials and cases against minors behind closed doors. This legislation apparently was rejected by representatives from Württemberg and Bavaria. See Ortmann, *Machtvolle Verhandlungen*, 171–72.

4. Journalists would now be forbidden to publish reports on any trial that had been closed to the public. Violation of this law was punishable by fines of up to 1000 Marks or up to 6 months in jail. (Free-standing Article III of this law)

Resistance in the *Reichstag*

Despite the acute concerns expressed by government officials about threats to national security, this new law proposal was not discussed on the floor of the *Reichstag* during the summer of 1886, nor after it was reintroduced by Schelling during the following session in December. One must remember that the *Reichstag* majority at this time was fairly antagonistic toward the policies of Otto von Bismarck. In the federal elections of 1884, the left-liberal *Freisinnige* Party, one of Bismarck's main antagonists, had lost a substantial number of seats (from 106 to 67 seats), whereas the friendlier German Conservative Party had seen the largest electoral gains (from 50 to 78 seats). The Conservatives, however, were still not able to hand Bismarck easy majorities for legislation, even when they cooperated with their most likely allies, the Free Conservatives (28 seats) and National Liberals (51 seats).[38] The biggest obstacle for Bismarck was now the Catholic Center Party, which controlled a very large bloc of ninety-nine seats. Still stinging from the impact of Bismarck's anti-Catholic *Kulturkampf* legislation of the 1870s, the Center Party was often wary of the chancellor's motives, and could not be counted on as a reliable partner. Over the next several years, therefore, Bismarck was continually frustrated by his inability to get key legislation passed.[39]

Many members of the *Reichstag*, including both liberals and members of the Catholic Center Party, were actually quite sympathetic to the idea of tightening up the legal code to protect national security; there was, however, deep suspicion about government motives and a firm commitment to the principle of an open courtroom. Most conservatives could be counted on to support the new law; however, other legislators were wary that broad labels such as "national security" (*Staatssicherheit*) and "morality" (*Sittlichkeit*) might be used to restrict public and press access to a broad range of trials and thus effectively vitiate the principle of legal openness. Both Socialists and Catholic politicians were especially vigorous in

38. Statistics from Heinrich August Winkler, *Germany: The Long Road West, 1789–1933* (New York: Oxford University Press, 2006), 227. The *Freisinnige* Party lost a high number of seats despite dropping approximately 1% in their proportion of eligible voters; meanwhile conservative gains in *Reichstag* seats came despite a similar drop in popular support. This reflects the idiosyncrasies of a single-member constituency electoral system. See Sperber, *The Kaiser's Voters,* 193.

39. Despite Bismarck's attempts to crush it over the previous 6 years, the Socialist Party also gained a substantial number of new votes and seats in the 1884 election.

their opposition to this legislation, in part because both groups had a long history of facing government prosecution. In fact, at the same time the Graef trial was commencing in Berlin, several Socialist leaders, including August Bebel, were standing trial in the city of Chemnitz for allegedly participating in a meeting that violated the Anti-Socialist Laws. The Chemnitz trial resulted in an acquittal for all defendants and a sensational public relations victory for the Socialist Party. Protecting public and press access to such trials was understandably a vital priority for the Socialists, especially as an acquittal (or even a conviction) in a court of law could provide a valuable propaganda opportunity.[40]

It is also important to note that in earlier in 1885, Chancellor Otto von Bismarck had proposed a separate slate of legal reforms that would have limited both the size of juries and the range of trials that could be held before them. These reforms, Bismarck had claimed, were intended to aid the efficiency of the criminal justice system. They were instead seen by many critics in the *Reichstag* as a rather brazen attempt to remove laypeople as a potential complicating factor in obtaining verdicts that were reliably favorable to government prosecutors. That legislative proposal ran into substantial opposition and stalled in the *Reichstag* in mid-1885. It is no surprise, then, that this new "Law Regarding Court Proceedings Closed to the Public" was met with equal suspicion a year later. Although Schelling, as head of the Imperial Justice Office, repeatedly insisted that this new law would not endanger legal openness but merely make existing statutes function as originally intended, his critics viewed this proposal as intending something potentially far more sinister.[41]

40. This would be proven shortly thereafter. Prosecutors quickly appealed the Chemnitz verdict, and it was eventually overturned by the Supreme Court. The case was sent back to the Criminal Court (*Strafkammer*) in Freiberg, which convicted Bebel and his associates in August 1886 and sentenced each to between 6 and 9 months in jail. As in many other such cases, the conviction still served as valuable propaganda for Socialist leaders and attracted sympathy even across party lines. This conviction almost certainly did more harm to the government than to the Socialist Party itself. See Franz Mehring, *Geschichte der Deutschen Demokratie* [History of German democracy], Vol. 4 (Books on Demand, 2011, Reprint of the 1909 original), 285–86 https://books.google.com/books?id=QK6BmEVzCaoC&pg=PA285&lpg=PA285&dq=bebel+freiberg+verurteilung&source=bl&ots=etROKcZcVP&sig=ZrLGGv4yOyluCsjGrlQOr4EBUjY&hl=en&sa=X&ei=U2OcVbjyPIq5ggSrnICwBw&ved=0CD8Q6AEwBg#v=onepage&q=bebel%20freiberg%20verurteilung&f=false (June 7, 2015).

41. It should also be noted that the upper house of Parliament, the Bundesrat, which was dominated by conservative elites, had previously angered some liberals by failing to move forward on two legal reforms that had substantial liberal support in the *Reichstag*: compensation for wrongly convicted defendants and the introduction of a full appeals process for criminal courts (*Strafkammern*). See Fritz Friedmann, *Die Öffentlichkeit der Gerichtsverhandlungen, ihre Vorzüge und Schäden* [The openness of court proceedings, its advantages and disadvantages] (Heine: Berlin, 1887), 1.

While the new legislation was stalled in the *Reichstag*, debates about it continued both in the press and within the legal community itself. In June of 1886, a Berlin district court judge named Hermann Jastrow gave a lecture on the new proposal in the Berlin Jurists' Society (*Juristische Gesellschaft*), which he later published as an essay in a specialized legal journal.[42] Jastrow argued that in trials involving sensitive military information, it made perfect sense to have all participants swear to keep the proceedings secret and also to ban the press from reporting significant details of the trial. The problem with the new law proposal, he suggested, was that it sought in a heavy-handed manner to restrict access to *all* trials that had been closed to the public. First of all, Jastrow suggested that not all trials that were closed to a public audience must necessarily be off-limits to press reporting. There were many reasons for closing a courtroom—including disruptions in the audience or attempts to influence witnesses—that necessitated neither shutting out the press nor keeping the grounds for the verdict secret. Second, passing a blanket restriction on who can attend a closed proceeding would also exclude social scientists, doctors, and others for whom the trial might be instructive and beneficial. Finally, a ban on all reporting about closed trials would also prevent acquitted defendants from regaining their public honor. In a society in which honor was paramount, Jastrow argued, it was not sufficient for defendants accused of grave crimes to have proven their innocence if that proof was kept secret. Without a right to proclaim their vindication in a pamphlet or through the press, the acquitted defendants would be powerless to completely remove the injury to their honor inflicted by the charges against them.[43]

Jastrow acknowledged that the breadth of the new legislation was sparked by the unseemly behavior of some newspapers during the Graef trial. However, he suggested that this could all have been prevented if Judge Müller had chosen to exclude the press from the proceedings, a decision that had been entirely within his power. After Müller's experience, Jastrow claimed, judges would now undoubtedly be more mindful about limiting press access to such scandalous cases. New blanket legislation

42. Jastrow, "Der deutsche Gesetzentwurf." Jastrow's pamphlet was only one of several public comments on the legislation by active jurists. See also Friedman, *Die Öffentlichkeit der Gerichtsverhandlungen*; Fuchs, "Zum Prozess Graef"; Georg Kleinfeller, "Das Reichsgesetz betreffend die unter Ausschluß der Öffentlichkeit stattfindenden Gerichtsverhandlungen vom 5. April 1888 [The federal law concerning trial proceedings closed to the public, from April 5, 1888]," *Der Gerichtssaal* 39 (1887): 417–70; and Ludwig von Bar, "Der Ausschluss der Öffentlichkeit bei Gerichtsverhandlungen [The exclusion of the public in trial proceedings]," *Die Nation* 5 (1887/1888): 173–76.

43. Jastrow, "Der deutsche Gesetzentwurf."

to restrict press access was, therefore, unnecessary and might actually do more harm than good.

Hermann Jastrow did, however, suggest a novel idea for limiting any trial reporting that transgressed the moral norms of society. He pointed specifically to existing laws that pertained to public nuisances, including blasphemy in public (§166 of the Penal Code or StGB), animal cruelty (§360 StGB), and lewd behavior (§183 StGB). Jastrow saw no reason why a similar clause could not be added to the Penal Code restricting press reporting on salacious trials that created a public nuisance. He even suggested a wording for such a law: "Those who publish reports in the press about court proceedings that were closed to the public, and who do so in a manner designed to create a public nuisance will be. . .punished. However, publications by trial participants that are released after the end of the proceedings and seek openly to defend rights or exercise legitimate interests will not be subject to this regulation."[44] Although Jastrow's speech and subsequent article were aimed particularly at jurists, his conclusions were discussed in the general press as well, including a review in the National Liberal *Hamburger Nachrichten* that urged lawmakers to follow his advice in rewriting the government's law proposal.[45]

Meanwhile, both the chancellor and his son were seething over the delay in passing this important legislation. In a stern letter to Schelling, Herbert von Bismarck pointed out that while the proposal was stalled in the *Reichstag*, another treason case had been heard at the Supreme Court in Leipzig, and detailed press reports had once again divulged state secrets for everyone to read. As an example, Bismarck attached a page-long article from the left-liberal *Berliner Börsen-Zeitung.* This article described the high treason trial of one of Christian von Sarauw's confederates and summarized all of the evidence against him, including revelations of a secret factory that manufactured the ignition devices for torpedoes, the existence of a special new sealing cap for an underwater torpedo bay, the methods used by the German Navy to lay sea mines, and the fact that the navy had conducted tests of particular ships to gauge their seaworthiness when partially flooded.[46] Because all of this information had been included by the judge in the legal grounds that substantiated the verdict, there was no explicit legal restriction on its publication.

44. Ibid.

45. *Hamburger Nachrichten*, November 18, 1886 in BA-L, R3001/4776, Vol. 1, 47–48.

46. The offending issue of the *Berliner Börsen-Zeitung* (November 28, 1886, #557, 1. Beilage), which reported on the treason trial of the conservative newspaper editor Prohl from Kiel, is present in BA-L, R3001/4776, Vol. 1, 49–57, as are subsequent exchanges among Herbert von Bismarck, Hermann von Schelling, and Leo von Caprivi on their continued national security concerns.

A Third Attempt

Schelling introduced his legislation into the *Reichstag* once again (for a third time) on March 18, 1887. Interestingly, he began his reintroduction of the bill not with a call for urgent action to protect military secrets, but with a not-so-subtle reference to another kind of case still apparently fresh in the public mind: the trial of Gustav Graef:

> First of all, the public has developed such a fondness for reading about interesting court cases that even the most respectable newspapers can't free themselves from the compulsion to write about them. However, this desire for sensation is no longer hidden behind closed doors; it instead seeks new kinds of stimuli to help achieve its satisfaction. I need only refer here to the lessons of that widely-discussed case from 1½ years ago which came before the local Regional Court (*Landgericht*), which I only mention here as evidence of the irresistible nature of public curiosity once it has been aroused.[47]

Schelling said that he sincerely wished that §184 of the Penal Code, the "obscenity paragraph," which banned the sale or distribution of obscene books and images, could be applied to newspaper reports as well. He lamented, however, that the obscenity statute was primarily designed only for the most extreme examples of moral decadence. Only after this long speech about press reporting on morally repugnant trials did Schelling finally move on to talk about recent treason cases and the potential danger to national security posed by press reports on closed treason trials.[48]

It is important to note here that the makeup of this *Reichstag* was considerably different than it had been during previous sessions. The National Liberals, under the leadership of Johannes Miquel, had been drifting to the right since 1884, and now firmly supported Bismarck's major priorities, including protectionism, anti-Socialist legislation, and state intervention into the economy.[49] Then, in early 1887, Otto von Bismarck dissolved the *Reichstag* and used the saber-rattling rhetoric of the French War Minister, Georges Boulanger, to attack the opposition parties for refusing to finance a military buildup. The strategy worked. In elections that February, the National Liberals increased their share of the eligible popular vote from 11 to 18%, and the conservative parties increased their share from 13 to 19%. This resulted in an overall increase of approximately seventy seats in the

47. Stenographic report of the *Reichstag* session on March 18, 1887 in BA-L, R3001/4776, Vol. 1, 75ff.

48. Stenographic report of the *Reichstag* session on March 18, 1887 in BA-L, R3001/4776, Vol. 1, 75ff.

49. Sperber, *The Kaiser's Voters,* 190.

Reichstag for these three parties, enough to secure a majority if members of the three parties worked together.[50] Therefore, in this new *Reichstag*, Bismarck could more confidently hope to build a majority among a *"Kartell"* of Conservatives, the Free Conservatives, and the National Liberals, without having to rely on support from the Catholic Center Party.

Despite a potentially more receptive audience, the "Law Regarding Court Proceedings Closed to the Public" still encountered substantial resistance. After a first reading in the *Reichstag* chamber, the bill was sent to a committee appointed by the leadership of the major parties. This committee would insist on a few significant changes to the government's proposal. First, the committee rejected the government's attempt to eliminate judicial discretion in allowing nonparticipant observers into an otherwise closed courtroom. Second, the committee proposed the revision of an entirely separate paragraph (§195 GVG), which would ensure that only apprentice judges would be allowed to sit in on judicial deliberations. This change would allow judges-in-training to observe the work of their senior colleagues firsthand, but would prevent high justice officials from abusing the right of attendance in legal proceedings to directly influence verdicts. These were small, but important changes. Other parts of the government proposal, however, were not significantly altered.

The generally supportive attitude of the committee, however, did not translate to an easy path to approval by the *Reichstag*. Members offered over a dozen significant amendments to the committee report, some of which came from members of the *Kartell* parties that could ordinarily be counted upon to support government priorities. Paul von Rheinbaben of the Free Conservative Party, for example, submitted an amendment that would restore the publication of the full legal grounds for a verdict (*ratio decidendi*) as the norm, with an exception only if a judge explicitly determined an immediate threat to national security or public decency.[51] Clearly, significant numbers of delegates from the *Kartell* parties still worried that the government's proposal went too far. Not surprisingly, therefore, the legislation languished once again and remained unpassed at the end of a third consecutive *Reichstag* session.

50. Ibid., 194, 197. Again, the dramatic changes in the number of seats earned by a party did not always match actual vote totals in the complex electoral system of Imperial Germany. The primary loser of this election, especially in terms of seats lost, was the left-liberal *Freisinnige* Party.

51. A version of this amendment would later be put forward by the *Freisinnige* (left-liberal) Deputy August Munckel, and would be adopted into law. See Rheinbaben's amendment in *Verhandlungen des Deutschen Reichstags* [Proceedings of the German Reichstag], (1887, 4), Aktenstück #152, 1145 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018470_00367.html (June 19, 2015).

Two additional amendments proposed to the *Reichstag* Committee Report of 1887 are especially interesting. Both the National Liberal Deputy Wilhelm Kulemann and the Catholic Center Deputy Viktor Rintelen separately took up Hermann Jastrow's advice that instead of generally restricting press access to cases dealing with moral issues, it would be more appropriate to add a new clause to the obscenity statute (§184 StGB) that directly targeted egregious trial reporting by journalists.[52] Ironically, whereas Hermann von Schelling, the state secretary of the Imperial Justice Office, had earlier suggested that the obscenity statute was an inappropriate method of dealing with press coverage of trials, it was now members of the *Reichstag* who seemed eager to push this forward as a potential solution.

A Fourth Attempt

In the meantime, Herbert von Bismarck complained bitterly to Schelling about a third treason trial that had once again yielded embarrassing and potentially damaging information through the press.[53] Bismarck now instructed Schelling to do whatever was necessary to get the essential parts of legislation through the *Reichstag* immediately, including fully accepting almost all of the changes offered by the previous *Reichstag* Committee and even adopting further amendments proposed by the National Liberals. Bismarck's hope was to attract enough support from the National Liberal and Catholic Center parties to push the legislation through over opposition from leftist parties. Schelling agreed, although he commented that Conservative members of the *Reichstag* would be very displeased since they placed great weight on tough press restrictions in cases involving morality as well.

In December of 1887, Schelling brought a revised bill to the *Reichstag* floor that was very close to the previous *Reichstag* Committee version, with two major exceptions. First, Schelling accepted the previous *Reichstag* Committee's insistence on maintaining judicial discretion

52. Both Kulemann and Rintelen were prominent judges: Kulemann served on a regional court in Braunschweig, and Rintelen, whose father had been a Prussian justice minister, served first on the Berlin *Kammergericht* and later on the Supreme Court (*Reichsgericht*) in Leipzig. Their amendment petitions are in the *Reichstag* record, available online at www.reichstagsprotokolle.de (April 10, 2014) and are also included in BA-L, R3001/4776, Vol. 1, 92ff.

53. This time, the case was against the anarchist Johann Neve. Apparently, Neve had been arrested in Belgium and then secretly transported to Germany for prosecution. Press reports on his apprehension and transfer had caused embarrassment for both governments and a strain on relations between the two countries. Letter from Herbert von Bismarck at the Foreign Office to Schelling on October 23, 1887 in BA-L, R3001/4776, Vol. 1, 98.

about the admission of outside observers to closed courts, but only in cases that *did not* involve national security issues. Second, although the new proposal still forbade all press reporting on cases that involved a potential danger to national security, it now incorporated an amendment by the National Liberal Deputy Wilhelm Kulemann that restored judicial discretion in allowing press access to other kinds of closed trials.[54]

The new proposal won over many critics in the National Liberal Party, but not enough to prevent it from being once again sent to committee for a thorough reworking. The new committee suggested a number of changes, some major and some minor. For example, the committee accepted the government's insistence on a blanket ban of press reports on closed trials that dealt with matters of national security. However, all restrictions on press reporting about morally sensitive trials were completely stricken from the law proposal, even the language from Kulemann's amendment that left such a decision up to judicial discretion. The committee turned instead to earlier amendments offered by Kulemann and the Catholic Center Party deputy Viktor Rintelen that would add a new clause to the obscenity statute (§184 StGB) dealing specifically with egregious press coverage of sensational trials. The new paragraph read: "The same penalty [as for the distribution of obscene literature or imagery] applies to those who publicly report on trials that were closed to the public on the grounds of a danger to morality, or who report about official documents that pertain to such a case, in a manner that is likely to cause a public nuisance."[55] The committee defended this change as a more effective method of cracking down against the excesses of the press, while avoiding unnecessary restrictions on the right of "responsible" journalists to report on trials in a reasonable manner. Judges could still choose to close the courtroom if they felt the matters at hand were too morally salacious; however, journalists would not be precluded from reporting on such trials, and they would only be vulnerable to prosecution if their reportage on such cases was later judged to have violated standards of decency.[56]

Once the overall proposal returned to the *Reichstag* floor, the legislation was picked apart once again in several contentious days of debate. One more significant change was approved from the floor. August Munckel, a well-known defense lawyer and left-liberal *Freisinnige* deputy, once again insisted that publication of the full legal grounds for a verdict

54. Ibid.

55. See the eventual law, "Gesetz, betreffend die unter Ausschluß der Oeffentlichkeit stattfindenden Gerichtsverhandlungen von 5. April 1888 [Law regarding court proceedings closed to the public, from April 5, 1888]," *Deutsches Reichsgesetzblatt* 19 (1888): 133–35.

56. *Verhandlungen des Deutschen Reichstags* (1888, 2), Aktenstück #138, 593 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018650_00151.html (April 10, 2014).

(*ratio decidendi*) should be the norm, unless a judge explicitly decided that such information posed a threat to either national security or public decency. This amendment, which was similar to one proposed by Paul von Rheinbaben in a previous session, was now accepted by the *Reichstag*.

After these changes, the National Liberals expressed their support for the new law. Wilhelm Kulemann, the chief National Liberal spokesman on legal issues, defended the law as a necessary balance among legal openness, freedom of the press, and the good of the nation. He insisted that the new laws would only restrict press access to a small number of very sensitive cases, and he chided opponents for seeking to adhere obsessively to legal abstractions such as the principle of *Öffentlichkeit* without regard to practical considerations. Kulemann also stressed that the revised legislation had largely restored judicial discretion to questions of public and press access to closed trials, except when national security was at stake. This, he suggested, should allow for much greater confidence in the independence of the courts; unless one was already convinced that judges themselves were criminals just waiting for their chance to abuse their judicial power behind closed doors.[57]

Members of opposition parties still rejected the legislation, and they accused the National Liberals of abandoning their core principles. Speaking for the Socialists, Paul Singer claimed that it would be a simple matter under existing law to close courts to public access in cases of a real danger to national security or public morality; the sweeping legislation under consideration, however—even in its watered down form—was designed primarily to restrict press access to a broad range of political trials and particularly to keep trials of Socialist defendants behind closed doors. As proof, Singer pointed to a comment made by a representative from the Bundesrat, Paul Kayser, which suggested threats to national security (*Staatssicherheit*) that could serve as grounds to ban press coverage might be either "external" or "internal" in nature. Singer used this statement to rebuke the National Liberals, whom he accused of voicing their commitment to legal openness and freedom of the press even as they sacrificed these very ideals.[58]

Attitudes were more mixed within the Catholic Center Party. Whereas some delegates, such as Viktor Rintelen, seemed to be somewhat

57. See *Verhandlungen des Deutschen Reichstags*, 50. Sitzung 1887/88, 2., 1 März 1888, 1199 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00509.html (June 22, 2015).

58. Singer had no training as a jurist; his target, Paul Kayser, however, was a Senate president at the Supreme Court in Leipzig. See *Verhandlungen des Deutschen Reichstags*, 55. Sitzung 1887/88, 2., 7 März 1888, 1340 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00650.html (June 19, 2015).

supportive (at least initially), other Center Party leaders, such as Ludwig Windthorst, were adamantly opposed to the legislation. Windthorst dismissed government claims that the new laws would not be a violation of the principle of legal openness. Instead, he suggested that they were a direct attack on the foundations of the modern legal system and a first step toward instituting a form of Star Chamber in Germany.[59] The left-liberal *Freisinnige* Party expressed similar grounds for their continued opposition. As the deputy Alexander Meyer argued: "In certain circumstances, legal openness (*Öffentlichkeit*) may lead to difficulties; however, under any circumstances, attempts to restrict openness always prove to be the greater evil."[60]

Despite this vigorous opposition, the approval of the National Liberals (in cooperation with the Conservatives and Free Conservatives) made passage of the revised law a fait accompli. The "Law Regarding Court Proceedings Closed to the Public," which included what might be referred to as a "Lex Graef"—an obscenity law for any press coverage of closed trials that violated standards of public decency—was approved by the *Reichstag* and became law on April 5, 1888.

Epilogues

Not surprisingly, the 1888 law did not herald the end of debates about restricting press coverage of controversial trials. Just a few years after the new law was enacted, another criminal prosecution inspired renewed attempts to limit the rights of the press. The new case was the infamous 1891 Heinze murder trial, in which the 27-year-old Gotthilf Heinze and his 42-year-old wife Anna were accused of murdering a night watchman named Friedrich Braun. The defendants had very long criminal records that included theft, fencing, embezzlement, forgery, counterfeiting, assault, and rape, and they were also involved in procuring (pimping) and prostitution. Like the Graef trial 6 years earlier, the case attracted considerable public attention before the start of proceedings. Faced with a packed courtroom that included members of the press, and a trial that was sure to delve deeply into the salacious details of the criminal underworld of Berlin,

59. A gifted lawyer, Windthorst had served twice as the Hanoverian Justice Minister in the 1850s and early 1860s. See *Verhandlungen des Deutschen Reichstags*, 47. Sitzung 1887/88, 2., 27 Februär 1888, 1146 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00456.html (June 19, 2015).

60. See *Verhandlungen des Deutschen Reichstags*, 50. Sitzung 1887/88, 2., 1 März 1888, 1197 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00507.html (June 19, 2015).

Judge Otto Rieck consulted carefully with the prosecution about whether or not to close the trial to both press and public. Rieck announced his decision in court: in the interests of protecting popular confidence in the justice system (*öffentliche Rechtsbewußtsein*), he would allow the courtroom to remain open to the public. He did, however, politely ask members of the press to maintain a sense of decency in reporting on the trial, so as not to endanger public morality.[61] The consequences, at least in hindsight, were predictable.

The initial hearing of the Heinze trial lasted only 4 days before it was postponed indefinitely while the court summoned a witness from Chicago. These 4 days of sensational testimony, however, were enough to raise the hackles of many newspaper readers, including the young German Emperor, Wilhelm II, who had assumed the throne 3 years earlier. The day after the trial was temporarily adjourned, Wilhelm had his adjutant send an urgent telegram to officials in Berlin from his hunting lodge in East Prussia expressing his outrage at press reports on the disturbing details of the Heinze case. The Emperor announced that he would now take a direct personal interest in rectifying the problems that the Heinze trial had exposed, both in society and within the justice system.[62]

The Heinze case sparked what many historians have called a "moral panic" in Germany and began a decade-long public battle over the so-called Lex Heinze: a series of laws pushed by a coalition of "Morality Associations" designed to root out the moral corruption that was poisoning the social body.[63] As a whole, the original Lex Heinze proposal was intended as an offensive against three major sources of moral corruption in German society: pimps, pornographers, and the press. Perhaps most notoriously, the Lex Heinze also went after those who wrote, distributed, performed, or staged literary or theatrical work that was overly salacious. As for restrictions on the press, the new Lex Heinze proposed that the Lex Graef (§184b StGB) be maintained, except for the fact that penalties for all violations of the obscenity statute would now be raised slightly.

61. Just as during the Graef trial, there were multiple newspapers that carried Heinze trial transcripts, and these accounts were often published as post-trial pamphlets. This summary comes from *Kreuzzeitung,* September 28, 1891, #452, Abend.

62. See Geheimes Staatsarchiv Preußischer Kulturbesitz, Berlin, Germany (hereafter GStAPK) I. HA Rep. 89, Nr. 17725, Vol. 5, 44ff. for the original telegram from *Flügeladjutant* von Scholl on behalf of Kaiser Wilhelm II on October 3, 1891; See also GStAPK I. HA Rep. 84a, Nr. 8095, 2ff. for responses within the Prussian Justice Ministry.

63. On the Heinze case as the start of a moral panic, see Hett, *Death in the Tiergarten*, 78ff; and Edward Dickinson, "The Men's Christian Morality Movement in Germany, 1880–1914: Some Reflections on Sex, Politics, and Sexual Politics," *Journal of Modern History,* 75 (2003): 59–110.

In addition to the Lex Graef, however, the government proposed a new addition to §173 of the German Code on Court Constitution. This law would give judges the option to restrict press reports about any trials that involved moral issues, *even if those trials had not been closed to the public.* Although discretion for such restrictions would be left in the hands of judges and not government officials, this change nevertheless signaled a potentially dramatic new limitation on the freedom of the press to report on trial proceedings.

The Lex Heinze eventually did pass into law in 1900, although in a modified form that many contemporaries (and modern historians) have described as a victory for opponents of the law rather than its supporters. The main achievement for foes of the Lex Heinze was the withdrawal of most proposed new restrictions on theater performances. Less commented on was the fact that additional restrictions on the press had also been dropped from the final text. The Lex Graef, the law passed in April of 1888 that threatened prosecution for press reports on closed trials that created a "public nuisance," remained intact in its original form.

Editorials, public complaints, and petitions to the *Reichstag* about the need to further restrict press coverage of sensational trials would continue throughout the course of the *Kaiserreich*. There was predictable consternation in 1907, during the so-called Eulenburg Affair, when a trial judge once again decided to close the courtroom to the general public, while allowing press representatives to remain present for explosive testimony about alleged homosexual affairs within the entourage of Emperor Wilhelm II. Both experts and lay critics decried the seeming incongruity of barring a few dozen local spectators for reasons of decorum, and yet allowing an international audience to salivate over printed accounts of every sordid trial detail.[64] However, despite multiple mass petitions to the *Reichstag* demanding new legal restrictions on the press, no further legislation was forthcoming. The Lex Graef would remain on the books not only through the remainder of Imperial Germany, but also through the World War, the Weimar Republic, the Nazi regime, and the first 25 years of the Federal Republic of Germany, before finally being stricken in 1973 and replaced by a law against child pornography.[65]

64. This was during the Moltke–Harden trial, at which the journalist Maximilian Harden was accused of libel for publishing rumors about a homosexual affair between Kuno Graf von Moltke and Philipp Fürst zu Eulenburg-Hertefeld, two close associates of the Kaiser. See Domeier, *Der Eulenburg-Skandal*, 112.

65. For an example of such public petitions during the Eulenburg Affair, see the *Reichstag* petition by a variety of women's organizations in January 1908 asking for a strengthening of the 1888 Law Regarding Court Proceedings Closed to the Public, and especially a sharpening of §184 StGB, the "Lex Graef" in *Verhandlungen des Deutschen Reichstags*, Aktenstück

A broader history of press rights and legal *Öffentlichkeit* in modern Germany lies outside the scope of this article. It should be noted, however, that much of the original 1888 Law Regarding Court Proceedings Closed to the Public still exists in the current German Court Organization Law (GVG), even if the language has been altered or expanded and the paragraph numbers changed. There are now, for example, more detailed guidelines for when a judge may order a closed courtroom under the modern §171–175 GVG, and in §174, ¶ 2, there are now explicit restrictions on television, radio, and press reports on trials closed for reasons of national security. As one might expect, the issue of allowing cameras in the courtroom for a variety of "sensitive" criminal and civil cases remains very contentious.

Conclusions

There is no question that, as Alexandra Ortmann suggests, the Imperial German government began a systematic campaign in the 1880s to restrict public and press access to criminal proceedings. There is also no question that, at the same time, both politicians and professional jurists from across the political spectrum were becoming increasingly concerned with the damaging influence of legal *Öffentlichkeit* on the criminal justice system, especially in regard to the constant drumbeat of press coverage of various sensational causes célèbres. What is not entirely clear, however, is to what degree such concerns resulted in significant *actual limitations* on the openness of criminal courts.[66] Although Ortmann does admit that the general principle of *Öffentlichkeit* remained sacrosanct throughout the

#813, 4819 http://www.reichstagsprotokolle.de/Blatt_k12_bsb00002887_00789.html (June 16, 2015). On subsequent attempts to limit public and press access to trials, especially those involving private personal or family matters, see Ortmann, *Machtvolle Verhandlungen*, 171–172. The Lex Graef was finally dropped as part of the Fourth Criminal Law Reform Act of 1973 because of its "lack of practical usefulness." See Burkhard Jähnke, Heinrich Wilhelm Laufhütte, and Walter Odersky, eds., *Strafgesetzbuch. Leipziger Kommentar* [Criminal law: Leipzig commentary], 11th ed., Vol. 9, §§339–58, Nachtrag zum StGB, Gesamtregister (Berlin: De Gruyter, 2006), 59 n.5 https://books.google.com/books?id=8WZbrufrCLMC&pg=PR4&lpg=PR4&dq=%C2%A7%C2%A7+339-358;+Nachtrag+zum+StGB;+Gesamtregister+2006&source=bl&ots=oX1iMgJ_gh&sig=f_kEPufqqqYkZWkLgvDDf__oxNY&hl=en&sa=X&ei=rIeUVZ3xL8WTsAWy0Y34Dw&ved=0CB4Q6AEwAA#v=onepage&q=unter%20hinweis&f=false (July 1, 2015).

66. This article has focused primarily on the debates surrounding the Graef and Sarauw trials, specifically regarding the exclusion of the press and public audience from the courtroom. During this same period, there were also substantial public discussions about the effectiveness of jury courts (*Schwurgerichte*) as an institution and the role of "lay-judges"

Kaiserreich, she also tends to overemphasize the willingness of liberal politicians and jurists to compromise this principle when faced with concerns about the behavior of the press. Ortmann particularly identifies the 1888 "Law Regarding Court Proceedings Closed to the Public" as a key success in government efforts to close the courtroom for sensitive moral or political trials. The oath of secrecy and the banning of reportage for closed trials involving national security, she claims, were part of a planned government offensive to keep controversial political trials behind closed doors. "If one considers the fact that that the original ideal of open courtrooms was implemented primarily to prevent arbitrary verdicts from being pronounced in political trials," Ortmann argues, "it is clear just how serious an attack this was against the foundations of this [legal] principle."[67] Ortmann also identifies the passage of §184b of the Penal Code—which I have described as the "Lex Graef"—as a serious curtailment of the freedom of newspapers to report on trials that involved a potential threat to public decency. Altogether, she insists, these laws demonstrate the degree to which the principle of legal transparency was already on shaky legal ground during this era.[68]

The evidence I have presented, however, suggests a more nuanced interpretation. First, although Bismarck and his minsters were certainly interested in using all possible means to limit public and press access to political trials, this was far from the only issue at hand during the consideration of this legislation, and the federal government was far from the sole driver in this political process. Although Bismarck's government did eventually get laws that tightened up legal loopholes, especially in limiting press reporting on cases involving national security, these measures passed only after substantial delays and significant concessions and revisions. Where Hermann von Schelling had tried to push a blanket ban on reporting

in criminal trial proceedings. This part of the debate about *Öffentlichkeit* will be explored in more detail as part of my upcoming book manuscript on the Graef trial.

67. Ortmann, *Machtvolle Verhandlungen*, 169.

68. Ibid., 168–170. Part of the problem here is that Ortmann's book makes minor, but still essential, errors in the timeline of these debates. She correctly points to the 1885 Graef trial as a point of origin for debates about restricting public access to controversial trials, but she then misattributes concerns about national security to that case rather than to the Sarauw trial. She also wrongly suggests that the oath of secrecy was originally intended to apply to all closed trials (instead of solely to those cases posing a threat to national security). Finally, she erroneously claims that §184b StGB, which I refer to here as the "Lex Graef," was passed as part of the 1900 Lex Heinze reforms instead of as part of the 1888 law. This last error allows Ortmann to suggest that the passage of the 1900 measure represented an *additional* successful attack on the open courtroom and the rights of the press. In truth, all attempts to pass additional restrictions on press reporting after the Heinze case—as well as after later scandalous trials—failed completely.

about any closed trials, members of the *Reichstag* insisted on differentiated responses to trials involving national security versus those that involved a danger to public morality. Even a friendlier *"Kartell" Reichstag* ended up passing a law that was substantially less restrictive—on either type of case—than Herbert von Bismarck and Hermann von Schelling had originally wished.

There were, admittedly, a few politicians in the debates on the 1888 law who openly questioned just how essential open courtrooms were to achieving just and fair verdicts; however, both government officials and even the most conservative of deputies repeatedly insisted that the principle of legal openness was sacrosanct and would not be substantially harmed by the proposed measures. These repeated government assurances were undoubtedly directed at the National Liberal Party in the hope of convincing them that the limited press restrictions at issue would not violate their core principles. Even if such statements were as much about pandering as principle, however, they are still a demonstration of just how embedded the ideal of legal openness was in Imperial German society.

In response to accusations that National Liberals had abandoned their principles by backing the revised legislation, the Deputy Georg Meyer countered that it was not they, but the government, who had been forced to make compromises: "Thus, gentlemen, the objections that I originally held [against the legislation] were not overcome by the fact that *I myself* was *won over to a new opinion* of the proposal, but because in the meantime *the Federated Governments* [a reference to the Bundesrat] undertook *a through reworking of the proposal*."[69] It was clear, he argued, that the Bundesrat "had on many points come to adopt the points of view that were first expressed here in this house."[70] Georg Meyer's self-evaluation here does not seem entirely unreasonable. The changes forced on the government suggest a National Liberal Party that was far from powerless, feckless, or gullible. If National Liberals were keen to look for areas of compromise with the government, and if their nationalism made them relatively unsympathetic to Socialist claims that the new laws could be easily abused, it is also true that National Liberal resistance to the original government proposals seems to have been driven by belief in the independence of judicial proceedings, the value of a free press, and the necessity for checks to government power. Deeply concerned about preserving the

69. See *Verhandlungen des Deutschen Reichstags*, 50. Sitzung 1887/88, 2., 1 März 1888, 1195 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00505.html (June 21, 2015). Emphasis in the original transcript.

70. See *Verhandlungen des Deutschen Reichstags*, 50. Sitzung 1887/88, 2., 1 März 1888, 1195 http://www.reichstagsprotokolle.de/Blatt3_k7_bsb00018648_00505.html (June 21. 2015). This is actually Meyer quoting his own statement from an earlier *Reichstag* session.

openness of legal proceedings and assuring the freedom of the press to report on trials, the National Liberals had joined with other opposition parties to repeatedly stymie restrictive legislation that the government deemed vital to national security. The compromises they forced were significant limitations on governmental power, even if they did not preclude the government from manipulating the legal process against its political enemies in other ways.[71] In the end, even if one still interprets National Liberal acceptance of the final law as a compromise of liberal principles (especially in the concessions made for trials regarding national security), it is clear that Bismarck's government was forced to compromise in important ways as well.

It is also worth noting that much of the new restrictions on public and press access to the courtroom contained in the 1888 law were left up to judicial discretion and not governmental fiat. One might interject, here, that this was an important victory for the National Liberals in that it left most decisions about press access to the courtroom in the hands of a largely bourgeois cadre of professional jurists, who may have assumed that as "experts," they were best qualified to properly regulate the principle of *Öffentlichkeit*. Certainly, for Socialists, who often viewed German judges as sharing the same elite social status and political priorities as the government, this was cold comfort. However, as the historian Benjamin Hett asserted in his book on criminal justice in the Wilhelmine Era, it is difficult to argue that German courts went on to abuse the discretion stemming from this law.[72] Sensational cases such as the later Heinze trial and the Eulenburg Affair clearly demonstrated that judicial discretion would continue to fall consistently on the side of maintaining openness, even for trials that were salacious or embarrassing to the government. Despite the continuing outrage at press coverage of such cases, and complaints about the potential negative consequences of legal *Öffentlichkeit* across party

71. As was often the case, when German justice officials and prosecutors were denied one tool to achieve their goals, they quickly turned to others. In a government appeal of the 1885 acquittal of August Bebel and several Socialist colleagues at Chemnitz, the Supreme Court issued a ruling that made it easier for prosecutors to charge defendants with being part of secret conspiracies that violated anti-Socialist Laws. After August Bebel and his associates were convicted in a retrial, a wave of further Socialist prosecutions followed. According to Franz Mehring, however, press coverage of this new wave of trials often tended to be rather sympathetic to the defendants, even within many non-Socialist newspapers. Therefore, although government prosecutors successfully convicted and imprisoned many Socialist leaders, they could never destroy the party's organization or public appeal. See Mehring, *Geschichte der Deutschen Sozialdemokratie,* 286.

72. Hett, *Death in the Tiergarten,* 25. Hett mentions that the judge in the retrial of Gotthilf and Anna Heinze ordered that the proceedings be held in a closed court *without* press attendance; Hett also reports, however, that this decision provoked a significant public backlash.

and across socioeconomic lines, further efforts to restrict press access or reporting on such trials were almost entirely ineffective.

The *Reichstag*'s approval of a "Lex Graef," an obscenity law targeting press reports on closed trials that had caused a public nuisance, paints a slightly more complex picture. On the one hand, this "Lex Graef" can be understood as a compromise offered by Catholics and National Liberals to prevent the possibility of far more powerful restrictions on the press, and as a measure that could in theory be difficult for justice officials to enforce, much less abuse. Prosecutors across Germany had long complained that obscenity charges were difficult to sustain in court and that "lewdness" was an almost impossible standard to define. Therefore, the successful conviction of journalists for inappropriately lewd or sensational trial coverage *after the fact* promised to be a much more daunting a task for a public prosecutor than the *proactive* enforcement of a ban on all press accounts.[73] We must remember, however, that the Lex Graef was not simply a reluctant compromise made under government pressure; it was a novel approach that reflected real and widespread concern in the aftermath of the Graef trial about the corruptive power of a sensationalist and potentially "obscene" press. Prussian justice officials had for decades been reluctant to pursue any revision or expansion of the obscenity statute to deal with the public display of lewd images, perhaps in part because of the anticipated difficulty of getting such changes approved in a hostile *Reichstag*. However, after Hermann von Schelling, the state secretary of the Imperial Justice Office, had dismissed the possibility of using an obscenity statute to restrict the press, it was Catholic and National Liberal politicians—truly convinced that press coverage of salacious trials could endanger public morality—who pushed forward legislation to do just that.

73. For complaints by Prussian leaders about the difficulty of prosecutions under obscenity statutes, see GStAPK I. HA Rep. 77 Preußisches Innenministerium, Tit. 657 Kunstsachen, Nr. 3, Vol. 1. It should be noted that Prussian prosecutors had often been instructed to use other statutes instead—such as disturbance of the peace (*grober Unfug*) under §360 Part 1 Nr. 11 of the Penal Code—to pursue charges against purveyors of obscene material and thus avoid the need to define "lewdness" in court.