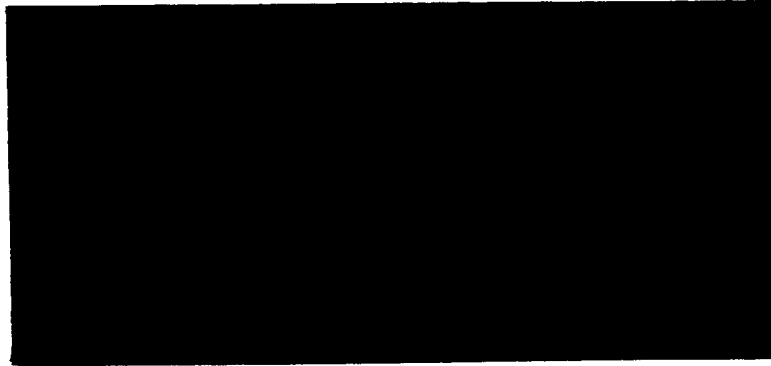




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**"The Production of Minorities and the Rule of
Law in German and Central European Politics"**

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1. Introduction

From an anthropological perspective, all individuals and groups, whether plant or animal, are diverse. Then the interesting empirical and theoretical questions become not how to maintain homogeneity, but, first, how and under what conditions is diversity eliminated, and second, how and under what conditions are forms of unity achieved. The question I would like to pose today is how and under what conditions in East Central Europe following the collapse of socialism has diversity been eliminated and/or has unity been achieved. In particular I will explore the role of one institution, the principles of "the rule of law,"—an Enlightenment-inspired and very modernist set of principles—in making the transformation from "already-existing socialist states" to states more liberal-democratic in form. Furthermore, I will concentrate on one aspect of the rule of law—retributive justice: the rewarding of good, the punishment of wrongdoing—in this ongoing transformation. I will use this focus—on the use, abuse, or non-use of retributive justice—to try to explain why, despite the display in democratization processes in all of East-Central Europe, certain states have established themselves as legitimate and have effected a change in state form under relatively peaceful conditions while others—Russia, rump Yugoslavia, Croatia, and Romania—are marked by a security and a legitimacy crisis, expressed by an exponential increase in violence. This violence is directly expressed through the production and exteriorization of "minorities"—a placing outside of the group what formerly belonged inside.

2. Comparison of regime transformations

First, I'll begin with an empirical observation and with a sociological typology of regime transformations. The jural restructurings in East-Central Europe divide into three basic types of transformations. A first type is where the legal regime has changed abruptly yet smoothly, with some restitution for victims of the old regime but hardly any reckoning with wrongdoing in the past—this has been the case in Slovenia, Poland, Hungary, and to a large degree in the Czech Republic, though there for different reasons. In Slovenia, Poland, and Hungary the regimes themselves initiated reform that enabled the participation of the opposition, making it difficult if not impossible to purge or prosecute former officials or public employees, or to review judges for past misdeeds. One of the first acts of the newly installed Slovenian government in March 1990, for example, was to stage a public ceremony where it apologized for violations in the past. In contradistinction to the other republics in the former

Yugoslavia, its demands for self-determination were accompanied by the systematic implementation of legislation formulated to protect minority rights according to the norms put forth by the Parliament of Europe (Minnich 1993: 91). In Poland, there was only one prosecution, trial, and conviction—for the murder of a priest. In Hungary, there were several prosecutions of individuals responsible for putting down the 1956 revolution, no imprisonments, and no trials against officials for actions after 1956. Also, many argue that since the extent of criminality was much less in these regimes than in the other East Bloc states, there was less need for prosecution.

In the former Czechoslovakia, President Havel, largely motivated by a desire to prevent a scapegoating of groups of state employees, sought to hinder such a reckoning, arguing instead for a form of collective guilt: since all Czechs were complicitous, singling out any individuals for punishment would be unfair and unproductive. Thus government form initially changed while personnel, except at the very top, remained substantially the same. Judicial personnel were screened for secret police complicity, resulting in about 10% of the judges leaving service, with a smaller number of state prosecutors being demoted but not fired. Individuals working in state agencies have also been vetted, but the severest penalty has been demotion to a lesser position of authority; many of these cases have been appealed and most individuals reinstated. After 1992, the split between the Czech and Slovak Republics distracted attention from internal cleansing. In 1994 and 1995, however, Czech prosecutors made additional indictments with some trials already completed. Of the states in this first type, Hungary and the Czech Republic both engaged in major steps to reward the good: vindicating and rehabilitating victims, adjusting pensions, and publicizing acts of contrition.

A second type of transformation, where regime change, especially in the legal domain, has been more apparent than substantive, where there has been minimal recognition of victims and very little or no prosecution of wrongdoers, would be rump Yugoslavia, Croatia, Romania, and Russia, and perhaps all of the former Soviet Republics except the Baltic states. Yugoslavia disintegrated into a genocidal war, centered in Bosnia, victimizing most of the population in an attempt to create ethnically homogeneous territorial and political units. In Romania, the Ceaucescu couple were executed, their son put in jail, and the remaining members of the Politburo were given sentences from 15 to 20 years for a planned "genocide," as it was called, referring to the final Politburo meeting they had sat in where it was planned to squash the demonstrations in the fall of 1989. These acts of revolutionary justice against a small elite served as a substitute for any further cleansing; the same government, state security, and public officials serve as before. In Russia, a new political class has arisen to compete with the old nomenklatura, but there has been no dismissal of judges or state prosecutors and no purge of officials. The Communist Party was declared illegal, but that act served, as in Romania, as a

substitute victim, an alibi to prevent, at least for the time being, further recriminations against persons or structures responsible for past wrongs.

A third type of transformation characterizes the Baltic states, Bulgaria, Albania, and Germany. In these states, there has been radical regime change, substantial compensation to former victims, and extensive prosecution of the old elite. In Bulgaria, several top government officials were put on trial, including three former Prime Ministers, who all went to prison. In the Spring and Summer of 1992, there was a widespread purge of former party officials from the civil service and academic institutions and vetting of thousands of others (Smollett 1993: 13). As elsewhere in the East bloc, this reckoning stopped abruptly when former communists, now nationalists and private property owners, returned to power. In Albania, a number of former high officials and symbolically prominent persons, such as Nexhmije Hoxha, the wife of the former dictator, were arrested and tried in relatively late wave of trials in 1993 and 1994. And tens of thousands of people were dismissed from their jobs in a labor reform. But initially these trials and dismissals were widely interpreted through local idioms: as acts of personal revenge, or ways of demobilizing lawful opposition, rather than as attempts to rectify past harms (Imholz 1995: 54-60). Given Albanian isolation from the international legal regime during the Cold War, such interpretations within a local idiom of revenge were to be expected. The majority of Germans after World War II held similar opinions of the Nuremberg Trials and began revising their judgments only fifteen years after the actual event. Hence for Albanians, this historical reckoning might form the memory base for future reinterpretations of the transformation. Jural reforms in the Baltic states differ from state to state, and they continue to be in a state of flux because they have been intricately tied to an ongoing separation from the Soviet Union and from internal ethnic Russian (among other) "minorities." But all three Baltic states have engaged in substantial retributive justice. In Germany, the reckoning with the past has been of another scale compared to the other states. Before elaborating the German case, how does one explain the correlation between cyclical violence and retributive justice?

3. Retributive Justice and the Control of Violence

First, what is retributive justice? Legal theorists, following Aristotle, most frequently divide justice into two types: distributive and corrective. Clearly, what I am dealing with here is not distributive justice; the wrongs cannot be righted by dividing up the pie, by dealing each person his/her proper share. As well, retributive justice should not to be confused with corrective justice, a distinction Jean Hampton (1991: 1701), philosopher at the University of Arizona, has clarified. Corrective justice is concerned to "compensate victims for harms," meaning that a jural authority acts only when an actual injury or harm is suffered by a

particular person, who is then identified as the victim deserving of remedy.¹ This remedy is corrective justice: it corrects the injury by compensating the victim for the harm suffered. By contrast, retributive justice seeks to "compensate victims for moral injuries." A moral injury is an agreed-upon wrong but need not necessarily result in a harm. The immorality of the deed lies not in the degree of harm suffered by the victim but in the wrongness of the deed itself. Attempted murder, for example, results in no harm but is nonetheless a wrong or a moral injury. In the case of a moral injury, the legal system focuses not on correcting a harm but on righting a wrong. It holds the wrongdoer accountable and by righting the wrong reestablishes the dignity of victims. Such victims can be either groups or individuals (insofar as they exist and can be identified), or they can be the entire moral community which has been injured.

In contrast to the dominant scholarly opinion among criminal justice experts, I maintain that the two conditions—righting the wrong and reestablishing the dignity of the victim—are linked, and that both are necessary in order to prevent cycles of retributive violence. A rising standard of living, or the expectation of such, has a tenuous relation to peace; it is neither a necessary nor sufficient condition to halt group violence. Likewise, a falling standard of living will not in itself precipitate group violence. In ex-socialist states where there has been no retributive justice, however, one can witness and even predict cycles of retributive violence. My concern here is to determine under what conditions it is possible to stop a longterm cycle of violence, which, as history shows, is always latent in any group. If the principles of the rule of law are not installed and processually reaffirmed, a society will be confronted with a potentially endless cycle of violent retaliations.

Although retribution is "neither the exclusive, nor perhaps even the primary, responsibility of the state..., [the state is] an impartial moral agent of the entire community. [It has] greater capacity to recognize the moral facts than any involved individual citizen" (Hampton 1991: 1693). Therefore, if the state wants to establish itself as a moral agent with legitimacy in the entire community, it has an obligation to pursue retribution where wrongdoing has occurred. This holds true particularly for democratic states.

¹Problems of distributive justice, such as those explored by Michael Walzer, follow a logic closer to that of corrective than restitutive justice. Walzer has consistently argued from a position of cultural relativism in comparisons of judicial systems and conceptions of justice, often borrowing from anthropological representations of the closed nature of cultural belief systems (see, e.g., Walzer 1983). If applied to Eastern Europe, his relativism would seem to support the assertion that socialist legal norms were separate and autonomous from liberal democratic legal norms, consequently making prosecution of wrongdoing extremely difficult if not impossible. In his most recent book, Walzer (1995) complicates his earlier position, arguing for a distinction between thick and thin moral standards, without however abandoning his earlier position regarding the autonomy of cultural systems from which a relativistic moral position necessarily must follow.

3. Retributive Justice, Principles of Accountability, Democratic Rule

In theory, democratic form distinguishes itself from all other political forms in one major respect: its leaders are accountable to the public over which they rule. By contrast, in other political forms such as monarchies and dictatorships, leaders are held accountable to no one but themselves. The principles of German *Rechtsstaatlichkeit*, or in English the "rule of law," represent an attempt to institutionalize this theory of accountability. Elaborated over the last nine centuries, these principles are not formally dependent on the democratic form alongside which they developed. In fact, they can coexist with other forms of political representation. However, principles of accountability are necessary to a democracy in a way they are not necessary to other political forms. These principles provide the framework for a process central to democracies: they make transparent and predictable the relation of the sovereign to the ruled. They include such axioms of government as separation of powers, the principle of legality, the demand that statute law find general application, the prohibition of excesses of state authority, assurances for an independent judiciary, a ban on retroactive legislation. They address the minimal conditions necessary to legitimate the democratic state's monopoly on the legitimate use of violence. Democratic legitimacy depends above all on a system of political and personal accountability that is institutionalized in the principles of the rule of law.²

²Trust in the rule of law will not initially develop out of an affirmation of the procedural guarantees alone, for these guarantees must first be installed. Hence the claim made by Jürgen Habermas (1988: 277) in his Tanner Lectures on Human Rights, that the rule of law "draws its legitimacy from a rationality of legislative and judicial procedures guaranteeing impartiality," cannot be extended to the present context in East-Central Europe. By contrast, Foucault (1978) has criticized this pretext of impartiality, claiming that, as political authorities distance themselves from the responsibility for and machineries of violence through the institutionalization of rational procedures, these procedures tend to lead to more minute and indirect forms of practical domination. Along these lines, Michael Herzfeld (1992: 156) argues that the modern state's bureaucracy is fundamentally involved in the "production of indifference," a process wherein "the state itself becomes a massive machine for the evasion of responsibility, while arguing that people should 'pay' for their crimes." Differences notwithstanding, all three writers share in common a concern for the difficulty inherent in turning the principles of accountability into actual practices.

A way out of this tangle, at least theoretically, may be to follow Judith Sklar, who shifts the focus in *The Faces of Injustice* by arguing that the core legitimacy question addressed by jural systems is not impartiality per se but a specific kind of moral response to perceived injustice. In other words, a jural system's validity does not rest primarily on its neutrality or objectivity (though I do not mean to minimize the significance of the perception of objectivity), but on the appropriateness of the response to the violation in question. What specific kind of moral response to perceived injustice is called for? The perception of injustice, writes Sklar (1990: 89) is "the one natural core of our morality. It is our most basic claim to dignity." Because injustice is an enduring feature of human life, the appropriate response is to address this "natural core" of morality by reaffirming our "most basic claim to dignity." Hence "dignity" is

Among the most controversial aspects of this restructuring are the trials and criminalizations of former political elites in East-Central Europe. In many ways, they are comparable to the Nuremberg Trials following World War II. At Nuremberg and in other war trials, thousands of individuals were tried and convicted, hundreds executed. At the time, they were considered of dubious legality and conducted without precedent. The usual interpretation given to the legacy of Nuremberg has been that the trials set a precedent for the extension of human rights (cf. Janis 1993: 241-272). But today the Nuremberg trials stand out in another respect: as landmark legal processes of world historical significance in holding governmental officials accountable for wrongdoing.

Largely because postwar democracies have tended to rely on legal positivism, they also tend to displace criminality from the center to the margins, away from political leaders to border regions and provincial actors. Or they redefine the border regions and margins, in turn, as those areas that include whatever is considered criminal. A counter-process of locating crime in and not outside of government could have enduring consequences for international legal regimes and for legal process in different democracies. To locate criminality in the center is to suggest that responsibility and accountability must be situated there also. Resistance to such attempts is massive, but the potentially enduring lessons of this attempt for the world's ruling elites can not be underestimated. Five years after the revolutionary change of regimes in East-Central Europe, how might we evaluate the performance of the new states in reckoning with their criminal pasts and the rectification of injustices?

First, we must note an apparent paradox. Where there has been little or no attempt to prosecute former authorities for wrongdoing in East bloc states—particularly rump Yugoslavia, Croatia, Russia, and Romania, societies have been marked by a cycle of violence and counter-violence, motivated by revenge and supported by some of the old elite, who have frequently resumed power under a nationalist platform. Surely, this violence is directly linked to the trauma of the communist epoch as well as to the revolution directed against its aborted utopia. One often hears in the background resounding echoes of the thunder of the First and Second World Wars. By contrast, in those states where there have been successful prosecutions of former authorities for wrongdoing—particularly in East Germany, Bulgaria, and Albania, the trials have frequently provoked sympathy for the convicted and scorn for the original victim's moral claims. Moreover, where such trials have occurred, the people's initial passion for "retributive justice" appears to have substantially subsided, if not altogether disappeared. Many analysts claim that such prosecutions delegitimize new states. It seems as if in all of the

not something about which the modern state can remain neutral if it is to establish itself as the ultimate arbiter in deciding what is right and wrong.

former socialist states, including East Germany, the possibility for a criminalization of the old elite and retributive justice, for jural reform generally, existed for a period of only several years after the regime change. Yet, in most of the new states where some retributive justice has been pursued, the extant potential for violence seems to have been peacefully, if precariously and perhaps only tentatively, dampened or diverted. On the other hand, the states with the most violence are those where there was no attempt at retributive justice.

What does a relative failure to continue public prosecution of criminality undertaken by the old regime and public indifference to the fate of past victims mean? In what context should it be interpreted? Is it because people are more fundamentally concerned with wealth and prosperity (problems associated with the economy) than with justice and morality (problems associated with legal security)? Does this indicate, as Stephen Holmes of the University of Chicago (1994: 33-36) and the Polish scholar Wiktor Osiatynski (1994: 36-41) concluded, a desire to close "the books on the crimes of the past"? Are we to evaluate, along with Osiatynski (1994: 36), "the failure of decommunization and resistance to the retributive phase of the revolution [as] ... one of the most important successes of the postcommunist transformation"? On the contrary, a successful reckoning with the criminal past obligates the state to seek retributive justice, and a failure to pursue retributive justice will likely lead to cycles of retributive violence.

4. Displacing Violence: Substitute Victims versus the Actual Perpetrator

When socialist states dissolved, socialist normative systems went with them. What followed was an agonistic period of tremendous ambiguity about judgment and guilt, a delegitimation of legal systems with a corresponding increase in criminality at every level of the society. At stake in the installation of the rule of law in former socialist states is whether it will be possible for the state to establish its ability to make legitimate moral judgments again. These moral judgments are political decisions, they involve violence, and they either displace or conceal that initial moment of violence.

Until recently, anthropological contributions to the regulation of violence have come primarily from the study of societies without states. When compared to states with the rule of law, stateless societies tended to distinguish themselves in one central respect: they practice forms of ritual sacrifice. Sacrifice of a substitute victim is understood as a preventive measure, embedded in religious practices, that, argues René Girard in a summary and theorization of anthropological studies, serves to "polarize the community's aggressive impulses and redirect them toward victims that may be actual or figurative, animate or inanimate, but that are always incapable of propagating further vengeance. The sacrificial process furnishes an outlet

for those violent impulses that cannot be mastered by self-restraint. The sacrificial process prevents the spread of violence by keeping vengeance in check" (1977: 18).

In the regime changes following 1989, the choice of sacrificial groups has been predictable and hardly random: external states or internal enemies, most often gypsies, Jews, and perceived foreigners. Association with "communism" has also served as a symbolic reservoir for pollution and therefore a substitute for actual wrongdoers. Thus communist parties or communist parties members have at times been targeted for purification. A sociologically informed explanation for sacrifice would make it unnecessary to hold to an (untenable) psychology of personal revenge to explain what motivates societies to construct jural systems for regulating violence. Rather, jural systems are a response to the group's search for a moral authority, and this authority is attained in part through retributive justice, by righting a wrong in such a way that the victim's dignity—always socially defined—is re-established. At this very general level, one can identify two dimensions to the sacrificial process that hold for each of the new East-Central European regimes: (1) identifying possible culprits to hold accountable, who then were vetted for complicity with the secret police, tried for crimes, or simply vilified in media campaigns, and (2) assuaging injured parties through rehabilitation, vindication, compensatory payments, publication of their stories, or other similar measures.

During this period of installation, East-Central European regimes have indeed relied on sacrifices for many purposes: in order to fight corruption, to open institutions to renewal, and to assuage victims of the old regimes. But legal regimes with the rule of law differ in a crucial respect from all others: The core of their legitimacy rests in identifying the real wrongdoer, or at least in a theory that the actual perpetrator has been identified. And with this identification and trial, the state establishes itself as a moral authority acting for the whole community.

Alternatively, when societies without rule of law seek someone to hold accountable for the initial offense, the first suspect is often replaced by another, and another, in a chain of substitutes. A substitute is actually preferred, notes Girard, since it avoids the principle of perfect reciprocity—an eye for an eye—and therefore the necessity for a cycle of reciprocal acts of revenge that would unleash violence and lead ultimately to a sacrifice of the entire group. This substitute requires a "certain degree of misunderstanding," even deception, so that it appears the god himself is demanding the new (and final) victim. The sacrifice "serves to protect the entire community from its own violence" by suppressing dissensions, rivalries, jealousies, and quarrels. It stems the tide of indiscriminate substitutions and redirects violence into 'proper' channels," meaning outside the community and toward some exteriorized individual or group that "lacks a champion" (Girard 1977: 8, 10). A substitute victim absolves the group of any further responsibility to seek redress for the initial crime.

The problem for the rule of law is that the actual perpetrator may be too powerful, or it may be too unpalatable politically to prosecute him. In that case, the perpetrator cannot be readily exteriorized, cannot be placed "outside" the society. Hence, a major problem for a Rechtsstaat is determining not only who committed the crime, but also whom is it politically possible to exteriorize, to place outside the group? Which ethnic group, political elite, nation, minority group, or individual can be held accountable for committed wrongdoings without dividing the political community? Since 1989, every East-Central European society has been struggling with this question, and the answer determines which offenses are held to be criminal and therefore worthy of prosecution. It is my thesis that in those states where there occurred a debate about moral responsibility and where there was no immediate exteriorization of guilt, the new Rechtsstaat performed a successful "final judgment," in the religious sense, a performance that will ultimately enable the state itself to function as a moral agent and settle accounts. The definition of the collectivity provided by the state at this moment is likely to occasion more conflict than consensus. But it is not the level of conflict but the belief in its fair arbitration that is the key to a peaceful outcome.

Alternately, in those places where the individual or group held accountable was not a purification from an acknowledged inside, where no internal cleansing and only scapegoating of already externalized others occurred, then further cycles of retributive violence are likely to follow. Cycles of violence will follow either as new waves of internal purges (of exteriorized others) or as foreign wars. Maurice Bloch (1982: 6) makes a very similar claim in his account of the politics of religious experience, noting that the "final consumption [of a 'native vitality'] is outwardly directed toward other species," or alternately, is "merely a preliminary to expansionist violence against neighbors."

To describe the absence of retributive justice—the failure to acknowledge victims, prosecute regime-related crime, and establish standards of moral accountability—as a sign of "one of the most important successes of the postcommunist transformation" (Osiatynski 1994: 36) effaces the actual efforts made in all of former socialist states to install the Rechtsstaat as a moral authority. If ongoing efforts to introduce standards of political accountability and responsibility fail, defenses of the newly installed Rechtsstaat will be reduced to arguments for a set of superior procedural techniques for getting things done.³ But, as I have been arguing, the

³The issue of accountability has been frequently discussed in ethnographic monographs, but it has usually been presented within discussions of rationality (e.g., whether the reasoning used was formally consistent and logical) or within discussions of human agency. For example, Evans-Pritchard's (1976) account of Azande causal reasoning has been used in both discussions. For an exception to this, see James Ferguson's (1993: 78-92) pointed critique of technicist reasoning in "structural adjustment" programs, where he redirects the discussion to one of human responsibility—or, as I am arguing, accountability—for the moral outcomes of economic policies.

legitimacy of getting things done through democratic political form rests on a prior installation of the principles of the rule of law. Often this defense of the new East-Central European regimes is further reduced to a kind of cargo cult argument about the new regime's ability to bring home the bacon, to generate wealth and private prosperity by respecting capitalist property laws: let bygones be bygones and let's all get wealthy together. It is frequently asserted that ethnic homogeneity, economic growth, or acts of reconciliation alone will legitimate the transformed Ostblock states. But who is buying that today? The single most significant and immediately noticeable result of the regime changes has been a massive redistribution of property and the creation of a wider range of economic class differences than previously existed. What seems to have made the most difference in peaceful and effective jural transformations is the use or absence of retributive justice. In those states where retributive justice had no hearing, proponents of the revolutions of 1989 have lost or are losing their moral authority, and members of the old apparatus have reasserted former privileges and prerogatives as well as often become the primary benefactors of the property reforms. A political community cannot legitimate itself on the basis of procedural impartiality and technical rationality alone, as, for example, some of Habermas' arguments suggest. A moral community also requires belief in a superior morality of politics, a politics perceived as just.

The other side of the coin to the question of accountability is that of the place of the victim. Efforts to vindicate or rehabilitate victims seek to reestablish their self-worth and value through the staging of an "event" that publicly repudiates the message of superiority or dominance that initially caused the diminishment in the victim's worth. "Whatever decisions we do make will, however, be unjust," Sklar (1991: 126) reminds us, unless we take the victim's view into full account and give her voice its full weight. Anything less is not only unfair, it is also politically dangerous." Cycles of violence can ultimately destroy the group; certainly they create conditions of permanent insecurity and instability. What discredits the legal system is its inability to displace violence onto itself: it fails to secure a monopoly on the legitimate use of violence. This displacement is successful only when a system of accountability is established whereby wrongdoers are punished and the dignity of victims is reestablished so that the injured party does not feel compelled to turn to violence to exact retribution.

If I am correct in following a long line of political theorists who maintain that the state strives not for moral neutrality but, as Hampton writes, "to implement a moral world" through its decisions to punish or not to punish wrongdoers, then our next question concerns which crimes is it the state's business to punish? And what are the justifications for these criminalizations? Law, in this view, does not exclude politics but requires a set of political decisions that reinforce a particular vision of dignity. The end of the Cold War has renewed debates about the prevailing definitions of human "dignity" that were embedded in the Cold

War order. Installation of the new practices of the rule of law with the corresponding symbolic meanings involves defining which crimes are the state's business to punish, whom to rectify and whom to hold accountable for injustices that, though now concentrated in the "socialist past," are continuous and ongoing. The jural reform in East-Central Europe, then, though ostensibly about eliminating past injustices, is more centrally about defining the future parameters along which the legitimate state not only has moral obligations but itself can claim to represent morality.

5. Accountability on Trial in East Germany: ZERV

What has happened when former government officials of East Bloc states are put on trial? When accountability is placed in the center, how does this frame the transition? Do such trials both alleviate the move to exteriorize minorities and legitimate the new Rechtsstaat? Rather than go into a single ethnographic case within a country, or try to cover all states in comparable detail, I will summarize and evaluate the results of retributive justice in East Germany. For reasons of length alone, I will offer more details about punishing wrongdoers than about rewarding the good. Fuller accounts, with individual cases, can be found in Borneman (1997).

Most of the individual cases of prosecution would illustrate not the establishment of clear principles but the challenges of bringing about justice and establishing principles of accountability in East-Central Europe: the difficulty of making clear distinctions between criminal and victim, the difficulties inherent in an originary installation of the principles of the rule of law, and the intertwining of socialist and Western European legal regimes during the Cold War.

In Germany, the major task of retributive justice fell to a special investigative unit called ZERV. How it came into existence is a story about the possibilities for the creation of retributive justice. In the chaos that followed the opening of the Berlin Wall on November 9, 1989, illegal activities of an unprecedented nature proliferated to such an extent that police and public prosecutors in East and West Berlin felt overwhelmed. They immediately reestablished the contacts that had been destroyed with the division of Germany in 1949. Officials in the Ministries of Justice commiserated with the police and public prosecutors about difficulties encountered in responding to the deluge of demands for justice. These demands involved investigating and prosecuting both old crimes committed by the GDR's elite and new crimes made possible by the disintegration of East German authority and, what at that time

was not apparent, the impending unification of the two states.⁴ On the day of unification, October 3, 1990, West Berlin police absorbed the East Berlin "Volkspolizei" (People's Police) and fired nobody immediately. By contrast, West Berlin's Ministry of Justice dismissed all of East Berlin's public prosecutors and judges. Although these East German civil servants were encouraged to reapply for their positions, in the following four years only 15 percent of the 281 new judges and public prosecutors who had worked in East Berlin were reappointed. Thirty percent retired or willingly left public service, with the remaining 55 percent actively rejected by the Ministry. Outside of Berlin, judges and public prosecutors were not all initially dismissed, and the rates of reappointment were much higher: e.g., Saxony 65 percent, Brandenburg 54 percent (Peschel-Gutzeit cited in *Der Tagesspiegel* 1994: 10).⁵ Because of the centralized nature of the GDR's police and judicial units, the major archives and federal

⁴After the fall of 1989, East German courts were literally inundated with demands for justice. The number of cases in labor courts alone increased by 742 percent in 1990 alone. The case overload, and accompanying backlog, continued to grow after unification. In the province of Brandenburg, for example, between 1991 and 1992, the total number of cases delayed because of court overload increased 57 percent from 9,145 to 16,000 (*Berliner Zeitung*, January 20, 1992, p. 14). Meanwhile, by the end of 1994, the number of East Germans going to court began to reach West German proportions. In Berlin, for example, the number of civil cases rose 273 percent between 1991 and 1994 (*Der Tagesspiegel*, October 10, 1994, p. 10).

⁵The dis- and re-qualifications for civil servants (criteria for disqualification in private businesses was not covered by the law) were uneven between and within the new Länder. Only in East Berlin were the criteria uniform, and there, as explained above, only judges and state prosecutors were dismissed; other civil servants, including police and teachers, remained in their posts though most were later vetted for Stasi activity by the Gauck-Authority. This was possible only because West Berlin had a large enough staff and was physically close enough to take over the jural administration of the entire eastern part of the city.

The fate of occupational groups who were subject to disqualification varied: among teachers in Berlin, 4.7 percent were implicated but only .99 percent dismissed (Gauck 1995a: 5); among lawyers in private practice, of 304 reviewed, four were disqualified (*Der Tagesspiegel*, October 1, 1994, p. 10). The Unity Treaty of August 31, 1990, envisioned continuity in civil servants but also obligated the new Länder to review civil servants for qualification and suitability for the position. Unlike "denazification" following World War II, political party affiliation was not used as a criteria (given that 97.6 percent of all GDR judges were members of the Socialist Unity Party, this would have made reappointment all but impossible (*Berliner Zeitung*, January 15, 1992, p. 10). A single criterion was listed as ground for dismissal: "Tätigkeit," activity connected with the Stasi. It did not specify whether this included those who merely had contact ("Kontakt") or those who worked with ("Zusammenarbeit") or those who worked for ("Mitarbeit") the Stasi. The Unity Treaty did, however, rule out consideration of political party membership (which had been the American criteria for de-Nazification). The different review commissions shared an assumption of an "objective" perspective, which entailed the search for an "objective" criterion from which to review GDR personnel. Although this insistence upon an objective standpoint intended to take into consideration conditions in the GDR, instead, it meant, as Diemut Majer has pointed out, that historically specific circumstances of behavior were ignored. On the other hand, resistance to forming a "catalogue of criteria" (because it was impossible to arrive at or agree on an "objective" one) facilitated arbitrary and variable application of standards for review (1992: 147-167).

ministries had been located in or around Berlin. For this and a variety of other reasons, the task of investigating and prosecuting the old and new crime was left primarily to West Berlin officials.

Approximately eleven months following unity, on September 1, 1991, the German Bundestag, Chancellor Kohl, the Federal Ministry of Interior, and the Ministry of Justice followed a recommendation of a conference of interior ministers to create the "Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität" (ZERV) (Central Investigative Office for Governmental and Unification Criminality). On that date, ZERV began with a team of three men, working under the leadership of Manfred Kittlaus and the auspices of Berlin's President of the Police, to coordinate the different ongoing investigations into governmental and unification crime. Public Prosecutor Christoph Schaeffgen became the leader of the division "Regierungskriminalität" in the Ministry of Justice. Since then, ZERV has become one of the "five pillars" of the Berlin police department.

ZERV was charged with investigating what has become known as the "strafrechtliche Bewältigung der Vergangenheit der DDR" (overcoming of/reckoning with the GDR's past through criminal law). Technically, its function is to gather and prepare the evidence for the state, and then to prosecute, in cases involving the GDR. A federal law passed in 1994 obligates the police and public prosecutors to complete all of their work, except for cases involving murder, by 2 October in the year 2000. In private interviews with public prosecutors and ZERV employees, I was told that while ZERV's investigations and prosecutions of governmental criminality will likely end by the year 2000, its investigations of economic crimes were growing and would continue well into the next century.

ZERV is divided into two divisions: Referat 1 deals with unification criminality, Referat 2 with governmental criminality. Unification criminality refers to crime having to do with the economic background and consequences of unification, in other words, primarily with crime that took place after November 1989. About half of the suspects here come from the old Länder of the Federal Republic, half from the GDR. In fact, most of ZERV 1's investigations are of suspected criminal activities engaged in jointly by organized criminal gangs from the old Federal Republic of Germany, or other West bloc states, *and* by former members of the East German state security (Stasi) or former GDR functionaries in the political parties and mass organizations (Kittlaus 1993a: 4).

"Crime" is a socially constructed category of wrong and unjust deeds; such acts are by definition both socially disapproved and legally prohibited. Needless to say, the definitions of crime vary by place and over time. ZERV has taken wrong actions and tried to construct them as violations of justice or "crime." This process is a fluid and interactive one, where the public pressures the state to react to wrongness and where the state prosecutes wrongness to which the

public responds. Often public pressure will be insufficient to prompt state action, and the perceived wrong will remain a misfortune. Or, alternately, state action will find no resonance and support in the public, leading the state to avoid or truncate prosecution, and the designated wrong will go unpunished. In either case—of the action remaining a misfortune from the public's perspective or a designated wrong from the state's—the deed will not become a "crime." In short, crime is never merely what is written in penal codes. It is a result of a complex interaction between the public and the state. And it is an interpretive process, involving the selection of categories of "wrongness" for investigation, the construction of evidence, and a trial.

Shortly after its founding, ZERV 1 organized itself into roughly ten different investigative units, with much overlap between units in suspects and sources for evidence: 1) "Transferrubel" fraud, 2) property of the former Socialist Unity Party (SED/PDS) and of mass organizations, 3) the Ministry of State Security (Stasi), 4) the Treuhandanstalt, 5) the currency union, 6) "Kommerzielle Koordinierung" (KoKo), a GDR agency set up to accumulate convertible (Western) currency, 7) extortion, 8) Western groups of the former Soviet army, 9) embargo violations, and 10) weapons sales. Taken together, these ten units are intended to account for an estimated total of 26.5 billion D-Mark (\$17.7 billion) in damages between October 1990 and the fall of 1993. By the end of 1995, ZERV investigations were underway for 13.5 billion of this total. Approximately 3 billion D-Mark has already been recovered since work began in 1990.

ZERV 2 investigates high-level representatives of the party and government as well as state functionaries who committed crimes while carrying out their offices. These crimes are acts of violence against humans and often involve human rights violations. By the end of 1995, ZERV 2 had investigated 7414 incidents. Moreover, seventy percent of all the investigations of ZERV 2, and over half of the overall total of ZERV investigations, have been for either attempted or completed homicides (Kittlaus 1993b: 38). The acts investigated took place over the entire period of GDR history, from 1949 to 1989, and the people subject to investigation worked at all levels of the state hierarchy, from postal employees to members of the Politbüro. Of the 4691 individual suspects, 213 held high-level posts (first lieutenant, major, major-general, general, ministers of state) (Kittlaus 1994: 29).

The Public Prosecutor's Office lists three major areas of criminal prosecution, while ZERV 2 divides its criminal investigations into roughly nine categories: 1) border violations, 2) contract murder by the Stasi, 3) kidnapping, 4) deaths on the Baltic Sea, 5) "Rechtsbeugung" (judicial illegality), 6) repression of the GDR worker rebellion on June 17, 1953, 7) doping of athletes, 8) forced relocation in 1952 and 1961, and 9) environmental crime. The Public Prosecutor's Office has made indictments in three general areas: 1) "attempted and completed manslaughter on the inner-German border," 2) "Rechtsbeugung in acts involving imprisonment or

manslaughter through the judicial organs of the GDR," and 3) "manslaughter, imprisonment, and violation of mail privacy by members of the Stasi" (Schaeffgen 1994: 151)

How successful has ZERV been? A complete list of the results of investigations, indictments, and verdicts is nowhere to be found. But even a partial list indicates that the results cannot be inferred from the numbers alone, which in any case are changing over time. In the fall of 1994, the head state prosecutor in Berlin, Christoph Schaeffgen, drew up an initial list. At that time he concluded that on the basis of the numbers alone, the results "look meager" (1994: 159). From October 3, 1990, through the fall of 1994, ZERV 2, charged with investigating governmental criminality, had opened 3,000 cases, of which 100 had resulted in indictments. In only thirty cases were suspects convicted, making a one percent conviction rate, 30 convictions out of 3000 cases opened; or, if one measures convictions per indictment, the success rate is thirty percent (Der Tagesspiegel, October 1, 1994: 10). After this release, the press along with most intellectual commentators widely criticized the work of ZERV and the public prosecutor.

A new evaluation by Berlin's Ministry of Justice that considers events through March 31, 1996, indicates a changing picture. Consider again for a moment merely the more controversial work of ZERV 2 on unification crime. It had opened 5,807 cases, out of which 167 resulted in an indictment. With 159 trials completed, in 73 cases suspects were convicted (some verdicts are on appeal), making a 2.5 percent conviction rate, 73 out of 5,807 cases opened; or, if one measures convictions per indictment, the success rate is 46 percent (Senatsverwaltung 1996: Anlage 1). Depending on how the numbers are tabulated, the rate of conviction has increased slightly, from one to 2.5 percent, or from 30 to 46 percent. ZERV 1, charged largely with economic crime, has engaged in even more investigations (19,264) and issued more indictments (300), though no numbers are available on convictions. These findings are summarized in the two tables below.

Chart I: Cases Opened, Closed, Uncompleted, and Indictments of ZERV 1 and ZERV 2, March 31, 1996

	ZERV 1	ZERV 2
Cases opened	19,264	5,807
Cases closed	11,873	4,074
Indictments	300	167
Uncompleted cases	7,391	1,733

(Source: Senatsverwaltung für Justiz 1996: Appendix 1-6)

Chart II: Indictments and Convictions of ZERV 2 (Governmental Criminality), March 31, 1996

Type of Criminality	Indictments	Convictions
Border violations	69	45
Judicial illegality	38	7
Stasi illegality	14	2
Economic illegality	38	19

(Source: Senatsverwaltung für Justiz 1996: Appendix 1-6)

In sum, there have been tens of thousands of investigations, there have been hundreds of indictments, there have been some convictions holding both minor and major figures accountable, and a great deal of money has been recovered from economic crime. By and large, however, these successes have been too few in number and too costly in time and attention to convince a large number of people, especially legal experts and politicians in the new Germany, of the necessity and appropriateness of the criminal investigations and prosecutions.

The head Berlin prosecutor, Christoph Schaeffgen, responds to public reservations by arguing that "justice is obligated to the principle of legitimacy and not that of public or political opinion." He suggests that the task of justice here lay in "enlightenment and in the prosecution of criminality and criminals who in exercising political power violated the law of their own states, not in reparations ("Wiedergutmachung") for wrong that originated in the former GDR" (1994: 159). Clearly, a full account of the results of reckoning with GDR's past through criminal law means more than listing trial results. To focus on trial results alone, that is, on the conviction or acquittal of suspects, places jural work in an economic frame of reference. Efficiency of justice becomes the primary criterion by which results, or the "rationality" of jural process, are evaluated. Such a framework may be useful in the domain of distributive justice, where outcomes most frequently involve material goods whose value can be clearly measured. Employing this logic, the political scientist Jon Elster (1992: 15) went so far as to claim that since everybody in former socialist states was harmed, and "because it is impossible to reach everybody, nobody should be punished and nobody compensated."⁶ Surely, comprehensiveness and outcomes that correspond to rational actor logic are not what criminal justice is about. Justice is about morality and the principle of legitimacy, which in turn rest not on efficiency but on various cultural standards of effectiveness. *The question is not whether criminal justice is efficient but whether it is effective in reckoning with a past.* It is important not to impose a single efficiency standard on justice systems, for the particular means by which effectiveness is measured varies. I would think that most justice systems have never been particularly efficient, since in most places of the world most crimes are never solved and most suspected criminals go free. Effectiveness, on the other hand, is a culturally and temporally

⁶Another argument often put forward is that property owners should be preferred for restitution claims because at least it is possible to determine the amount of damage they suffered, whereas intangible forms of harm are impossible to compensate for fairly. Offe and Bönker counter: "It would be morally irrelevant to let the choice of rectificatory strategies be guided and distorted by the morally irrelevant fact that property can be given back, while years lost in prison cannot" (1993:31).

variable standard, and a matter for not speculative but empirical research. In the German case, have the criminal investigations and trials been efficacious?

The head of ZERV, Manfred Kittlaus, justifies the criminal investigations in terms of three desired effects: 1) "Rechtsgefühl" defined as "the direct effect on the people's respect for legality," 2) trust in the "soziale Marktwirtschaft" (social market economy) by dealing with "organized economic crime," and 3) improving the "appearance of Germany abroad." Respect for the legality ("Rechtsgefühl") can be obtained, writes Kittlaus, only by fulfilling the "Verpflichtung" (obligation and commitment) to the "10,000 victims and the 100,000 GDR citizens who in 1989 worked to bring about the collapse of the morally, politically, and economically bankrupt GDR-system" (Kittlaus: 1994: 1). The primary groups to whom criminal reckoning is obligated, then, he argues, are the victims and the citizens who worked to bring about the collapse of the GDR.

Even those who have long opposed this reckoning through criminal justice, such as the senior editor and owner of *Die Zeit*, Marion Gräfin Dönhoff (1994: 1), the political scientist Egon Bahr (1993), and the legal historian Uwe Wesel (1995), for example, have had reservations about ignoring the feelings of the victims. In pleading for an end to the criminal reckoning and a general amnesty, Wesel wrote, "The single serious argument against an amnesty is the feeling of the victims. But everyone must make a contribution to the new beginning. Also the victims." Instead, he proposed a law of restitution "for which the sentencing of perpetrators is no substitute." He also insisted that the actual "reckoning with the past ... is the task of historians anyway, who are already at work. ... The Honecker trial has brought nothing new to light that was not already well-known." (1995: 3). Finally, he also argued for an end to criminalization through an amnesty, which, he claimed, was one of the reasons for the West Germany success story when former Nazis were amnestied in 1950. The question he addresses but did not ask is: whose trust in the new West German law is he most concerned with, that of the perpetrators or the victims? Both groups are actually small in number. Regardless of with whom one identifies, it is unlikely that amnestying suspects before they are brought to trial, before there is any finding of innocence or admission of guilt, will contribute to putting the past behind.

What Wesel seems to confuse is the task of the historian--to bring something new to light, to make the unknown known--and the task of the justice system--to reestablish the dignity of the victim and to prevent further wrong-doing. The latter task cannot be readily accomplished by historians whose (ideal-ized) function is diligent research, the uncovering of new evidence, constructing of events and interpreting them in new frameworks. Rather, re-establishing dignity would seem to require a process more similar to a criminal trial than to historical research, namely, a public participatory process, like that of Dr. Vogel's trial,

where following an open hearing one draws a thick line between the victim and those accountable for the injustice. Moreover, laws of restitution, like Wesel proposes, invariably rely on monetary dispensations, so that again an economic framework is imposed on a jural solution. Jewish victims of the Holocaust who received monetary sums from the West German government in its *Wiedergutmachung* policy have by no means renounced the use of criminal justice to hold individuals accountable for criminal actions. A law of monetary restitution is desirable (and indeed, has already been passed) but not in itself sufficient for settling accounts. Individuals must also be held accountable for wrongdoing, and the state, I have been arguing, as the only institutional moral representative of the entire community, has an obligation here. The state's obligation is not only a hermeneutic one but also a performative one. Its primary concern is with the consequences of what it does for legitimating the principles of its rule.

In those states that did not hold anyone accountable, where it was assumed that the system was at fault and changing "the system," whatever that is, would in itself be sufficient, there has been a form of sacrifice or ritual purification in reckoning with the past. but in each case the earmarked victim for sacrifice—the "minority" chosen to exteriorize—has been different. In Czechoslovakia no serious internal criminalization took place, rather the Czechs criminalized the Slovaks, who in turn criminalized the Czechs.⁷ Such practices of "ethnic cleansing" are expressions of an atavistic drive for retaliation, in which perpetrators and victims of the past strike at each other in new coalitions. Responsibility for past problems was exteriorized, projected onto an "outside" that had at one time been part of oneself. As soon as this split between Slovaks and Czechs was finalized, debate turned to the old question of the grounds for the sacrifice immediately after World War II of almost three million Germans, or individuals identified as such, who were driven from their homes. These *Sudetendeutsche* living in Germany, or the young people who want to identify themselves that way and who had never personally suffered this harm, in turn called for retaliation.

In Romania, the Ceausescu couple and the Politburo on top served as the objects for internal purification, though in the first moments of euphoria most European observers did not even notice that this ritual was accompanied by a scapegoating of Romanian Gypsies and Hungarians on the bottom. Partly through these substitute sacrifices the old power structure was actually preserved. In Russia, political elites seemingly accountable to no one sacrificed Chechnya in a similar way, though one of the peculiarities of the Russian case is that leaders still want to control what they identify as external to them. In Yugoslavia, archenemies Croatia and Serbia united to sacrifice Bosnia—and by many measures they have succeeded.

⁷Holy reports that in opinion polls carried out in 1991, "92 percent of Czechs were of the opinion that the Slovaks benefited more from the common state than they did themselves and 86 percent of Slovaks expressed the opposite view" (1994: 810).

These regimes "secured" their rule not through the legitimate domination of the rule of law but in genocidal acts of exclusion and abjection of an internal other. Moreover, an active, non-elected clique of former perpetrators and victims directly incited and manipulated the violence. To be sure, the Croats and Serbs did not act alone but with the complicity of the international community, including the aid of irredentist populations in Europe and the United States. But if we focus solely on the role of the jural "transitions," in as much as the word applies to this situation, they were most frequently subordinated to strategic political operatives, which in turn were directed by former perpetrators who readily identified new scapegoats—the Bosnian Muslims, inter-ethnic couples—on whom the ethnonationalists could project their feelings of guilt.

In none of these states did former victims receive much recognition; there was little or no retributive justice and internal cleansing; accountability was shifted from the political center to some posited exterior, which was then sacrificed. In Hungary, Slovenia, and to a large extent in Poland, some people claim no sacrifice was necessary since state form was already a "rule of law" and therefore the transformation was not from one type of regime to another but within the regime. This may be true. And, indeed, the relative inclusiveness of these regimes is to be applauded. But one should not overlook the reappearance of anti-semitism in Poland, especially given its history of dealing with internal divisions through demarcation from its minorities, including a history of recurrent pogroms. And in Slovenia, state functionaries have had it easy escaping personal accountability and responsibility for their own errors by pointing the finger at their dangerous and barbarian neighbors and former federal comrades in Serbia, Croatia, and Bosnia.

The political transformation in Germany since 1989 is a part of this political and psychological dynamic in the former East bloc. For this reason, reestablishing the dignity of victims required a prosecution of perpetrators among the old elite for their moral-legal wrongs. But since the state's legitimacy is now tied to the principles of the rule of law, it must also, especially in the hours of its birth, avoid criminalizing politically expedient substitutes. It must prosecute and punish actual wrongdoers, with the understanding that for a variety of political and procedural reasons it will not be able to punish them all. The old East German political elites and their West German accomplices do not fall into the category of substitute victims for they are being held accountable for what they actually did. Nothing more, nothing less. And when, as has most frequently been the case, it is impossible to convict following the procedural protections of the principles of the rule of law, the new state has not thereby failed, for each trial must be viewed alongside other prosecutions. The major significance and efficacy of a trial is not always the guilty verdict. Rather, a trial demonstrates through its performance the ongoing necessity of reiterating the state's moral principles. Effective

criminal law is not to be equated with efficient justice. *Effective criminal law establishes the state as a moral agent representing the entire community by reiterating the principles of responsibility and accountable for injustices as part of an attempt to reestablish the dignity of victims.*

That the justice system has been effective is attested to by another kind of evidence: steadily increasing public trust in the judiciary indicated in public opinion polls. Of all the institutions in the united Germany with whom citizens are asked to identify, the institution with which eastern and western Germans trust most is the Constitutional Court, followed closely by the other courts and the police. At the bottom of this list are the press and the political parties. In the middle and far below the judicial branch are the legislative branch and the military (Gabriel 1993: 3-12).

Is it possible to go beyond the enclosed scenario of the trial and the jural system at work, and beyond the reactions of victims, to describe ethnographically everyday reactions to and ramifications of retributive justice? I am, after all, claiming that a relationship exists between the use of retributive justice and the creation of social peace. Where, exactly, does one locate the situations in which retributive justice is received? One of the major problems here is that the primary descriptive evidence to which I am appealing is a non-event: the lack of violent demonstrations directed against one's neighbors, the willingness to defer in social conflicts to the state's courts and administrative bodies.

On the surface, the major evidence to be explained would be the significant increase in violence perpetrated against foreigners in both 1991 and 1992: more than 2000 acts, including the bombing and burning of homes of asylum seekers and the 17 murders by right-wing groups, of which eight of the victims were foreigners. At that time, the Office of Constitutional Protection estimated that political parties of the radical right in eastern and western Germany had about 40,000 members, of whom 6,000 were ready to use violence.⁸ Equally if not more disturbing than these specific acts of murder was the acceptance, often extending to support, of this violence by a large number of German bystanders.

This violence quickly subsided, however, largely in response to a concerted effort by the state to investigate and isolate these perpetrators, and by large numbers of individual citizens to identify with the victims ^{and} the groups to which they belonged. In the fall of 1992, several million East and West Germans demonstrated publicly their opposition to this violence, organizing peaceful marches and demanding that politicians and police take resolute action to stop the violence. Following these demonstrations, politicians and significant numbers of relatively apolitical citizens ^{were} ~~have been~~ spurred into action against this new wave of right-

⁸*This Week in Germany*, 12 November 1992, 1.

wing violence. This action alone did not stop the violence, though it did demonstrate an unwillingness to go along. One may criticize the kinds of the various responses, but they are clear indications of a successful refusal to exteriorize a part of the social group. And they were in fact effective in preventing the violence from escalating.

There are of course many other factors which have contributed to the many non-events marking the relatively peaceful transition in Germany. Above all, there is the well-developed German social welfare system which cushioned the difficult economic transitions. Hence despite displacing more than half of the workforce in the East and creating unemployment of from 12 to 40%, depending on how it is calculated, the standard-of-living of the vast majority of people in the East has actually improved. This may not be sufficient to have made them happy, but it does have a pacifying effect. And there are the German democratic political institutions and the political party system. Especially of note here is the work of the Party of Democratic Socialism, the renamed Socialist Unity Party, which has channelled the voices of those who have felt disenfranchised into the institutional structures of the West German state. Finally, there are the non-jural institutions which have taken up the task of reckoning with the GDR's past, especially historians through the investigations of the parliamentary Enquete-Kommission, private citizens who have read Stasi documents about their own private pasts made available through the Gauck-Authorities, and a proliferation of newspaper, television, and public forums for the discussion of discontents. Beyond these institutional contexts, how has retributive justice been taken up in everyday life?

During the last six years, I have attended many public forums in Berlin and I have watched many of the televised discussions. These serve as catalysts for reactions in homes or among small circles of friends in bars and restaurants. When opinion pollsters or political scientists remark on the silence concerning these issues, they are merely registering the final effects of intensive social involvements: watching, listening, and sometimes talking. "Silence" in this context is not passivity or disinterest but a measured response to a public and private working-through of present injuries and past wounds. To explain this response in terms of old culturalist cliches—Germans historically just follow orders, they are a prototype of subaltern peoples—does not adequately explain the remarkable changes in postwar domestic arrangements and public culture (Borneman 1992). Admittedly, these changes are more extensive in the metropolis Berlin than in smaller provincial settings, and Germany is a country of primarily middle-sized cities. Yet the cultural processes and events in Berlin exert a disproportionate influence on national developments, disproportionate in numbers, in the setting of cultural trends, and in media coverage.

Perhaps a good illustration of the audience reception to retributive justice is the changing reaction to the fate of particular perpetrators and victims in the public imagination.

Two of the most prominent public figures identified in 1989 as perpetrators, Erich Honecker and Alexander Schalck-Golodkowski, have by 1996 disappeared from public attention. By contrast, one of figures most identified with the victims, Bärbel Bohley, who lost much of her public following within a year of the revolution, is currently enjoying a renaissance. Both trends are direct indices of the effects of successful retributive justice. How have people I know followed these developments? After Erich Honecker voted himself out of office in October 1990, he was forced to leave his home in Wandlitz, the Politburo residential compound he had built in an isolated forest an hour north of Berlin. Threatened by public scorn, with nowhere safe to stay, he and his wife took refuge in the home of a Lutheran minister outside Berlin. The newly reformed East German television and print media directed public anger and resentment to the governmental abuse of power, focusing on Honecker's Wandlitz compound and on the illegal trading activities of Schalck-Golodkowski for the regime. During this same period, Bohley, the moral dissident who helped bring about the regime collapse, was considered increasingly out-of-touch as she criticized people for the very materialism that led them to be discontented with the GDR.

Fearing arrest, Honecker fled to Moscow, but then the Federal Republic pressured Russia to send him back to Germany for trial. Hence he was denied refuge in the Chilean embassy in Moscow and returned to Berlin. He arrived only to discover that he had terminal cancer and would not likely live long enough for the prosecutors to be able to complete the case against him. After a brief stay in prison, public prosecutors released him to join his daughter who was living in Chile, what in effect can be called exile as a political solution. His death within a couple of years received little notice in the media, and no discussion among the people I know. When in the summer of 1996 I asked people what they thought of Honecker, those in the East always mentioned embarrassment at having submitted to his petty rule, along with repression, a factor those in the West foregrounded in their comments. Nobody mentioned the base motives of hate, resentment, or revenge. By 1996, people who had expressed so much anger at Alexander Schalck-Golodkowski (who was acquitted in his first trial but awaits others) were now satisfied that he was still under a kind of house and they were relatively unconcerned about his fate. As to the voices of victims, in 1995 and 1996 the public esteem of Bärbel Bohley and other former dissidents grew, acclaimed by people across the political spectrum, as they were acknowledged to be speaking from a position of dignity based on past moral actions on the side of "the good." In other words, an actual closing of the books is occurring, a thick line is being drawn, but only through a ritual purification.

This closing of the books does not imply that memory of the past will be accurate and continuous but merely increases the likelihood for a future affirmation of the principles of the rule of law. In the meantime, many reminders of this past will be erased. Such is the fate of

the Wandlitz compound, which I visited in the summer of 1996. Surrounded by a barbed wire fence falling quickly in disrepair, the small petty-bourgeois-looking single-family houses of the former Politburo members have been totally renovated and integrated into a large state-run health spa. All that remains that might remind one of its former use is the large metal entrance gate in unmistakable Socialist Realist style. During the summer, a small van is parked outside selling maps of the former government compound, a few books, and GDR memorabilia. Large numbers of private condominiums are under construction, but the settlement is now centered around an already-completed six-story health spa, complete with fountain, swimming pool, cafe, and well-kept strolling paths in the forest. People on crutches recovering from accidents or needing longterm physical therapy wander the grounds with their entire families in tow. When I asked where Honecker's house was, people directed me to it, but it is totally unmarked. I engaged a couple leaving the house in a brief conversation; they expressed no anger, no resentment. The complex is theirs to recover in from an automobile accident. The historical kindling used to ignite future fires is gone.

When I told a friend, who had always been skeptical about a judicial reckoning with the past, about ZERV's most recent report, she remarked, "That is pleasing to hear, John. It gives one faith that the justice system is working after all." Her non-eventful deference to the state's legitimacy is in stark contrast to the eventful turn to violence by those who reject state legitimacy to settle accounts. This reaction resembles that of others: there is no reference to the technical categories I have employed, but there is an appreciation of what Kittlaus called "Rechtsgefühl," a respect for legality. Another woman commented on the reaction of her two children, ages 16 and 19, "They are uninterested in that. They only want to have fun. Fully depoliticized. And they are not worried about the future, they take things in stride." For the moment, the young heirs to the transformations are not directing their energies against anybody or in critique of anything in particular but instead toward their own projects in self-fulfillment. Even if one does not subscribe to this attitude toward life, one must recognize that these young people have an implicit trust in the Rechtsstaat as providing the framework in which to experience their freedoms.

In November 1994, ZERV published a small, slick, green bulletin of eleven pages. It is meant both to inform the public about the work ZERV already is doing and to involve citizens in the criminal justice process by asking for their help in investigating criminal activity. It lists a telephone number to call to obtain or provide information, which in the first 12 months following publication resulted in 150 callers (ZERV 1996: 8). For the bulletin's cover ZERV (1994) chose the slogan: "When victims are silent everything always begins again from the start" ("Wenn die Opfer schweigen, beginnt alles immer wieder von vorn.") The current German reckoning with the injustices of a particular past through criminal law is a counter-experiment

to the silence-induced terror which engulfed Germany, Japan, and Italy in the 1970s—a terrorism that can be understood as retaliation for the crimes committed by the Axis powers in World War II! In other words, to avoid a cycle of retributive violence and state insecurity it may be wise to go through a longer phase of painful historical reckoning with the past, that is, of retributive justice in the present.

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**Panel 6: Social Criticism and the Role of Intellectuals:
The Case of Germany**

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Konrad Jarausch (University of North Carolina)

