TYRANNY ON TRIAL:
THE POLITICS OF NATURAL LAW AND LEGAL POSITIVISM
IN THE FEDERAL REPUBLIC OF GERMANY

by

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B.A., Economics
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Submitted to the Department of Political Science
in Partial Fulfillment of the Requirements for the Degree of
Doctor of Philosophy in Political Science
at the
Massachusetts Institute of Technology
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Abstract

This dissertation examines post-transitional justice in the Federal Republic of Germany. It analyzes how the West German criminal justice system treated former Nazi malefactors after 1945 and how it has treated former Communist malefactors since 1990. The dissertation operates at two levels: empirical and normative.

The question of what to do with Nazi and Communist perpetrators presents a profound dilemma. The human rights abuses that they committed were legal under the laws of their respective regimes. Should this fact protect them from punishment? On the one hand, punishing them would violate the principle that no one should be subject to retroactive legislation; on the other hand, failing to punish them would undermine the sanctity of human rights. The Federal Republic has attempted to finesse the issue.

The early postwar period was a critical conjuncture in which natural law and legal positivism vied for supremacy. Eventually, for political and jurisprudential reasons, a particular variant of legal positivism, which this dissertation labels ‘ahistoric’ legal positivism, came to dominate the way in which the courts treated Nazi malefactors. The same doctrinal approach has—once again, for political as well as jurisprudential reasons—governed the treatment of Communist malefactors since reunification.

‘Ahistoric’ legal positivism accepts the premise that no one may be punished for an act that was not illegal at the time the act was committed; but, it simultaneously permits current courts to liberally reinterpret the laws of the former regime. The doctrine allows a narrowly circumscribed range of post-transitional prosecutions. Thus, Communist malefactors may be punished, but only if their actions can be construed as having been illegal under some (often tortured) interpretation of East German law.

This approach represents a middle course between the extremes of full-fledged natural law on the one hand and full-fledged legal positivism on the other. This middle course, the dissertation argues, has a distinct and deleterious set of normative consequences. It has, in a sense, produced the worst of both worlds: it subjects individuals to retroactive legislation, yet it fails to affirm the existence of inalienable human rights.

Thesis Supervisor: Joshua Cohen

Title: Professor of Philosophy and Political Science
To my parents.
Acknowledgments

Writing a dissertation is a solitary endeavor. Most of one's time is spent alone, either in the library or at the computer. Nonetheless, dissertations are, in many ways, a collective product. One cannot complete them without the assistance of others. I am fortunate to have received abundant support from many quarters. The support came in various forms: intellectual, institutional, emotional, and financial. For all of it, I am most grateful.

I began my research in Berlin in the fall of 1991 as a Bundeskanzler Scholar of the Alexander von Humboldt Foundation. The Bundeskanzler Scholarship enabled me to attend the first trials of East German border guards charged in connection with the death of would-be refugees shot at the Berlin Wall. It was largely out of my fascination with those trials that this dissertation grew. In addition to providing me generous financial support, the Humboldt Foundation also used its good offices to help me obtain access to various government officials. I am thankful not only to the Foundation as an institution, but to Dr. Kurt-Jürgen Maaß and Dr. Wolfgang Holl for their tremendous engagement and personal support.

My year as a Bundeskanzler Scholar would not have meant very much had I not spoken German. That I did speak German is in large part thanks to the German Academic Exchange Service (DAAD), which was kind enough to send me to an intensive language program at the Goethe Institute.

For those who never encountered "real existing socialism", it is difficult to imagine what East Germany was like. For those who never visited Berlin when it was divided, it is impossible to fully comprehend the Wall's explicable yet tragic reality. A pre-dissertation grant from the Friedrich Ebert Foundation allowed me to spend the 1988/1989 academic year in Berlin. I was supposed to attend seminars on German history at the Free University, but a well-timed student strike meant that classes were cancelled for much of the year. As a result, I was able to spend most of my days exploring Berlin and its environs. Although the Ebert Foundation surely had something else in mind when it awarded me the grant, having gotten to know divided Berlin and East Germany's ancien régime proved invaluable when writing this dissertation.
The Program for the Study of Germany and Europe (PSGE), amply funded by the government of the Federal Republic of Germany and ably administered by the Center for European Studies at Harvard University, twice provided me with critical financial support. A PSGE Doctoral Research Fellowship permitted me to spend the 1993/1994 academic year in Germany. The bulk of my field research was conducted during that year. But, as every academic knows, accumulated notes are meaningless unless you have the time to write. Fortunately, a PSGE Dissertation Writing Grant helped free me from all teaching responsibilities during the 1995/1996 academic year.

A Charlotte W. Newcombe Doctoral Dissertation Fellowship, given by the Charlotte W. Newcombe Foundation and administered by the Woodrow Wilson National Fellowship Foundation, was my primary source of support while completing the dissertation. It was an enormous boon to be able to devote an entire year to writing, liberated from all financially imposed distractions.

When in Cambridge, most of my time was spent as a graduate affiliate at Harvard’s Center for European Studies. CES gave me more than an office; it gave me an academic home. The Center is a special place full of intellectual vitality and collegial camaraderie. The invigorating atmosphere is due in large measure to the efforts of Stanley Hoffmann, Guido Goldman, and Abby Collins. I am particularly grateful to Guido and Abby for their unstinting support throughout my graduate years. I am also grateful to Grzegorz Ekiert and Danny Goldhagen for their help in gaining access to indispensable research materials. I owe thanks as well to Lisa Eschenbach and Anna Popiel for their encouraging words and repeated assistance. While at the Center, I was able to present drafts of various parts of this dissertation. I appreciate the comments that I received from the participants in the German Study Group, the Workshop on Law and Society in Modern Germany, and the Forum on Justice in Post-Communist Europe.

During the 1993/1994 academic year, I was the guest of Professor Michael Stolleis at the Johann Wolfgang Goethe Universität in Frankfurt am Main. Professor Stolleis’s Lehrstuhl was a wonderful base of operations. Professor Stolleis himself is both erudite and engaging. His
graduate assistants, moreover, are extraordinarily welcoming and tremendously helpful. Whether it was deciphering impenetrable German legalese, procuring obscure articles on short notice, or rendering assistance in any of a thousand other ways, they always came through for me. I am, therefore, extremely thankful to Wiebke Gorny, Christian Keller, and Kolya Urban. I am equally thankful for precisely the same reasons to Christian Meier, whose frequent presence made him, in my mind at least, an honorary member of the Lehrstuhl.

While in Frankfurt, I participated in the Graduiertenkolleg mittelalterliche und neuzeitliche Rechtsgeschichte, an interdisciplinary graduate seminar on legal history. I am grateful both to the other participant's for their comments on my paper and to the Graduiertenkolleg itself for having paid many of my research expenses. I also owe thanks to Professor Klaus Lüderssen, Dr. Klaus Günther, Dr. Jörg Arnold, and Dr. Cornelius Nestler-Tremmel, each of whom provided me with useful materials and stimulating discussion.

In the course of my research, I interviewed numerous officials—judges, prosecutors, politicians and bureaucrats. Each was, without fail, remarkably generous with his or her time. For that I am grateful. I wish to thank (according to their positions at the time): Prof. Dr. Jutta Limbach (Berliner Justizsenatorin and Richter beim Bundesverfassungsgericht); Prof. Dr. Dieter Grimm (Richter beim Bundesverfassungsgericht); Hartmut Horstkotte (Richter beim Bundesgerichtshof); Rainer Eppelmann (Mitglied des Bundestages); Joachim Gauck (Bundesbeauftragter für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik); Dr. Hansjörg Geiger (Direktor beim Bundesbeauftragten der für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik); Franz Brüner (Stellvertretender Abteilungsleiter für Strafrecht beim Sächsischen Justizministerium); Herr Schlüter (Assistent zum Stellvertretenden Abteilungsleiter für Strafrecht beim Sächsischen Justizministerium); Manfred Kittlaus (Leiter der Zentralen Ermittlungsstelle Regierungs- und Vereinigungskriminalität); Oberstaatsanwalt Dr. Wolfram Klein (Leiter der Schwerpunktabteilung für Verfolgung von SED-Unrecht bei der Staatsanwaltschaft Magdeburg); Staatsanwalt Alexander Kulf (Schwerpunktabteilung zur Verfolgung der Unrechtstaten des SED-
Regimes des Landes Thüringen); Staatsanwalt Dr. Ulrich Meinerzhagen (Leiter der Schwerpunktabteilung SED-Unrecht bei der Staatsanwaltschaft Dresden); Oberstaatsanwalt Thomas Nehlert (Leiter der Abteilung 51 bei der Staatsanwaltschaft beim Landgericht Berlin); Oberstaatsanwalt Christian Pick (Leiter der Schwerpunktabteilung zur Verfolgung SED-Unrechts bei der Schweriner Staatsanwaltschaft); Oberstaatsanwalt Christoph Schaefgen (Leiter der Arbeitsgruppe-Regierungskriminalität bei der Staatsanwaltschaft beim Kammergericht); Oberstaatsanwalt Franz Trost (Leiter der Schwerpunktabteilung zur Verfolgung der Unrechtstaten des ehemaligen SED-Regimes des Landes Thüringen); and, Staatsanwalt Jan van Rossun (Leiter der Schwerpunktabteilung-Regierungskriminalität bei der Staatsanwaltschaft Neuruppin).

Working on what is in part an evolving issue has meant having to scramble to collect current data and recent decisions. The task was made easier by Uta Fölster (Sprecherin der Berliner Senatsverwaltung für Justiz); Herr Kunz (Leiter des Ministerbüros beim Thüringer Justizministerium); and, Regierungsdirektor Schliebs (Direktor des Entscheidungsversandes des Bundesgerichtshofes).

My final year of writing was spent at MIT’s Center for International Studies. I am glad to have had the desk and the companionship of those around.

Every social scientist worthy of the appellation knows that the success of a bureaucracy ultimately depends upon the competence, dedication and initiative of its organizational staff. MIT’s Department of Political Science is lucky to have the staff that it does. I am grateful to Alison Salisbury, Helen Ray, Jeanne Washington, Maryann Lord and Anne Grazewski. They always did their best to counteract the inevitable inconveniences and unique absurdities of MIT policy. I am also grateful to Dick Samuels, the chairman of the department, for having been quite accommodating as I navigated the financial shoals of thesis submission.

The chairman of my dissertation committee, Josh Cohen, is a man of many virtues. He is a lucid thinker and an excellent teacher. He is unflinching in his criticism, yet full of encouragement. Despite being chair of a department, editor of a journal, and member of numerous committees, he reads draft chapters promptly and closely. He is, in short, an ideal thesis adviser. Josh was
unwavering in support of my project and never let the fact that he strenuously disagrees with my normative conclusion detract from his mentorship. I thank him very much.

The other members of my dissertation committee, Charles Maier and Richard Locke, managed to read my thesis although consumed by administrative responsibilities, institutional battles, and scholarly projects of their own. I thank them too.

As a graduate student in Cambridge, I was fortunate to have had superb teachers. At MIT, Suzanne Berger and Charles Sabel offered stimulating seminars that combined history and theory with uncommon clarity and great effect. At Harvard, Stanley Hoffmann and Peter Hall delivered sweeping lectures that were as enlightening as they were grand. As an undergraduate at Wesleyan University, I benefited from the dedicated teaching of Richard Adelstein and Leon Sigal. Although none of what I learned from these teachers is immediately apparent in the work that follows, they have shaped the way I think and have thus had an indirect but pervasive influence over it. I am grateful for what they taught me.

Various friends read various drafts of various chapters. Jonah Levy, Nina Tannerwald, Karen Alter, and James Rosberg did their best to steer me straight. Though not always heeded, their criticisms were greatly appreciated.

Needless to say, a dissertation writer's friends are more than a mere sounding board for half-baked, poorly articulated ideas. No matter how exciting one's topic, writing a dissertation entails years of toil. Inevitably, there are periods of deep discouragement. Without one's friends, one would never see the enterprise through to the end. I am lucky to have good friends who were always there when I needed them. Time and again, Jonah Levy bolstered my spirits when I was down and calmed my nerves when I was stressed. Nina Tannerwald was no less stalwart, steadfastly reassuring me—all evidence to the contrary notwithstanding—that completion of the dissertation was within my grasp. They are not the only ones upon whom I have relied: Annabelle Lever, Simon Johnson, and Mary Kwak were also tremendously supportive. One could not ask for truer friends.
For several years, Germany became my home away from home. There too I found fast friends. In Berlin, Ulf Dammann and Carolin Unger became my dearest chums and ersatz parents. I cannot thank them enough for their many acts of kindness over the years. I am also grateful to Irene Spillmann and Ralf Wolz for having introduced me to Berlin's historically complex and infinitely fascinating urban landscape. Thanks to a fabulous set of friends—including Dagmar Hoffmann, Stefan Hilla, Ursula Breymayer, Didier Keh, Anke Heutling, Isolde Ledermann, and Matthias Koller—my years in Berlin were not only productive, but thoroughly enjoyable as well.

In Frankfurt, Margarethe Nimsch took me in for an extended period, a period far longer than either of us had anticipated. Her warm hospitality made me feel welcome in what had until then been a strange city. During my year in Frankfurt, Wiebke Gorny and Christian Meier became my constant companions. Their sharp tongues, keen minds, and good cheer enriched my life enormously. Paragons of cosmopolitan Europe, Uli Speck and Corinne Malbran-Speck were gracious hosts in whose apartment I spent many a pleasant evening. To all of these friends I am indebted.

My greatest debt, however, is that which I owe my parents, Stephen and Erika Tauber. From my youngest days, they instilled in me a respect for knowledge and a love of learning. They always gave me space to grow, yet were quick to provide wise guidance and tender support whenever I needed it. I value their counsel and cherish their love. It is to them that this dissertation is dedicated.
## Unfamiliar Terms

In order to draw necessary distinctions between previously conflated jurisprudential doctrines, the author has been forced to introduce new terminology. For the reader’s benefit, the newly introduced terms are defined below. The definitions given here are meant to serve only as a convenient reference. More complete definitions are to be found in Chapter 1, pages 25-30.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘affirmative’ natural law</td>
<td>Under ‘affirmative’ natural law, immoral laws are invalid, and an individual is criminally liable for a morally repugnant act even if it was not proscribed by a duly enacted law at the time it was committed.</td>
</tr>
<tr>
<td>‘negative’ natural law</td>
<td>Under ‘negative’ natural law, immoral laws are invalid (and therefore not exculpatory), but an individual is criminally liable for a morally repugnant act only if it was proscribed by some duly enacted law at the time it was committed.</td>
</tr>
<tr>
<td>’reinterprete’ legal positivism</td>
<td>Under ‘reinterprete’ legal positivism, even immoral laws are valid (and therefore exculpatory), but an individual is criminally liable for an act whenever duly enacted law valid at the time of the act can be construed as having proscribed that act.</td>
</tr>
<tr>
<td>’empirical’ legal positivism</td>
<td>Under ‘empirical’ legal positivism, immoral laws are valid, and an individual is criminally liable for an act only if it was proscribed by duly enacted law as such law was interpreted at the time of the act.</td>
</tr>
<tr>
<td>’ahistoric’ legal positivism</td>
<td>Ahistoric’ legal positivism subsumes ‘negative’ natural law and ‘reinterprete’ legal positivism. Under ‘ahistoric’ legal positivism, an individual is criminally liable for an act if: duly enacted law valid at the time of the act can be construed as having proscribed that act; and, duly enacted law valid at the time of the act either contained no exculpatory provision at all or contained an exculpatory provision rendered void by virtue of its immorality.</td>
</tr>
</tbody>
</table>
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>German meaning</th>
<th>English meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 103 II GG</td>
<td>Artikel 103, Paragraph 2 des Grundgesetzes</td>
<td>Article 103, Paragraph 2 of the Basic Law [= the constitutional codification of <em>nulla poena</em>]</td>
</tr>
<tr>
<td>Art. 315 EGStGB (i.d.F.d. EV)</td>
<td>Artikel 315 Einführungsgesetz zum Strafgesetzbuch (in der Fassung des Einigungsvertrags Anlage I (B) Kapitel III Sachgebiet C Abschnitt II Nummer 1 (b))</td>
<td>Article 315 of the Introductory Act of the Penal Code (in the version contained in the Unification Treaty, Appendix I (B), Chapter III, Functional Area C, Section II, Number 1 (b)) [= the law governing the application of FRG and GDR law to acts committed in the GDR prior to reunification]</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof</td>
<td>Federal Court of Appeals</td>
</tr>
<tr>
<td>BGHSt</td>
<td>Entscheidungen des Bundesgerichtshofs in Strafsachen</td>
<td>Decisions of the Federal Court of Appeals in Criminal Matters</td>
</tr>
<tr>
<td>BVerfG</td>
<td>Bundesverfassungsgericht</td>
<td>Federal Constitutional Court</td>
</tr>
<tr>
<td>BVerfGE</td>
<td>Entscheidungen des Bundesverfassungsgerichts</td>
<td>Decisions of the Federal Constitutional Court</td>
</tr>
<tr>
<td>FRG</td>
<td>Bundesrepublik Deutschland</td>
<td>Federal Republic of Germany [= West Germany]</td>
</tr>
<tr>
<td>G 131</td>
<td>Gesetz zur Regelung der Rechtsverhältnisse der unter Artikel 131 des Grundgesetzes fallenden Personen</td>
<td>Law Regulating the Legal Situation of Persons Falling under Article 131 of the Basic Law [= the 1951 law under which most civil servants of the Third Reich could claim a right to reinstatement]</td>
</tr>
<tr>
<td>GDR</td>
<td>Deutsche Demokratische Republik</td>
<td>German Democratic Republic [= East Germany]</td>
</tr>
<tr>
<td>G G</td>
<td>das Grundgesetz</td>
<td>the Basic Law [= the constitution of the Federal Republic of German]</td>
</tr>
<tr>
<td>KRG 10</td>
<td>Kontrollratsgesetz Nummer 10</td>
<td>Control Council Law Number 10 [= the Allied occupation statute permitting retroactive punishment of crimes against humanity]</td>
</tr>
<tr>
<td>KSSVO</td>
<td>Kriegssonderstrafrechtsverordnung</td>
<td>Decree on Extraordinary Criminal Regulations in Wartime [= a draconian Nazi law]</td>
</tr>
<tr>
<td>LG</td>
<td>Landgericht</td>
<td>regional court</td>
</tr>
<tr>
<td>OGH</td>
<td>Oberster Gerichtshof für die britische Zone</td>
<td>High Court of Appeals in the British Zone</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
<td>Translation</td>
</tr>
<tr>
<td>--------</td>
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<td>----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>OGHSt</td>
<td>Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen</td>
<td>Decisions of the High Court of Appeals in the British Zone in Criminal Matters</td>
</tr>
<tr>
<td>OLG</td>
<td>Oberlandesgericht</td>
<td>regional appellate court</td>
</tr>
<tr>
<td>StGB</td>
<td>das Strafgesetzbuch</td>
<td>the Penal Code [of the Federal Republic of Germany]</td>
</tr>
<tr>
<td>StGB-DDR</td>
<td>das Strafgesetzbuch [der Deutschen Demokratischen Republik]</td>
<td>the Penal Code [of the German Democratic Republic]</td>
</tr>
<tr>
<td>ZS</td>
<td>Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen</td>
<td>The Central Office of the State Ministries of Justice for the Investigation of National-Socialist Crimes [= the national prosecutorial office established in 1958 with special responsibility for pursuing Nazi malefactors]</td>
</tr>
<tr>
<td>§ 3 StGB</td>
<td>Paragraph 3 des Strafgesetzbuches [= Geltung für Inlandstaten]</td>
<td>Paragraph 3 of the Penal Code [= applicability to domestic acts (= the rule that the penal code applies to acts committed within the FRG)]</td>
</tr>
<tr>
<td>§ 5 StGB</td>
<td>Paragraph 5 des Strafgesetzbuches [= Auslandstaten gegen inländische Rechtsgüter]</td>
<td>Paragraph 5 of the Penal Code [= foreign acts against domestic legal objects (= the rule that certain acts committed abroad are subject to the FRG penal code)]</td>
</tr>
<tr>
<td>§ 6 StGB</td>
<td>Paragraph 6 des Strafgesetzbuches [= Auslandstaten gegen international geschützte Rechtsgüter]</td>
<td>Paragraph 6 of the Penal Code [= foreign acts against internationally protected legal objects (= the rule that acts banned by international law are subject to the FRG penal code committed abroad even if committed abroad)]</td>
</tr>
<tr>
<td>§ 7 StGB</td>
<td>Paragraph 7 des Strafgesetzbuches [= Geltung für Auslandstaten in anderen Fällen]</td>
<td>Paragraph 7 of the Penal Code [= applicability to foreign acts in other cases (= the rule that acts committed abroad by Germans or people who become Germans are subject to the FRG penal code)]</td>
</tr>
<tr>
<td>§ 107 a StGB</td>
<td>Paragraph 107 a des Strafgesetzbuches [= Wahlfälschung]</td>
<td>Paragraph 107 a of the Penal Code [= electoral fraud]</td>
</tr>
<tr>
<td>§ 125 StGB</td>
<td>Paragraph 125 des Strafgesetzbuches [= Landfriedensbruch]</td>
<td>Paragraph 125 of the Penal Code [= disturbing the peace]</td>
</tr>
<tr>
<td>§ 211 StGB</td>
<td>Paragraph 211 des Strafgesetzbuches [= Mord]</td>
<td>Paragraph 211 of the Penal Code [= murder]</td>
</tr>
<tr>
<td>§ 212 StGB</td>
<td>Paragraph 212 des Strafgesetzbuches [= Totschlag]</td>
<td>Paragraph 212 of the Penal Code [= manslaughter]</td>
</tr>
<tr>
<td>§ 239 StGB</td>
<td>Paragraph 239 des Strafgesetzbuches [= Freiheitsberaubung]</td>
<td>Paragraph 239 of the Penal Code [= deprivation of liberty]</td>
</tr>
<tr>
<td>Paragraph 241 a des Strafgesetzbuches der DDR [= politische Verdächtigung]</td>
<td>Paragraph 241 a of the Penal Code [= denunciation]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 236 des Strafgesetzbuches der DDR [= Rechtsbeugung]</td>
<td>Paragraph 336 of the Penal Code [= perversion of justice]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 27 des Grenzgesetzes</td>
<td>Paragraph 27 of the Border Law [= law specifying circumstances under which border guards could use deadly force]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 112 des Strafgesetzbuches der DDR [= Mord]</td>
<td>Paragraph 112 of the Penal Code of the GDR [= murder]</td>
<td></td>
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<tr>
<td>Paragraph 113 des Strafgesetzbuches der DDR [= Totschlag]</td>
<td>Paragraph 113 of the Penal Code of the GDR [= manslaughter]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 211 des Strafgesetzbuches der DDR [= Wahlfälschung]</td>
<td>Paragraph 211 of the Penal Code of the GDR [= electoral fraud]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 213 des Strafgesetzbuches der DDR [= Republikflucht]</td>
<td>Paragraph 213 of the Penal Code of the GDR [= 'desertion of the Republic' (= the law that prohibited unauthorized emigration)]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 214 des Strafgesetzbuches der DDR [= Beeinträchtigung staatlicher Tätigkeit]</td>
<td>Paragraph 214 of the Penal Code of the GDR [= interference in state activities (= an infinitely elastic law used to curb dissent)]</td>
<td></td>
</tr>
<tr>
<td>Paragraph 244 des Strafgesetzbuches der DDR [= Rechtsbeugung]</td>
<td>Paragraph 244 of the Penal Code of the GDR [= perversion of justice]</td>
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</tr>
</tbody>
</table>
Chapter 1: Natural Law vs. Legal Positivism in Post-Transitional Justice

The Underlying Dilemma: To Punish or not to Punish?

For the second time in less than fifty years, German courts confront the dilemmas of justice inherent in the transition from totalitarian rule. When considering what to do with former communist officials, German judges must grapple with an ethical and jurisprudential conundrum whose significance extends far beyond present-day Germany.

The treatment of former dictators and their subordinates raises an important issue of political philosophy as well as practical policy. Many of those officials, while in power, committed grave human rights abuses. Should the fact that their actions were legal at the time protect former officials from punishment by a successor regime? Punishing them would violate the principle that no one should be subject to retroactive legislation; but, failing to punish them would undermine the sanctity of human rights.

Nowhere has this eternal dilemma been felt more acutely than in Germany. Officials of both the Third Reich and the German Democratic Republic were, by statute, either permitted or required to trample individual liberty. After the collapse of each dictatorial regime, jurists seeking to confront the totalitarian legacy have—to put it in stark, somewhat over-simplified terms—had to choose between two distinct conceptions of law: legal positivism and natural law. Legal positivism is based on the proposition that law and morality are utterly distinct. Within the legal positivist framework, all laws duly enacted by the former regime were valid, no matter morally how repugnant. Natural law, by contrast, assumes that morality is an integral element of law. From the natural law perspective, immoral laws, although formally enacted, were ipso facto invalid. Positivism denies that there is a legal basis for punishing state-sponsored human rights abusers; natural law asserts that the legal basis exists in morality itself.

The Dissertation: Post-Transitional Justice in the Federal Republic of Germany

This dissertation will analyze the politics of natural law and legal positivism in the Federal Republic of Germany. The dissertation has a dual purpose, part empirical and part normative:
On the one hand, the dissertation will describe how the West German criminal justice system treated former Nazi officials after 1945 and how it is has treated former communist officials since reunification in 1990. On the other hand, the dissertation will elucidate the normative consequences of having treated those former officials in the way that Germany has.

Since 1990 criminal charges have been brought against various former East German officials. The course of justice in reunified Germany is noteworthy in several regards. That there have been any trials at all is, from a comparative perspective, in itself remarkable for post-transitional trials are in general quite rare. Indeed, there have been virtually no other trials of ex-officials in the rest of post-communist Europe. Even more puzzling, perhaps, is the rather odd pattern of charges that have been brought against former East German officials. Some charges, such as indictments for electoral fraud or for manslaughter in the deaths of would-be refugees killed trying to leave their country, are clearly apposite. Others are not: ex-officials have faced trial for relatively petty offenses and for serious offenses, but ones not directly related to political repression. At the same time, many odious practices characteristic of communist oppression, such as political denunciation and psychological terror, have escaped post-transitional punishment entirely. Punishing ex-officials for crimes that are trifling or tangential trivializes the injustice they perpetrated and casts the West German judicial system in a vengeful light. Moreover, the failure to punish officials who abused dissidents suggests that human rights may be violated with impunity. What explains this pattern of punishment and non-punishment? Why has the Federal Republic punished those ex-GDR officials that it has on the charges that it has?

This dissertation will argue that former East German officials have been treated as they have largely, though not exclusively, as a result of the way in which the West German judiciary treated former Nazi officials after 1945. The early postwar period was a critical conjuncture in which natural law and legal positivism vied for supremacy. Eventually, a particular variant of legal positivism came to dominate the way in which former Nazi officials were treated. Forty years later, this variant of legal positivism, having triumphed over its doctrinal rivals, now structures state
action. The resilience of (what I shall call) 'ahistoric' legal positivism was such that the pressures arising from reunification failed to break its hold on German jurisprudence.

The postwar precedent, the dissertation will demonstrate, represents a middle course between the extremes of full-fledged natural law on the one hand and full-fledged legal positivism on the other. This middle course, the dissertation will argue, not only (partially) explains the puzzling pattern of punishment and non-punishment in reunified Germany, but has a distinct and deleterious set of normative consequences. It has, in a sense, produced the worst of both worlds: it subjects individuals to retroactive legislation, yet fails to affirm substantive human rights.

*Post-Transitional Choices*

Successor regimes would appear to face a clear cut choice between two coherent and mutually exclusive alternatives, each entailing a unique array of practical and philosophical consequences. On the one hand, a successor regime can adopt legal positivism. If it does so, it accepts the validity of the deposed regime's laws and acknowledges that legally sanctioned human rights abuses, regrettable as they may be, are not punishable under law. In so doing, it protects former officials from retroactive legislation. Alternatively, a successor regime can adopt natural law and punish human rights violators despite the formal legality of their actions. By taking this path, the successor regime accepts retroactivity in order to affirm the sanctity of substantive human rights.

Depicting the situation faced by successor regimes as a stark choice between natural law and legal positivism is, however, an initially convenient but ultimately misleading oversimplification. In reality, the post-transitional quandary is more complex than a single choice between dichotomous alternatives. A successor regime must actually decide two distinct (albeit closely entwined) questions. The successor regime must first decide whether erstwhile officials should in fact be protected from retroactive legislation. If the successor regime decides that they should, it must then decide what would constitute retroactive legislation. Among the various pairs
of possible answers that the successor regime might give to these two questions, some coincide with the over-simplified natural law/legal positivism divide while others intersect it.

The first issue confronted by a successor regime considering the punishment of deposed human rights abusers is whether or not to respect the principle of *nulla poena sine lege* (literally: no punishment without law). The *nulla poena* principle, which is a ban on retroactive legislation, applies to the judiciary as well as the legislature. Under *nulla poena*, the legislature may not enact retroactive legislation and the judiciary may not punish someone absent a prior law criminalizing the behavior in question. *Nulla poena*’s purpose is to enhance liberty by protecting individuals from arbitrary state action. The ban on retroactive legislation, it is said, achieves this by guaranteeing ‘legal certainty’. Legal certainty is the ability to know what the law is at a given time. If an individual has legal certainty, the individual can know what the (legal) consequences of his or her actions will be. Such knowledge allows the individual to plan his or her life autonomously. Those in favor of extending *nulla poena* protection to deposed dictatorial officials argue that *nulla poena* is an absolute value that each regime—especially a newly forming democratic regime that seeks to establish the rule of law—ought to respect unconditionally lest criminal law degenerate into the capricious exercise of force. Those who oppose extending *nulla poena* protection to deposed dictatorial officials argue that *nulla poena* is an instrument whose teleological purpose—viz. the promotion of individual liberty—would be subverted by immunizing tyrannical state officials against prosecution for acts of oppression.

Even if a successor regime decides that former officials should enjoy *nulla poena* protection, a fundamental question remains: what actually constituted valid law under the former regime? Until one provides an answer to this question, it is impossible to identify what qualifies as retroactive legislation and thus impossible to determine the scope of permissible punishment under *nulla poena*. The question of what constituted valid law under the former regime—and, indeed, the question of what constitutes valid law under any regime—is not a facile empirical question readily answered by quick reference to the appropriate source books. The question of what constitutes valid law at any given moment is a philosophical conundrum that has occupied
thereof for millennia.¹ There are various factual constellations in which the validity issue arises, but for illustrative purposes imagine a situation in which a subsequently deposed regime had, in due accordance with proper constitutional procedure, enacted a criminal code that included among other provisions a vaguely worded statute that sharply restricted the free exercise of a basic liberty under the threat of draconian punishment and summary police enforcement. Furthermore, imagine that the regime had routinely applied the hypothesized statute not only to cases that lay unambiguously within its ambit but to cases that lay beyond its literal meaning as well. The question faced by a successor is regime is this: when, if ever, is a judge or police officer who acted pursuant to the hypothesized statute as authoritatively interpreted by the former regime criminally liable for his or her actions? Under *nulla poena*, the official may not be punished if his or her actions were justified by the statute. But, was the hypothesized statute valid as routinely applied, as narrowly written, or not at all? And if the hypothesized statute was substantively invalid, what then? Was there an absence of valid law? Did valid law comprise all remaining statutes enacted by the deposed regime? Or did valid law consist of something else altogether?  

The answer that one gives to these questions depends on one’s conception of law. When considering issues of post-transitional justice, it is useful to distinguish between four alternative conceptions of law: ‘affirmative’ natural law, ‘negative’ natural law, ‘reinterpretive’ legal positivism, and ‘empirical’ legal positivism.² As arrayed, the four conceptions of law represent a continuum from maximal idealism to maximal empiricism. In actual post-transitional practice, the major distinctions lie between each pole and everything in between. Thus, though it is at times necessary to distinguish between the two, ‘negative’ natural law and ‘reinterpretive’ legal positivism can often be treated as variants of a single, more general category: ‘ahistoric’ legal positivism.

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²These categories, which are explained in some detail below, are the author’s own. Previous analysts of and participants in post-transitional justice have typically relied on the inadequate binary distinction between natural law and legal positivism.
There are various versions of natural law, some secular and others religious. Common to all, however, is the notion that legality and morality are inextricably linked. Natural law theories typically presuppose the existence of a morally informed "higher" law. Whether assumed to be universally valid or historically determined, this higher law is seen as limiting state sovereignty. On the natural law view, all positive law (i.e. all law enacted by a state) that violates the postulated standards of morality is ipso facto null and void. Within the natural law framework, immoral positive law can, as a result of its inherent invalidity, neither obligate nor exculpate an individual. 'Negative' natural law, which is a weak form of natural law, goes no further. It denies the validity of morally repugnant positive law, but imposes no legal obligations of its own. In other words, 'negative' natural law is a partial conception of law, a theory—as its name suggests—of what law is not rather than a theory of what law is. In and of itself, therefore, 'negative' natural law provides no basis for post-transitional punishment. Prosecutions arising under 'negative' natural law must rely upon an additional, positivist assumption (which is discussed below in the context of 'ahistoric' legal positivism). By contrast, 'affirmative' natural law does impose legal obligations of its own. It assumes that individuals are in fact subject to extra-positive norms. That is to say, under 'affirmative' natural law, individuals are criminally liable for morally repugnant behavior under natural law itself, irrespective of the formally enacted laws that might or might not have existed at the time. Thus, for example, an ex-official of a deposed regime who tortured political prisoners could be punished under 'affirmative' natural law even if that regime's criminal code lacked a provision outlawing bodily harm.

One can characterize the relationship between 'affirmative' natural law and nulla poena in either of two ways. On the one hand, one might say that the post-transitional application of 'affirmative' natural law is fully compatible with the nulla poena principle. This characterization rests on two assumptions: first, that 'affirmative' natural law is law within the meaning of nulla poena sine lege; and second, that 'affirmative' natural law was valid when the act in question occurred.

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Clearly, if natural law constituted valid law at the time, its subsequent application cannot be construed as retroactive. On the other hand, one might argue that there is indeed a conflict between *nulla poena* and the post-transitional application of ‘affirmative’ natural law. Each of the two assumptions upon which the contrary conclusion stands can be contested, and a legal positivist would surely dispute both. Legal positivists of all stripes are adamantly in their insistence that the application of ‘affirmative’ natural law violates the *nulla poena* principle. Even if one rejects legal positivism and presupposes the binding force of ‘affirmative’ natural law, one can still accept the proposition that *nulla poena* refers to positive law alone. Thus, a proponent of ‘affirmative’ natural law can acknowledge that post-transitional prosecutions do in fact violate *nulla poena* but nonetheless assert the overriding primacy of natural law. Either way, whether a violation of *nulla poena* or not, there is no doubt that the post-transitional application of ‘affirmative’ natural law subjects individuals to punishment without regard to the positive law that had prevailed under the former regime.

Unlike natural law theories, legal positivism insists upon a strict separation of law and morality.\(^4\) According to the tenets of legal positivism, there is no necessary connection between law as it is and law as it ought to be. Thus, an immoral law is, on the positivist view, no less a law for being immoral. Legal positivism treats law as an objective social fact. Under the positivist conception of law, something is law if and only if the state designates it as such. By extension, an individual incurs a binding legal obligation if and only if the state has imposed such an obligation upon the individual. Within the positivist framework, it is against this officially sanctioned normative corpus that retroactivity is measured. The various forms of legal positivism are distinguished by alternative conceptions of what it means to be officially sanctioned.

‘Empirical’ legal positivism insists that positive law comprises all rules and only those rules actually enforced by a particular regime. From the perspective of ‘empirical’ legal positivism, written law—be it statutory or constitutional—is of secondary importance at most. If

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there is a discrepancy between nominal law and persistent state practice, 'empirical' positivists maintain, it is the practice that defines positive law. On this view, if a deposed regime routinely enforced secret directives issued by its paramount leader, then those directives were in fact valid law (and any derivative actions are therefore protected by nulla poena), even if the country's written constitution nominally stipulated that binding law could only be enacted by the legislature acting in open session.

Like legal positivism more generally, 'ahistoric' legal positivism recognizes officially sanctioned law as the only source of legal obligation, and hence as the only basis for criminal liability. Consequently, adherents of 'ahistoric' legal positivism refuse to invoke 'affirmative' natural law and insist instead that there be statutory grounds for the punishment of deposed officials. 'Ahistoric' legal positivism is, however, a highly qualified acknowledgment of empirical reality. Unlike its 'empirical' cousin, 'ahistoric' legal positivism does not necessarily accept the former regime's view of what constituted positive law. 'Ahistoric' legal positivism admits the possibility of distinguishing between actual praxis on the one hand and "true" law on the other. It is, on the 'ahistoric' view, positive law "properly understood" that constitutes the appropriate referent for nulla poena considerations. There are two subspecies of 'ahistoric' legal positivism: 'reinterpretable' legal positivism and 'negative' natural law. The distinction between the two revolves around what exactly constitutes positive law "properly understood".

According to the tenets of 'reinterpretable' legal positivism, officially sanctioned law is identical with formally valid law, where the written constitution provides the criteria by which to judge whether an enactment is or is not formally valid. Thus, if the constitution stipulates that all laws must be enacted by the legislature acting in open session, then any extra-legislative directive (such as a secret order issued by the regime's paramount ruler) is invalid under reinterpretivism. 'Reinterpretable' legal positivism insists upon the validity of all duly enacted statutes, whether moral or immoral, whether actually enforced or not. Reinterpretivism takes the deposed regime at its word: if torture was nominally illegal under the criminal code of the deposed regime, then—on the reinterpretivist view—torture was in fact illegal under positive law,
no matter how pervasive state-sponsored torture may actually have been. Although ‘reinterpretable’ legal positivism demands recognition of all duly enacted statutes, including those that might exonerate deposed malefactors, it does not require that a successor regime accept the previous regime’s interpretation of those statutes. As a result, reinterpretableism allows a successor regime to adopt an interpretive methodology in which potentially exculpatory enactments are interpreted narrowly and potentially incriminating enactments are interpreted broadly. Under reinterpretableism, a successor regime may therefore, subject to the bounds established by explicit statutory language, interpret the laws of a deposed dictatorship as if they had been those of a liberal democracy. Thus, within the reinterpretableist framework, positive law “properly understood” comprises all constitutionally legitimated law—and only constitutionally legitimated law—interpreted (at least potentially) in the most humane light possible.

The other subspecies of ‘ahistoric’ legal positivism is ‘negative’ natural law. Though it is paradoxical to subsume a form of natural law under a positivist heading, the typological stance is in the event justified. ‘Negative’ natural law is indeed a form of natural law in that it deems procedurally correct but substantively immoral enactments to be—by dint of their immorality—null and void. The positivist aspect of ‘negative’ natural law emerges only after the invalidation of formally valid law on extra-positive grounds. As mentioned above, ‘negative’ natural law imposes no legal obligations of its own and thus provides, when taken alone, no basis for post-transitional punishment. Therefore, whenever a successor regime prosecutes deposed officials under ‘negative’ natural law, it must presuppose the existence of legal obligations under some other conception of law. That conception of law could of course be ‘affirmative’ natural law (in which case the prosecutions would not be positivist in the least). As it so happens, however, in the postwar German context at least, the conception of law typically associated with prosecutions arising under ‘negative’ natural law is in fact positivist. Taking duly enacted positive law as the starting point, it is assumed that the invalidation of immoral enactments affects only those particular enactments, leaving the rest of duly enacted positive law intact. The criminal liability of deposed perpetrators is then derived from those provisions of formally valid law that remain
after the morally repugnant provisions have been nullified. For example, an individual who shot
another individual pursuant to a statute ceemed invalid on extra-positive grounds is held liable
under that provision of the penal code which criminalizes homicide. On this view, positive law
"properly understood" comprises all constitutionally legitimated laws and only such constitutionally
legitimated laws that are not morally repugnant.

'Ahistoric' legal positivism permits limited post-transitional prosecutions within the nominal
confines of nulla poena. By loosening the definition of what was law at the time, 'ahistoric' legal
positivism allows greater scope for punishing human rights abusers than does 'empirical' legal
positivism; but, by continuing to insist upon a statutory basis for punishing human rights abusers,
it allows less scope for punishment than does 'affirmative' natural law. In dealing first with ex-Nazi
and then with ex-communist officials, the courts of the Federal Republic have generally adopted
an 'ahistoric'—and, in particular, reinterpretivist—conception of law.

Preview of the Empirical Story

The immediate postwar period was a critical conjuncture in which legal doctrine was openly
contested. The Nazis' unprecedented atrocities spawned a furious debate between natural law
advocates, who insisted that Nazi perpetrators be punished irrespective of statute, and legal
positivists, who vigorously defended the nulla poena principle. Indeed, it was in these
dichotomous terms that the debate was conducted. Advocates of natural law, whether they
located legal obligations in natural law itself or in that which remained of positive law, freely
acknowledged that their position entailed retroactivity, and it was precisely this overt retroactivity
that was so bitterly attacked by their positivist opponents (the most vocal of whom were—for
political reasons—reinterpretivists). This doctrinal debate was mirrored by the dual system of law
that existed under Allied occupation, rooted on the one hand in the German penal code and on
the other hand in Allied occupation statute. While the German penal code (known as the
Strafgesetzbuch or 'StGB') was thoroughly positivist with nulla poena enshrined in § 1 StGB,
Allied occupation law was, in part, explicitly retroactive, with Kontrollratsgesetz Nr. 10 allowing
punishment of Nazi perpetrators regardless of whether their actions had been legal at the time.
or not. The duality was reflected in a mixed judicial practice. Of those prosecuted in the early postwar period, some were punished on avowedly retroactive natural law grounds while others were punished on reinterpretivist grounds.

This open moment, in which overtly retroactive natural law temporarily flourished, was followed by a gradual 'repositivization' of law. The establishment of the Federal Republic in 1949 marked a turning point. Kontrollratsgesetz Nr. 10 soon lost force, and Article 103 of the Grundgesetz, the new West German constitution, elevated nulla poena to constitutional rank. An initial willingness to tacitly ignore Article 103's provisions steadily diminished for a variety of reasons. Simultaneously (but not coincidentally), the number of prosecutions declined dramatically. By the time systematic trials resumed in the late 1950s, nulla poena had been fully embraced and overt retroactivity had disappeared entirely. Natural law was reduced to little more than a redundant vestige. In those increasingly rare instances in which natural law was invoked at all, it was always in the form of 'negative' natural law, never in the form of 'affirmative' natural law. Punishment invariably rested on that which remained of duly enacted statute and all retroactivity was disclaimed. Moreover, even when 'negative' natural law was still invoked, it was never invoked alone. Instead, it was always accompanied by an independent line of pure reinterpretivist logic. It was, indeed, reinterpretivism that dominated the second wave of Nazi trials. But, whichever the variant—'negative' natural law or 'reinterpretive' legal positivism—it was unambiguously an 'ahistoric' conception of positive law to which the courts ultimately coupled the nulla poena principle.

German reunification in 1990 meant that the Federal Republic had once again to contend with the former officials of a tyrannical regime. Unlike in the early postwar period, however, legal doctrine was never seriously contested. The underlying commitment to nulla poena was not challenged, and 'ahistoric' legal positivism's previously established hegemony was quickly reaffirmed at the highest appellate level. Once again, though traces of 'negative' natural law can still be found, it is reinterpretivism in particular that dominates post-transitional jurisprudence. As
a result, some former communist officials have been punished, but only if their actions could be construed as having been illegal under some (often tortured) interpretation of East German law.

The course of post-transitional justice in the Federal Republic of Germany is explained by a combination of factors. Politics, contingencies, institutions and ideas have all played a role, though not in equal proportion. The most important factors have been politics and ideas, specifically popular politics and jurisprudential ideas.

The first thing that one must know is that after the collapse of both the Third Reich and the German Democratic Republic there was widespread popular opposition to post-transitional trials. Only an infinitesimal minority of those who lived under the respective regimes had resisted their tyrannical machinations. The vast majority had—whether with enthusiasm or resignation—participated in the regimes’ repressive structures. As a result, most people perceived the prosecution of totalitarian perpetrators, if not as a direct threat to their own liberty, then at the very least as an indirect condemnation of their personal history. This broad antipathy toward post-transitional trials was to some degree counter-balanced by support for the trials among, at various times, the Allied occupation authorities, interested international observers and certain members of the German political elite. The net result has been an implicit—and at points explicit—political understanding that some trials but not too many trials must be held.

The combination of ‘ahistoric’ legal positivism and nulla poena is, in some sense, tailor made to achieve this result. It allows prosecutions where ‘empirical’ legal positivism would have none, yet limits prosecutions where ‘affirmative’ natural law would have many. And, of course, it is not pure happenstance that German judges, especially German appellate judges, would subscribe to a legal theory that broadly corresponds to the perceived political exigencies of the day. It would, however, be a significant mistake to characterize jurisprudential ideas as nothing more than an epiphenomenal reflection of underlying political forces.

Not merely a rationalization of the politically desired, jurisprudential ideas are also an autonomous constraint on the politically feasible. In a democracy, courts enjoy a considerable degree of institutional independence and judges place great stock in legal arguments. It should
not be surprising, therefore, that legal ideas have affected the course of post-transitional justice in the Federal Republic. Over the course of the postwar period, West German judges grew increasingly committed to a particular set of beliefs. They came to believe ever more firmly that *nulla poena* must be respected, that law within the meaning of *nulla poena* is positive law alone, and that positive law is rightly conceived in an ‘ahistoric’ fashion. The origins of this set of beliefs are disparate, lying both within and beyond the confines of law narrowly understood. Thus, for example, the judicial rejection of ‘affirmative’ natural law is in (large) part a function of Article 103, but also in part a function of historiographic perceptions of how law was manipulated during the Third Reich. Be the origins what they may, by the time of reunification in 1990, the set of jurisprudential beliefs was well ensconced in an extensive body of case law arising from the prior confrontation with Nazi perpetrators. Since judges, even in a civil law system such as Germany’s, value continuity in case law as a good in itself, there would have to have been massive pressure before the judiciary abandoned the precedent that had been established. Such pressure was not forthcoming and the precedent stood. This placed a clear constraint on how communist malefactors could be treated. Individuals could be punished if and only if it could be shown that they had committed a crime on some interpretation of duly enacted East German statute. It is this complex requirement, which results from the conjunction of *nulla poena* and ‘ahistoric’ legal positivism, that explains the peculiar pattern of punishment noted above. It explains why some perpetrators have faced apposite charges, some have faced trivial or irrelevant charges, and many others have faced no charges at all.

*Preview of the Normative Argument*

The conjunction of *nulla poena* and ‘ahistoric’ legal positivism has significant and overwhelmingly negative normative consequences for post-transitional justice. Indeed, each half of the dyad is seriously misguided: one should neither recognize the *nulla poena* principle nor adopt an ‘ahistoric’ conception of positive law. Combining the two, however, is especially problematic. At its most basic, the dilemma faced by a successor regime contemplating what to do with deposed tyrannical malefactors amounts to a mutually exclusive choice between the
affirmation of substantive human rights and the protection of legal certainty. Under the circumstances, one can achieve either one or the other, but not both. By conjoining *nulla poena* and ‘ahistoric’ legal positivism, the courts of the Federal Republic have managed to achieve neither. They have simultaneously undermined the inviolability of human rights and eviscerated the concept of legal security.

Totalitarian officials ought not enjoy *nulla poena* protection. *Nulla poena* is a means of guaranteeing individual liberty; it is not an end in itself. Preventing the prosecution of totalitarian officials on *nulla poena* grounds undermines the very goal that *nulla poena* seeks to achieve. Rather than immunizing deposed tyrants, courts should instead, through the use of overtly retroactive ‘affirmative’ natural law, unequivocally avow the existence of inviolable human rights. Relying, as the German courts have, on positive statute for the punishment of state-sponsored human rights abusers means that human rights are championed only to the extent that they were actually guaranteed under the totalitarian regime’s nominal laws. This runs the risk of an unacceptable penal lacuna. Should a thoroughly evil state arise which explicitly and unambiguously denies its citizens basic human rights, there is nothing in the ‘ahistoric’ legal positivist logic which would permit punishment of that state’s officials while still respecting *nulla poena*. As it is, many high-ranking former officials of both the Third Reich and the GDR, although directly involved in political repression, have escaped punishment because their actions could not be subsumed under any provision of the penal code.

Ironically, at the same time that it hinders the prosecution of human rights abuses, using an ‘ahistoric’ legal positivist conception of law as the baseline by which to measure retroactivity fails to provide meaningful legal certainty. Under the tenets of ‘ahistoric’ legal positivism, it is permissible both to interpret statutes in a way that they had not been interpreted by the deposed regime and to ignore exculpatory statutes that had been recognized by the deposed regime. On this view, which is that of the German courts, appropriate reinterpretation and invalidation produces nothing other than positive law “properly understood”, the application of which is fully consonant with *nulla poena*. Yet, all pious disavowals of retroactivity notwithstanding,
punishing individuals on the basis of statutes that have either been reinterpreted or selectively extracted from a larger body of enactments effectively subjects those individuals to criminal liability that had not existed at the time of their actions. This is, on any reasonable understanding, a violation of the *nulla poena* principle.

The conception of law against which retroactivity ought to be measured is that of 'empirical' legal positivism. No other conception of law can form the basis for genuine legal certainty, and no other conception of law can adequately capture the realities of a given regime. To claim, as 'ahistorical' legal positivists do, that human rights abuses really were illegal all along under positive law "properly understood" is an insidious historiographic distortion which needlessly sanitizes the tyrannical regime's truly reprehensible character. The sad fact is, Jews living in Nazi Germany were utterly without legal protection. Killing Jews was encouraged, not criminalized. To pretend otherwise is to miss the very thing that made Nazi Germany so wicked.

Needless to say, defining positive law in 'empirical' legal positivist terms is highly controversial. Nevertheless, this dissertation takes the propriety of such a definition as axiomatic. Since a full justification of the assumption would greatly exceed the bounds of what is possible here, none shall be offered. However, the animating thought behind the assumption can be stated succinctly: if one is to speak of law as it is rather than of law as it ought to be, then one must truly refer to objective social reality. If one reinterprets or expunges part of that reality, one transforms it into something fundamentally different. Whatever it is, it is no longer positive law in any meaningful sense.

There is, of course, no reason to suppose that positive law necessarily exists at all times and in all places. Indeed, there have undoubtedly been periods in which certain regions have experienced lawlessness. One could conceivably describe the Third Reich and the German Democratic Republic as two instances of such lawlessness. Perhaps, given the incongruity between nominal statutes and actual practice, it makes more sense speak of arbitrary rule rather than of law. Perhaps, given the brutal renunciation of individual rights, it makes more sense to speak of systematic terror than of law. This much is clear, however: if there was an absence of
positive law under the respective regimes, then there is by definition no basis in positive law for prosecuting the perpetrators. Under such circumstances, ‘affirmative’ natural law is the only basis for establishing criminal liability.

One could argue that combining nulla poena and ‘ahistoric’ legal positivism is a prudent and practical way of balancing competing values. One could argue that people should on the one hand not get away with murder and on the other hand not be exposed to boundless retroactivity. And indeed, as the experience of the Federal Republic demonstrates, the combination of nulla poena and ‘ahistoric’ legal positivism does engender a highly circumscribed form of post-transitional justice. Nonetheless, the combination should be rejected. Making ‘ahistoric’ legal positivism the measure of retroactivity results in an artful evasion of nulla poena. Hardly a public virtue in general, deceit is certainly misplaced here. Given the corrosive effect had by years of official mendacity in the Third Reich and the GDR, it is especially important that the Federal Republic—and in particular its courts—refrain from calculated hypocrisy. Even more troubling than the disingenuousness of the approach, however, is its timidity. As weak as its nulla poena protection is, it is still significantly greater than it ought to be. Rather than honoring nulla poena, if only in the breach, the courts of the Federal Republic should have issued a clarion reaffirmation of the Nuremberg principle that state-sponsored human rights abusers are criminally liable for their actions regardless of positive statute.
Chapter 2: Natural Law and Legal Positivism in the Early Postwar Period

Overview

The early postwar period, during which thousands of Nazi malefactors were prosecuted, was a critical conjuncture in which legal doctrine was openly contested. At the Nuremberg trials immediately following World War II, the victorious Allies prosecuted former Nazi officials on what were essentially natural law grounds. Within months of the war's end, German courts were authorized to prosecute Nazi perpetrators as well. There was stiff debate amongst German jurists as to whether natural law—whether embodied in retroactive Allied law or simply enunciated from the bench—was a proper basis for punishment. In the wake of the Holocaust, natural law did indeed find intellectual adherents and judicial recognition. Defenders of legal positivism and *nulla poena*, however, refused to concede the field. A few positivists insisted that Nazi perpetrators had acted legally under the laws of the Third Reich and were therefore immune from prosecution. Most positivists, however, argued instead—whether out of conviction or as a concession to the political realities of postwar occupation—that natural law was unnecessary because Nazi malefaction could be subsumed under the existing penal code. This highly charged diversity of judicial thought was facilitated by the institutional fragmentation that attended Allied occupation prior to the establishment of the Federal Republic. The adoption of the West German constitution in 1949 marked a turning point. It not only enshrined *nulla poena* as a codified principle of German constitutional law, but also created a unitary judicial system subject to the oversight of an authoritative appellate court. By 1950, 'reinterpretive' legal positivism had become increasingly dominant.

This chapter traces the emergence of reinterpretivism. Its ultimate triumph, though explicable, was not inevitable. Indeed, in the earliest postwar years—against the backdrop of the Nazis' unprecedented iniquities and the resultant Nuremberg Trials—it was natural law that held the upper hand. Reinterpretivism was in its origins a jurisprudential strategy designed to reconcile German judicial proclivities with the realities of Allied occupation. Despite the enthusiasm with which some embraced natural law, many German judges remained deeply
committed to *nulla poena* and thus strongly averse to overt retroactivity. Yet, these same judges knew full well that the Allies would not countenance a blanket exoneration of Nazi perpetrators and thus would not accept 'empirical' legal positivism. Because it permitted the punishment of (some) perpetrators on the basis of (nominally) valid statute, reinterpretivism was a convenient way of simultaneously avoiding overt retroactivity and Allied disapproval.

**Allied Trials**

In January 1942, more than three years before Germany's defeat, the representatives of nine European governments-in-exile established the Inter-Allied Commission on the Punishment of War Crimes. In their joint communiqué, known as the Declaration of St. James's (for the London palace at which they gathered), the governments-in-exile rejected "acts of vengeance on the part of the general public" and called instead for the punishment of Nazi perpetrators "through the channel of organized justice."¹ Hampered by a profound lack of resources and sharp differences of opinion, neither the Inter-Allied Commission nor its immediate progeny, the United Nations War Crimes Commission, amounted to much.² In the end, the fate of Nazi perpetrators rested not with the governments-in-exile but rather with the three great powers that ultimately defeated Germany: Britain, the United States, and the Soviet Union.

The three Allies agreed that those responsible for Nazi atrocities should be held accountable for their deeds. Characteristic of this resolve was Franklin Roosevelt's March 1944 declaration that "none who participate in these acts of savagery shall go unpunished." The question that divided the Allies was not whether Nazi malefactors would be punished but how. Neither the Moscow Conference of the Allies' foreign ministers at the beginning of November 1943 nor the Teheran Conference of the Allies' leaders later that month produced agreement.³ While the US and the USSR wanted to establish some sort of judicial tribunal, the British believed that "execution without trial is the preferable course."⁴ The issue remainec unresolved

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even after Roosevelt, Churchill and Stalin met at Yalta in February 1945. It was not until May 3, 1945—several days after Hitler and Goebbels had committed suicide and only a few days before Germany's capitulation—that the British agreed to the establishment of a judicial tribunal.5

The institution that emerged as a result was the International Military Tribunal ('IMT') at Nuremberg.6 The IMT, established under the London Charter of August 8, 1945, was composed of judges from the four countries that occupied Germany after its defeat: Britain, the United States, the Soviet Union and France. The IMT conducted just one trial, the Trial of the Major War Criminals, in which twenty-two leading Nazis were prosecuted.7

The defendants were charged under Article 6 of the London Charter.8 Article 6 established three crimes over which the IMT had jurisdiction: crimes against peace, war crimes and crimes against humanity. The concept of war crimes was relatively unproblematic. The criminality of maltreating civilians and POWs was, as a result of the Hague and Geneva conventions, a well established principle of international law prior to World War II. The prosecution of those responsible for such abuses, therefore, did not violate the *nulla poena* principle.

The same, however, cannot be said of prosecutions brought under either of the other criminal categories enunciated in Article 6. “Crimes against peace” and “crimes against humanity” were novel charges. Article 6(a) defined crimes against peace as the “planning, preparation, initiation or waging of a war of aggression.” Robert Jackson, a justice on the U.S. Supreme Court and the chief American prosecutor at Nuremberg, maintained that Article 6(a) represented

6Of the various accounts of the International Military Tribunal, the most sophisticated is Telford Taylor's *The Anatomy of the Nuremberg Trials* (see footnote 1 above). Taylor was one of the American prosecutors at Nuremberg. In addition to Robert Conot's *Justice at Nuremberg* (see footnote 4 above), other accounts include: Bradley Smith, *Reaching Judgement at Nuremberg* (New York: Basic Books, 1977); and, Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Athenaeum, 1984).
7Twenty-four individuals were indicted. One committed suicide prior to the trial and another was deemed unfit to stand trial. Of the twenty-two tried, one was tried in absentia. The transcripts of the trial (and related documents) are to be found in: International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, 42 vols., (Nuremberg: 1947-9). For a concise list of the defendants (and their positions in the Third Reich), see: Bundesjustizministerium, "Bericht über die Verfolgung nationalsozialistischer Straftaten," (Bonn: 1965): 6-7.
nothing more than a codification of preexisting principles.\footnote{Robert H. Jackson, The Case Against the Nazi War Criminals (New York: Knopf, 1946): 73-86. (This book is a reprint of Jackson's opening statement to the IMT.)} Jackson placed great weight on the fact that Germany, as a signatory to the 1928 Kellogg-Briand Pact, had “renounced war as an instrument of national policy”. But the legal significance of the Kellogg-Briand Pact was far from clear.\footnote{As quoted in: Max Güde, "Die Anwendung des Kontrollratsgesetzes Nr. 10 durch die deutschen Gerichte," Deutsche Rechts-Zeitschrift (1947): 113.} Germany's voluntary renunciation of war said nothing about the illegality of breaching that promise, let alone anything about the individual criminal liability of German officials for such a breach.

Crimes against humanity were defined in Article 6(c) as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population ... or persecutions on political, racial or religious grounds.” As with crimes against peace, the IMT prosecutors denied the statute's retroactive nature. They argued that the acts criminalized by Article 6(c) were already illegal under municipal law (in Germany and elsewhere) and that the London Charter thus merely extended recognized principles of municipal law to the international sphere. According to the lead French prosecutor, François de Menthon, the various acts subsumable under the concept of crimes against humanity “represent nothing more than crimes under ordinary law” that are “provided for and punishable under the penal laws of all civilized states.”\footnote{Jackson, The Case Against the Nazi War Criminals, p. 8.} Yet, all protestations to the contrary notwithstanding, the very text of Article 6(c) belied its disregard for nulla poena. Article 6(c) stated that crimes against humanity were punishable “whether or not in violation of the domestic law of the country where perpetrated.”

As the Allied jurists themselves realized, Articles 6(a) and 6(c) of the London Charter did in fact constitute retroactive legislation. Robert Jackson admitted as much in his opening statement when he declared: “If these men are the first war leaders of a defeated nation to be prosecuted in the name of law, they are also the first to be given a chance to plead for their lives in the name of the law.”\footnote{Jackson, The Case Against the Nazi War Criminals, pp. 77-8.} Indeed, it was Jackson's avowed intent that the IMT establish a precedent for the future, which was of course possible only if the IMT broke with past practice.
The London Charter was innovative in several ways. In addition to promulgating two new crimes (which were then retroactively enforced), it abolished two previously accepted defenses. The London Charter rejected both the ‘acts of state’ doctrine (according to which state officials could not be held liable for any act committed in the line of duty) and the ‘superior orders’ defense (according to which a subordinate was immune from prosecution for any act committed at the behest of a superior).\textsuperscript{14} The abolition of these defenses was necessary if Nazi officials were to held legally liable for their misdeeds. Robert Jackson explained:

> The charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state... Modern civilization ... cannot tolerate so vast an area of legal irresponsibility.\textsuperscript{15}

The innovations introduced by the London Charter constituted, in the words of Antonio Cassese, a “veritable revolution, both in the field of law and of ethics.” The London Charter not only articulated unprecedented human rights standards, but insisted that “when the international rules that protect humanitarian values are in conflict with state laws that contravene those values, every individual must transgress the state laws.”\textsuperscript{16}

The International Military Tribunal, acting under the London Charter, convicted nineteen of the twenty-two Nazi officials who had been indicted. Of those convicted, twelve were sentenced to death, three sentenced to life in prison and four sentenced to long prison terms. Though the IMT was the only trial held under the London Charter, the legal novelties introduced by the charter played a major role in subsequent trials of Nazi perpetrators.

Occupied Germany was governed by the Allied Control Council (the ‘Kortrolliat’), which comprised representatives of Britain, the United States, France and the Soviet Union. One of the Council’s most important pieces of legislation was Control Council Law Number 10 (known in

\textsuperscript{14} These defenses were abolished by Articles 7 and 8 respectively. Although the London Charter and the subsequent IMT represented a dramatic sea change, the rejection of the ‘superior orders’ defense was not entirely unprecedented. On Nuremberg and the demise of the ‘superior orders’ defense, see: Antonio Cassese, “Abraham and Antigone,” in idem., ed., Violence and Law in the Modern Age (Princeton: Princeton University Press, 1988): 119-148. (Cassese now presides over the International War Crimes Tribunal in the Hague.)

\textsuperscript{15} Jackson, The Case Against the Nazi War Criminals, p. 82.

\textsuperscript{16} Antonio Cassese, “Abraham and Antigone,” p. 132. (Emphasis in the original.)
German as Kontrollratsgesetz Nr. 10 or 'KRG 10').

Enacted on December 20, 1945, KRG 10 was in essence a restatement of the London Charter. KRG 10 reaffirmed both the retroactive illegality of crimes against peace and crimes against humanity as well as the inadmissibility of the 'acts of state' and the 'superior orders' defenses. The only significant difference between it and the London Charter was jurisdictional. Whereas the London Charter had established the quadripartite IMT, KRG 10 authorized each Allied power to conduct its own trials within its respective zone of occupation.

In the four years between the defeat of the Third Reich and the founding of the Federal Republic, the western Allies prosecuted thousands of ex-Nazi officials under KRG 10. The most prominent of the Allied trials were the twelve 'follow-on' trials held by the Americans at Nuremberg in which a total of 177 defendants were prosecuted for their part in Nazi maleficence. The defendants included doctors who tortured patients, jurists who destroyed the rule of law, bureaucrats who administered concentration camps and officers who systematically murdered hundreds of thousands of East European civilians. All told, the western Allies prosecuted over 5,060 Nazi malefactors under the provisions of KRG 10.

German Prosecutorial Activity 1945-1951

During the Third Reich, the German judiciary was an instrument of tyranny. Inhumane laws enacted by the Nazis were enforced with rigor while liberal laws inherited from the Weimar Republic were distorted beyond recognition. Tens of thousands of people, including both real and imagined regime opponents, were killed on judges' orders.

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17 Published in: Official Gazette of the Control Council for Germany, No. 3 (January 31, 1946): 50-55.
18 Thousands of others were prosecuted by the Soviets. Exact data on the number of trials conducted by Soviet military tribunals are unavailable. See: A. G. M. Rückerl, NS-Verbrechen vor dem Besatzungsgericht. Vorsuch einer Vergangenheitsbewältigung (Heidelberg: Müller, 1984): 99-100.
19 A case-by-case description of the follow-on trials can be found in: Bundesjustizministerium, 'Bericht über die Verfolgung nationalsozialistischer Straftäter,' pp. 7-9.
20 According to the 1965 report published by the West German Federal Ministry of Justice ("Bericht über die Verfolgung nationalsozialistischer Straftäter", pp. 9-10), the Americans prosecuted 1,941 individuals of whom 1,517 were convicted, the British prosecuted 1,085, and the French convicted 2,107.
22 Jörg Friedrich claims that at least 32,000 people were executed under the Nazis, but he (all too characteristically) provides no source for this figure. See: Jörg Friedrich, Freispruch für die Nazi-Justiz:
trials at Nuremberg, twelve high-ranking German jurists—accused of having utilized "the empty forms of legal process for persecution, enslavement, and extermination on a vast scale"—were convicted by an American military tribunal under KRG 10.23

In light of the judiciary's participation in Nazi terror, one of the Allies' first acts upon occupying Germany was to order the immediate closure of all German courts.24 Those courts that had exercised jurisdiction over political offenses during the Third Reich were shut permanently. These included both the Reichsgericht, the traditional Supreme Court which the Nazis had considered ideologically suspect, and the Volksgerichtshof, the draconian People's Court established by the Nazis for the purpose of inflicting swift retribution on regime opponents.25 The notorious Sondergerichte, 'special courts' created by the Nazis and practiced in the art of summary judgment, were abolished as well.

The extirpation of Nazi institutions was, however, only one facet of occupation policy. The Allies were also committed to the reestablishment of (democratized) German self-administration.26 In keeping with this policy, the Allies authorized the gradual reopening of normal German courts beginning in the fall of 1945.27 Under the provisions of Control Council Law No. 4, no member of the Nazi Party who had been more than a "nominal participant" in its activities was permitted to serve as either a judge or prosecutor. This stipulation, like denazification as a whole, was largely ineffective. Many former Nazis occupied judicial posts in

the postwar period. In the British zone of occupation, for example, less than one-third of all judges who had held office in 1940 were dismissed as a result of denazification even though the overwhelming majority had been members of the NSDAP. Be that as it may, by 1946 the reconstituted court system was fully operational.

The reconstituted German courts operated in a sharply bifurcated legal system. There was, on the one hand, the (purified) German penal code, the Strafgesetzbuch (or 'StGB'). Though purged by the Allies of all "peculiarly Nazi" laws, this was in essence the same penal code that had (at least nominally) been in continuous force since German unification in 1871. The second paragraph of the sanitized Strafgesetzbuch (= § 2 StGB) explicitly banned retroactive legislation.

On the other hand, in contrast to the traditional positivist law of the StGB, there was Control Council Law No. 10. Though initially intended for use primarily by Allied courts, German courts were ultimately permitted (and, indeed, at times required) to apply KRG 10's retroactive provisions. Authorizing German courts to try cases under KRG 10 was meant to serve a dual purpose: on a jurisprudential level, it would consolidate the fragile IMT precedent; on a practical level, it would relieve the considerable burden on the Allies' own courts. While the American occupation authorities permitted German courts to apply KRG 10 rarely and then only on a case-

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29The British were the least stringent when it came to denazification. In the American zone, roughly two-thirds of judges were dismissed. See: Martin Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung': Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945-1949," Vierteljahrshefte für Zeitgeschichte (1981): 508.

30Military Government Law No. 1 (reprinted in R. Hemken, Sammlung der vom Alliierten Kontrollrat und der Amerikanischen Militärregierung erlassenen Proklamationen, Gesetze, Verordnungen, Befehle, Direktiven) repealed nine laws and dozens of ordinances. Those statutes enacted after the Nazi seizure of power but not repealed by the Allies had to be "applied in accordance with the plain meaning of the text and without regard to objectives or meanings ascribed in preambles or other pronouncements." The courts were, moreover, prohibited from using Nazi legal doctrine as the basis for statutory interpretation. The list of abrogated laws was extended in Control Council Law No. 11 and again in Control Council Law No. 1 (published in Official Gazette of the Control Council for Germany, No. 1, pp. 6-8 and No. 3, pp. 55-7 respectively).


32Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung'," p. 487.
by-case basis, the French and British military governments issued blanket authorizations for its use.\textsuperscript{33}

KRG 10 was, at least potentially, much harsher than the \textit{Strafgesetzbuch}. The fact that crimes against humanity were punishable “whether or not in violation of the domestic laws of the country where perpetrated” and the fact that ‘superior orders’ were denied exculpatory force meant that KRG 10 deprived accused individuals of two standard lines of defense available under the StGB. Moreover, unlike the StGB, KRG 10 defined its crimes in purely objective terms. Thus, potentially mitigating subjective factors, such as the absence of criminal intent, played no role under KRG 10. Finally, KRG 10, again unlike the StGB, made no distinction between a primary perpetrator and a mere accessory. Under KRG 10, each participant was equally liable.\textsuperscript{34}

Whether proceeding under the StGB or under KRG 10, the German courts were subject to an important jurisdictional constraint: they could only try cases in which Germans were accused of having committed crimes against other Germans (or stateless individuals). This limitation meant that the worst Nazi atrocities—those committed in the East—could not be prosecuted in German courts.\textsuperscript{35} Still, given the extent of Nazi malefaction, there were ample misdeeds left to prosecute.\textsuperscript{36} The range of cases tried by German courts in the early postwar period included: acts of mayhem during the \textit{Kristallnacht} pogrom; the deportation of Jews from Germany to the eastern gas chambers; the systematic murder of institutionalized patients (euphemistically


\textsuperscript{36}NB: I have consciously chosen to speak of ‘malefactions’ committed by ‘malefactors’ rather than of ‘crimes’ committed by ‘criminals’. The term ‘crime’ implies that the act in question was prohibited by law at the time it was committed. I, however, believe that the atrocities committed during the Third Reich were in fact permitted under positive law as it stood at the time. If one assumes that what the Nazis did was illegal all along, one misses the fundamental dilemma confronted in the postwar period. Bernd Schünemann makes a similar linguistic point (although he ultimately concludes that what the Nazis did was illegal under positive law at the time). See his excellent, although ultimately misguided essay: Bernd Schünemann, “Ungelöste Rechtsprobleme bei der Bestrafung nationalsozialistischer Gewalttaten,” \textit{Festschrift für Hans-Jürgen Bruns} (Cologne: Carl Heymanns, 1978): 223-47 (224).
referred to as 'euthanasia' by the Nazis); the murder of intra-party rivals and other political undesirables during the so-called 'Röhm Putsch' in June 1934; the denunciation of individuals by Gestapo informants; the maltreatment of prisoners; the abuse of the judicial process for the elimination of Jews and others noxious to the Nazi regime; and, the summary execution of supposed defeatists in the final days of the war.37 Between 1945 and 1951 (the year in which KRG 10 was effectively revoked), German courts convicted 5,487 Nazi perpetrators.38

Gustav Radbruch and the Natural Law Renaissance

The application of Control Council Law Nr. 10 found an energetic advocate in the person of Gustav Radbruch, a prominent scholar whose legal views were strongly affected by the Nazi experience.39 Unlike some of its other defenders, who sought to portray KRG 10 as a mere compilation of statutes that already existed under the German criminal code, Radbruch openly acknowledged the law's retroactive character.40 Rather than deny the obvious, Radbruch argued that the law's retroactivity was morally justified by the "utterly unique" depravity that prevailed under the Nazis.

37 Since the number of convictions arising from each category of misdeed is not readily available on a yearly basis, I cannot say how many were convicted for what sort of misdeed between 1945 and 1951. But, according to the aggregate data released in 1965, approximately 44% of those convicted (2,703 of 6,115) between 1945 and 1964 had been charged in connection with the Kristallnacht pogrom, approximately 24% (1,440 of 6,115) were charged in connection with the elimination of political opponents, and approximately 10% (603 of 6,115) were charged in connection with the denunciation of individuals to the Gestapo. Given the fact that the vast majority of prosecutions occurred in the immediate postwar period and the fact that later prosecutions tended to focus on genocide in the East, the aggregate figures tend to understake the relative weight of these categories in the prosecutions between '45 and '51. See: Bundesjustizministerium, "Bericht über die Verfolgung nationalsozialistischer Straftaten," pp. 20-34.

38 Adalbert Rückerl, NS-Verbrechen vor Gericht, p. 329. Many former Nazis were also prosecuted by German courts in (what had been) the Soviet zone of occupation. According to data released by the East German government, 12,478 Nazi perpetrators were convicted in (what became) the G.D.R. between 1945 and 1951. It is impossible to determine how many of those convicted were convicted under KRG 10 and how many under the StGB. See: Der Generalstaatsanwalt der DDR, Die Haltung der beiden deutschen Staaten zu den Nazi- und Kriegsverbrechen (Berlin: Staatsverlag der Deutschen Demokratischen Republik, 1965): 27-71. Many of those prosecuted in the GDR were convicted in a flurry of summary trials that were held in 1950 and known collectively as the "Waldheimer Prozesse." After German reunification in 1990, several participants in the Waldheimer Prozesse were tried (and convicted) on charges of having perverted justice.

39 Radbruch, a committed democrat who had twice served as minister of justice in the Weimar Republic, was the very first professor purged after the Nazi seizure of power in 1933. For an overview of Radbruch's life and work, see: Arthur Kaufmann, "Gustav Radbruch—Leben und Werk," in Arthur Kaufmann, ed., Gustav Radbruch: Gesamtausgabe, Vol. 1 (Heidelberg: C. F. Müller Juristischer Verlag, 1993): 7-88.

Radbruch was not only a staunch defender of KRG 10, but an ardent champion of natural law more generally. “The legal community,” Radbruch declared, “must again remind itself of the hoary wisdom—common to antiquity, the Christian Middle Ages and the Age of Enlightenment—that there is a higher law ... according to which injustice remains injustice even if it is cast in the form of statute.” In the seminal article “Statutory Injustice and Extra-Positive Law”, Radbruch enunciated what came to be known as the ‘Radbruch formula’. Influential among both scholars and judges, the Radbruch formula specified the conditions under which positive law is—for ethical reasons—invalid. According to Radbruch, positive law must yield to natural law “when the contradiction between positive law and justice reaches an intolerable proportion.”

Though couched in universal terms, the Radbruch formula was of course conceived in and of immediate relevance to Germany’s postwar situation. “When judged against this standard,” Radbruch noted, “whole swaths of National Socialist law” are rendered invalid. Declaring Nazi law invalid under natural law standards had far reaching practical implications. It meant that those who had acted in accordance with Nazi law—for example, the doctors who engaged in so-called ‘euthanasia’—had acted illegally and were thus criminally liable for their behavior.

Radbruch’s formula was, in effect, a denial of legal certainty. Radbruch made no secret of this fact. “One cannot deny,” he wrote, “that the concept of ‘statutory injustice’ and the denial of legal validity to positive statute involves terrible dangers for legal certainty.” Radbruch’s concern was genuine, for he considered legal certainty to be a component, albeit a subsidiary

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one, of justice itself.\textsuperscript{46} Indeed, he regarded the reestablishment of legal certainty after its
degradation under the Nazis to be one of the most important tasks of the postwar period.\textsuperscript{47} Therefore, Radbruch wrote, "we must attempt to satisfy the requirements of justice vis-à-vis the
statutory injustice of the past twelve years with the smallest possible loss of legal certainty."\textsuperscript{48} Radbruch thought that the inevitable loss of legal certainty would be minimized if the invalidation
of positive law was limited to the most extreme cases of statutory turpitude. Moreover, he
thought it preferable that immoral laws be retroactively abrogated through legislative act rather
than declared null and void by individual judges operating on an \textit{ad hoc} basis.\textsuperscript{49} Still, these
qualifications notwithstanding, Radbruch believed that a court ought to ignore positive statute
whenever justice demanded it. After all, Radbruch argued, "legal certainty is not the only and not
the primary value that law seeks to realize."\textsuperscript{50}

Radbruch's advocacy of natural law in the postwar period represents a stunning
reversal.\textsuperscript{51} Prior to the Third Reich, Radbruch was a deeply committed legal positivist who
placed no ethical limits on state sovereignty. "He who has the power to impose law," Radbruch
wrote in 1932, "proves by that very fact that he is called upon to set law."\textsuperscript{52} As a positivist,
Radbruch valued legal certainty above all. He argued that it was the "judge's professional
obligation ... to ask only what the law is without ever asking what is just."\textsuperscript{53} Radbruch's postwar
conversion stemmed from his belief that legal positivism had contributed to Nazi maleficence.

\textsuperscript{46} Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," p. 107.
\textsuperscript{47} In 1935, the Nazis amended § 2 StGB and in so doing abolished its \textit{nulla poena} guarantee. In
contrast to the old version, which (like the current version) had banned punishment in the absence of an
applicable and precisely worded law, the amended version of § 2 StGB stipulated that an individual was
to be punished whenever punishment was called for "by the sound instincts of the people." (See: Ingo
Müller, "Das Strafprozeßrecht des Dritten Reiches," in Udo Heßner and Bernd-Rüdiger Sonnen, eds.,
\textit{Strafjustiz und Polizei im Dritten Reich} (Frankfurt/M: Campus Verlag, 1984): 76.) Radbruch was well
aware that his two postwar projects—the reestablishment of legal certainty and the application of extra-
positive law—"appear to stand in contradiction to each other." Radbruch, "Die Erneuerung des Rechts,"
pp. 1-2.
\textsuperscript{49} Radbruch, "Die Erneuerung des Rechts," pp. 2-3; and, Radbruch, "Gesetzliches Unrecht und
\textsuperscript{50} Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," p. 107.
\textsuperscript{51} Arthur Kaufmann argues that Radbruch's conversion was more a change in emphasis than a complete
recantation of earlier beliefs. See: Arthur Kaufmann, "Problemgeschichte der Rechtspolitik," in
(Heidelberg: C. F. Müller Juristischer Verlag (UTB), 1989): 90-98.
\textsuperscript{52} Gustav Radbruch, \textit{Rechtsphilosophie}, 3rd ed. (Leipzig: Verlag von Quelle und Meyer, 1932): 81,
“The positivist conviction that ‘law is law’,” Radbruch wrote in 1946, “rendered German jurists defenseless against statutes of a tyrannical and criminal nature.” Promoting natural law was, in a sense, an act of intellectual contrition.

Though articulated with singular clarity and endowed with immense personal authority, Radbruch’s stance was hardly unique. Natural law flourished in Germany in the years immediately following World War II. The impetus for this “natural law renaissance” is easy to identify. Nazi rule constituted state-sanctioned maleficence on an unprecedented scope and scale: entire peoples were oppressed and millions of individuals were slaughtered as a matter of official policy. The Nazis were the "embodiment of the ultimate evil."

Natural law provided an ethical antidote to state sovereignty run amok. To endorse natural law was to affirm the existence of an objective morality that imposed inalterable limits on what a state might do to its subjects. Support for KRG 10 was, under the historical circumstances, a pragmatic corollary of the natural law postulate. KRG 10 was welcomed by natural law proponents as an *ex post facto* codification of eternally valid extra-positive principles to which the Nazis were properly subject.

Radbruch and those of a like mind, application of KRG 10 was nothing less than an “ethical necessity.”

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54 Radbruch, “Gesetzliches Unrecht und Übergesetzliches Recht,” p. 107. This proposition is known as the ‘Wehrlosigkeitstheze’.


58 The phrase is found in: August Wimmer, "Die Bestrafung von Humanitätsverbrechen und der Grundsatz 'nullum crimen sine lege,'" *Süddeutsche Juristenzeitung* (1947): 130. Other supporters of KRG 10 included: Richard Lange, "Das Kontrollratsgesetz Nr. 10 in Theorie und Praxis," *Deutsche Rechts-Zeitschrift* (1948): 155-61; and, Wilhelm Kiesselbach, "Zwei Probleme aus dem Gesetz Nr. 10 des Kontrollrats," *Monatsschrift für Deutsches Recht* (1947): 2-5. Kiesselbach, head of the Zentraljustizamt (a quasi ministry of justice in the British occupation zone), argued: i) that protecting Nazi maleficence from prosecution on *nulla poena* grounds would "serve injustice rather than justice"; ii) that *nulla poena* was not itself an absolute element of extra-positive law; and, iii) that KRG 10 was in any case binding because it had been enacted by the ruling occupation powers. As Broszat notes, Kiesselbach’s emphasis on a judge’s obligation to apply all positive law was problematic in that it could foster blind obedience to statute. See: Broszat, "Siegerjustiz oder strafrechtliche ‘Selbstreinigung’," p. 523-4.
Support for an extra-positivist approach to Nazi maleficence was not limited to academic jurists. In the early postwar years, German courts frequently ignored *nulla poena* when judging acts committed during the Third Reich.\(^5^9\) Sometimes the courts invoked KRG 10 and other times they invoked the Radbruch formula. But either way, the result was the same: Nazi perpetrators were subjected to retroactive legislation. There was, in the words of one observer, “a flood of natural law verdicts.”\(^6^0\)

Particularly in the British zone of occupation, where the courts received blanket authorization for its use, KRG 10 was applied often.\(^6^1\) A wide variety of Nazi malefactions were the subject of KRG 10 prosecutions, including (but not limited to): the denunciation of individuals to the Gestapo, the deportation of Jews to the extermination camps, and the persecution of individuals through the judicial system. The courts that applied KRG 10 insisted that the attendant suspension of *nulla poena* protection was fully justified. “Justice,” said the Oberlandesgericht Braunschweig, “demands that the inhumane deeds perpetrated during the years of National Socialism be legally avenged, whether or not they were punishable under the laws in existence at the time.”\(^6^2\)

As the highest court of appeals in the British zone, the Oberster Gerichtshof (the ‘OGH’) heard many KRG 10 cases.\(^6^3\) The court routinely rebuffed appeals that challenged KRG 10.

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\(^{6^2}\) OLG Braunschweig, *Neue Juristische Wochenschrift* (1947/48): 353. A similar statement, in which the Oberlandesgericht Köln refers to Nazi “evil”, can be found in OLG Köln, *Neue Juristische Wochenschrift* (1947/48): 70. NB: Only the decisions of the highest German courts are published in official registers, and not all decisions of even those courts are published. Thus, practicing attorneys and legal scholars must often rely on the unofficial versions of court decisions that are published in the leading professional journals (such as *Neue Juristische Wochenschrift*). The standard form of citation is: “Court, *Journal* (year): page number.”

\(^{6^3}\) For an overview of the court’s jurisprudence, see: Karl-Alfred Storz, *Die Rechtsprechung des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1969). According to Storz (p. 6), more than half of all cases heard by the OGH concerned charges brought under
10 on *nulla poena* grounds. In its very first verdict, in a case that stemmed from the torture of Jewish prisoners, the court made clear that it would not hesitate to enforce the law's *ex post facto* provisions. In a subsequent decision, in a case arising from the deportation of Gypsies, the OGH argued that protecting Nazi perpetrators from punishment on *nulla poena* grounds would contradict the principle's underlying purpose.

The ban on retroactive legislation is ... one of the legal principles that was wrung from the absolutist state during the struggle for human and civil rights in order to protect citizens from despctism. Its meaning is derived from this context. It would, therefore, transform that meaning into its very antithesis were the ban on retroactive legislation to thwart just expiation for crimes that consisted precisely in the participation in unbounded despotism.

In the eyes of the OGH, the retroactive criminalization of Nazi maleficence—and the punishment that it entailed—was a necessary rectification of extreme injustice. *Nulla poena* would not be allowed to stand in the way: “Securing injustice,” said the court, “is not the task of legal certainty.”

One of the most insidious forms of Nazi maleficence was that of judicial depravity. During the Third Reich, “the dagger of the assassin was concealed beneath the robe of the jurist.”

But, for the German courts operating in the postwar era, holding judges accountable for what they had done between 1933 and 1945 was doctrinally problematic. According to long-standing German case law, a judge was criminally liable for the consequences of an official action only if the judge had willfully perverted the law when taking that action. That is to say, a judge was protected from prosecution for official actions unless it could first be proven that the judge had

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64This is not surprising given that the British occupation authorities had consciously appointed jurists to the court who they thought were sympathetic toward the law. On appointments to the court, see: Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung'," p. 334.

65Oberster Gerichtshof für die Britische Zone, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. 1 (Berlin: Walter de Gruyter & Co., 1949): 1. NB: Following German practice, references to OGH decisions that appear in the official collection of decisions will be cited as OGHSt [volume number], [starting page number] ([specific page reference]). Using this convention, the location of the passage referred to here would, for example, be given as OGHSt 1, 1 (1). The decision taken as a whole would be referred to as OGHSt 1, 1.

66OGHSt 1, 375 (380).

67OGHSt 1, 1 (5).


committed the crime of Rechtsbeugung (the perversion of justice) as defined by § 336 StGB. Under this doctrine (known as 'judicial privilege'), a judge who imposed a death sentence could be convicted of murder only if it was proven that he had either deliberately misapplied the relevant statute or deliberately violated binding procedural norms. Much of the judicial injustice that occurred during the Third Reich, however, resulted from the correct application of inherently odious law rather than from the misapplication of fundamentally sound law. And even in those cases in which the law was obviously misapplied, proving intent was virtually impossible. Thus, under traditional German jurisprudence, former Nazi judges were effectively immune from prosecution.

Various lower courts were inclined to extend the 'judicial privilege' doctrine to charges brought under KRG 10. They refused to convict judges charged with crimes against humanity unless it was first proven that the judge in question had intentionally misapplied substantive statute or deliberately disregarded procedural norms. The lower courts that took this tack were, in effect, making guilt under the German criminal code—in particular, guilt under § 336 StGB—a precondition for conviction under KRG 10.

The Oberster Gerichtshof would have none of this. The court stressed repeatedly that the violation of German law was not a prerequisite for conviction under KRG 10. "Each individual was obligated to have acted in accordance with the principles of humanity," said the court, "even when municipal law allowed—or indeed encouraged—the violation of those principles." The OGH emphasized that KRG 10 applied to everyone equally. There was, said the court, "no obvious reason why judges alone should be exempt" from the obligations imposed by KRG 10.

The OGH concluded, therefore, that a Nazi judge could be convicted of crimes against humanity for actions taken in an official capacity even if the judge had correctly applied substantive

70See, for example: LG Düsseldorf 8 Ks 1/49 and LG Hamburg (50) 19/49, published in: C. F. Rüter, et al., eds., Justiz und NS-Verbrechen. Sammlung deutscher Strafsenten wegen nationalsozialistischer Tötungsverbrechen 1945-1966 (Amsterdam: University Press Amsterdam, 1968ff), Vol. 4, pp. 195-237 and Vol. 5, pp. 193-256 respectively. These verdicts were subsequently overturned by the Oberster Gerichtshof in OGHSt 2, 269 and OGHSt 1, 217 respectively. See the discussion below.
71The misapplication of substantive statute and the violation of procedural norms each constituted Rechtsbeugung (the perversion of justice) under § 336 StGB.
72OGHSt 1, 217; and, OGHSt 2, 269.
73OGHSt 2, 269 (272).
74OGHSt 2, 269 (272).
statute without violating procedural rules. Holding judges criminally liable for the faithful application of Nazi law was, as the court pointed out, simply a logical consequence of KRG 10's extra-positivist premise.

Though the application of KRG 10 was a clear violation of *nulla poena*, the courts that applied it could at least claim to be acting on the explicit legislative authority of the Allied Control Council. Extra-positivism in the postwar period, however, was not limited to the application of KRG 10. Some courts, especially those in the American zone (which lacked blanket authorization to apply KRG 10), imposed natural law standards on their own initiative.

The most notable application of natural law was its invocation by the Landgericht Frankfurt when confronted with cases of so-called 'euthanasia'. 'Euthanasia' under the Nazis was nothing more than mass murder with a medical imprimatur; doctors killed tens of thousands of mentally and chronically ill patients.\(^{75}\) After the war, some of those who had participated in the killings were charged with murder under § 211 StGB. In the earliest 'euthanasia' trials, the defendants argued that their actions had been legal under positive law and that they were therefore free of criminal liability.\(^{76}\) The claim had considerable merit: the 'euthanasia' program had been carried out on Hitler's orders, and Hitler's orders were considered law in the Third Reich.\(^{77}\) The Landgericht conceded that Hitler's 'euthanasia' decree was formally valid law under the constitutional practice of the Third Reich. But, according to the Landgericht, this fact did not exculpate the defendants.

The state is never the sole source of all law. The state itself is subject to law, the state itself is bound by the eternal norms of moral law and if the state violates these norms, then its own statute loses all binding force upon its subjects. This so-called law of Adolf Hitler violates the most basic of all natural law goods, the individual's right to life... The morally and legally binding force of the natural law norm 'Thou shalt not kill' is so strong that it can never be supplanted by the formal validity of a statute. Thus, rather than create law, this decree of Hitler's at most elevated the most flagrant form of injustice to a procedurally valid enactment which, because of its unjust content, cannot be cited as grounds for

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\(^{76}\) In later trials, many defendants offered a modified necessity defense (according to which one is justified in breaking one law if it is the only way to prevent the violation of another, more weighty law). They argued that killing some sanatoria patients was, under the circumstances, necessary in order to be able to save other patients. See, for example: OGHSt 1, 321.

exoneration by anyone. A law with such fundamentally immoral content is, because of its content, always and under all circumstances legally invalid. Thus, the supposed law is legally invalid and never achieved substantive legal validity. The actions of the defendants are, therefore, objectively illegal.\textsuperscript{78}

After determining that the defendants had not acted under duress, the court proceeded to convict them of murder.

It is interesting to note that the Landgericht went out of its way to employ natural law. The prosecution had offered an entirely different—in my terminology: 'reinterpretivist'—rationale for conviction. According to written law as inherited from the Weimar Republic and never formally repealed by the Nazis, all official enactments had to be published in the \textit{Reichsgesetzblatt} (the Imperial Gazette) before they could take effect.\textsuperscript{79} Proceeding from the premise that written law and positive law were necessarily identical, the prosecution argued that Hitler's 'euthanasia' decree lacked legal force—and, thus, all exculpatory power—because it was never promulgated in the prescribed manner. The Landgericht rejected this argument. Hitler, the court noted, "was in fact the bearer of all-encompassing state powers."\textsuperscript{80} To claim, as the prosecution did, that Hitler's order was invalid because of its secrecy was, said the court, "to ignore the constitutional circumstances that prevailed" at the time.\textsuperscript{81}

Natural law was, for a time at least, also invoked by German courts trying individuals who stood accused of having executed people in the final days of the war after either a perfunctory trial or no trial at all. The typical victim of such summary justice was a military deserter or a civilian advocating capitulation to the advancing Allies. Charged with murder under § 211 StGB, the postwar defendants argued that they had been acting under orders that were in accordance with the law of the time. Two orders were repeatedly cited by defendants as legal justification for


\textsuperscript{81} LG Frankfurt, 4 Kls 15/46 and 4 Kls 1/47, in Rüter, \textit{Justiz und NS-Verbrechen}, Vol. 1, pp. 156 and 253 respectively. The Oberlandesgericht Frankfurt, the appellate court with jurisdiction in the case, upheld the convictions but on precisely the reinterpretivist grounds that the trial court had rejected. See: OLG Frankfurt, Ss 92/47, Ss 206/47, Ss 160/48 and Ss 188/48, in Rüter, \textit{Justiz und NS-Verbrechen}, Vol. 1, pp. 166-86, 262-83 and 366-79 respectively.
their actions: a directive issued by Göring on Hitler's authority that disobedience and other "manifestations of disintegration" be punished by swift execution; and, the so-called Himmler-Keitel order which stipulated that all individuals found in a house flying a white flag be shot without trial. These orders, the defendants claimed, were legally validated by the two ordinances governing wartime justice that were promulgated in early 1945.

The courts rejected this line of defense on two distinct grounds. The first reason was reinterpretivist: according to the courts, the summary executions, even those that had been preceded by a perfunctory trial, failed to meet the (already quite minimal) procedural standards required under positive law at the time. In the immediate postwar period, the reinterpretivist reasoning was routinely complemented by a substantivistic, natural law argument. On numerous occasions, the courts declared that every state was, as a matter of extra-positive law, obligated to be respect certain procedural standards before putting an individual to death. In the eyes of the Landgericht München, the orders cited by the accused in their defense, as well as the enactments which had nominally validated those orders, "flagrantly contradicted" the legal principles of every civilized nation.

They repudiate the legal order and law itself and are thus invalid. Any state action based on them is to be considered null and void ... There can, therefore, be no doubt that the death sentences ... were invalid and illegal.

According to the Landgericht, the violation of natural law was so self-evident that "the formal validity of these authorizations and orders need not be discussed."

Opposition to Nuremberg and KRG 10

The extra-positivist trend in postwar jurisprudence went neither unnoticed nor unchallenged. There was considerable popular opposition to the International Military Tribunal at

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82 See, for example, the defense arguments recapitulated in OLG Stuttgart, Ss 14/46 and Ss 103/47, published in Rüter, Justiz und NS-Verbrechen, Vol. 1, pp. 84-9 and 520-9 respectively.
83 The ordinances were: the 11. Durchführungs- und Ergänzungsverordnung zur Kriegssonderstrafverfahrensverordnung (enacted on January 11, 1945); and, the Verordnung über die Errichtung von Ständgerichten (enacted on February 15, 1945).
84 See, for example, the following verdicts: OLG Stuttgart Ss 103/47, LG München 1 Kls 95-97/47, LG Ellwangen Kls 63-69/47, and OLG Oldenburg Ss 67/48, published in Rüter, Justiz und NS-Verbrechen, Vol. 1, pp. 520-9; Vol. 2, pp. 49-65, 77-90, and 158-75 respectively.
86 LG München 1 Kls 95-97/47 in Rüter, Justiz und NS-Verbrechen, Vol. 1, pp. 56.
Nuremberg and to the subsequent Allied trials. Even though the Allied tribunals focused on
particular individuals charged with particular acts, there was a widely shared perception that “the
entire German nation was in the dock.” The trials were seen as not only vindictive, but
hypocritical as well. After all, it was well known that the Soviet Union—one of the four countries
sitting in judgment over the vanquished Germans—had itself waged aggressive war (against
Poland and Finland) and had itself committed war crimes (by slaughtering thousands of Polish
POWs). The Allied practice of referring to the tribunals as “war crimes trials” compounded the
problem. Subsuming all that the Nazis had done under the 'war crimes' label obscured the
singularity of Nazi maleficence and made it correspondingly easier for Germans to dismiss the
trials as nothing more than victors’ justice. The majority of Germans, understandably defensive
about their role in the Third Reich, were of course eager to dismiss the trials. The trials were a
constant reminder of things that most Germans preferred forgotten. Whether consciously or
unconsciously, the average citizen perceived the trials as a personal rebuke. Allied denazification
policies, which were poorly administered and unevenly enforced, contributed to this
perception. The net result was widespread popular antipathy toward the trials of Nazi
perpetrators. The popular aversion extended to all trials, including those conducted by German
courts.

Opposition was not limited to the masses. Many jurists denounced the trials as well. Among trained lawyers, opposition to the trials was expressed primarily in terms of *nulla poena*
and the threat to legal certainty. For those opposed to the trials, it made little difference whether they were rooted in the retroactive provisions of KRG 10 or in the natural law pronouncements of individual courts. Given the open-ended definition of crimes against humanity, there was in fact little difference between the application of KRG 10 and the *ad hoc* invocation of natural law.\footnote{93} Opponents argued that because natural law was so ill-defined its application was tantamount to judicial caprice. If every judge were empowered to review the substantive validity of every statute under natural law standards, wrote one scholar, “the result would be a chaos of legal uncertainty.”\footnote{94}

In an interesting twist, the defenders of *nulla poena* argued that natural law was fundamentally amoral and therefore susceptible to the whim of whomever might be in power.\footnote{95} There are, it was said, as many versions of natural law as there are conceptions of nature.

\[N\]atural law is a formal concept that says nothing about the content of law. With natural law one can prove and justify anything, even the gas chambers of Auschwitz. One need only specify the axiomatic conception of nature in an appropriate manner.\footnote{96}

Opponents of extra-positivism argued that the postwar invocation of natural law was, from a formal perspective, identical to the Nazis’ use of ‘racial law’ during the Third Reich.\footnote{97} In each instance, opponents said, notions of substantive justice were given priority over written law to the detriment of individual liberty.

\footnote{93}{Crimes against humanity were defined as “atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts ....” [emphasis added] As Radbruch noted, KRG 10 provided but “a skeleton that must be fleshed out by judicial precedent.” (Radbruch, “Zur Diskussion über die Verbrechen gegen die Menschlichkeit,” p. 133.) For lawyers trained in Germany’s civil law system, the notion of judge-made law was alien. On the conceptual difficulty faced by German lawyers in this regard, see: Hodo Freiherr von Hodenberg, “Zur Anwendung des Kontrollratgesetzes Nr. 10 durch die deutschen Gerichte,” Süddeutsche Juristenzeitung (1947): 116-7.}


\footnote{95}{This was, of course, *mutatis mutandis* the primary charge leveled by natural law proponents against legal positivism.}


According to postwar positivists, the recourse to natural law was not only unwise, but unnecessary. Articulating a widely held view, Hodo von Hodenberg, the head of the Oberlandesgericht Celle and an outspoken critic of KRG 10, insisted that “the overwhelming majority of cases” could be subsumed under the German penal code.98 Another prominent positivist, Adolf Arndt, argued that exclusive reliance on the Strafgesetzbuch was, under the historical circumstances, as much a political desideratum as it was a jurisprudential imperative. Arndt, an official in the Hessen ministry of justice and an accessory prosecutor in the first Frankfurt ‘euthanasia’ trial, maintained that the best way to counteract the popular aversion to what was generally perceived to be victors’ justice was to demonstrate that the Nazi perpetrators “were also felons under German law.”99

Arndt criticized the Landgericht Frankfurt for having needlessly invoked natural law in its ‘euthanasia’ verdict.100 Arndt acknowledged that de facto power—such as that possessed by the Nazis—can, by virtue of the general population’s compliance, bestow legal validity upon a new regime’s decrees and thus supplant the previous legal order. But, he argued, secret decrees, precisely because they are unknown by the general population, cannot possibly induce the sort of compliance that would transform the de facto into the de jure. The failure to publish Hitler’s ‘euthanasia’ decree in the Imperial Gazette was, therefore, no mere formality, said Arndt. Rather, it was clear evidence “that Hitler lacked the power ... to establish such a ‘law’.”101 As Arndt saw it, legislative power was divisible: a revolutionary regime might possess sufficient power to legislate in certain areas but not in others. Whatever his general ability to legislate, Hitler’s “usurpation had failed,” said Arndt, wherever he was forced “to seek refuge in secrecy.” On this view, Hitler’s decree had never enjoyed legal validity and ‘euthanasia’ had remained “an

99Arndt, “Das Verbrechen der Euthanasie,” p. 281. Arndt’s presentation, which was delivered to an important gathering of German jurists, is as close as one gets to a conscious, contemporary defense of reinterpretivism. Although he does not use the term “reinterpretivism” (which indeed was not used by any of the postwar protagonisti), he distinguishes his position from those who would apply natural law (p. 273) as well as from those who would accept the legal validity of Hitler’s orders (p. 272).
100See pages 53-4 above.
101Arndt, “Das Verbrechen der Euthanasie,” p. 276. NB: all quotations in this paragraph can be found in the same location.
illegality under the standards of the positive law of the time.” The Landgericht’s invocation of natural law, Arndt argued, was therefore unnecessary.

British occupation officials believed that the *nulla poena* objections raised by German jurists were simply an excuse to avoid trying Nazi perpetrators.102 The suspicion was not without foundation. Large parts of the legal community displayed an unmistakable reluctance to confront Germany’s immediate past, an epoch in which many jurists had played an ignominious role.103 But, however opportune *nulla poena* objections may have been to those directly implicated in Nazi maleficence, such objections were more than mere pretense. As Arndt’s stance indicates, even those in favor of postwar trials and in possession of unimpeachable anti-fascist credentials were reluctant to abandon the hallowed ban on retroactive legislation.104 No lesser than Radbruch, the chief exponent of postwar extra-positivism, had emphasized that “positive law continues to have priority even when it is unjust and inappropriate” until that point where the contradiction between positive law and justice becomes unbearable.105

There was, in addition to principled opposition and self-interested aversion, yet another reason why many jurists were disinclined to apply KRG 10 or invoke natural law. Military Government Law No. 1, the very first law issued by the Allied occupation forces, declared that henceforth “no charge shall be preferred, no sentence imposed and no punishment inflicted for an act, unless such act is expressly made punishable by law in force at the time of its commission.”106 The Allies had, in other words, fully restored the *nulla poena* guarantee previously abolished by the Nazis.107 Moreover, in case a mere declaration to that effect was not enough, the Allies had threatened any judge who violated the law’s *nulla poena* provisions with punishment by death.108 Of course, the Allies never intended that the postwar restoration

104See, for example, the comments of Curt Staff reported in: Broszat, “Sieg justice oder strafrechtliche ‘Selbstreinigung’,” p. 521. Staff, the chief prosecutor in Braunschweig, was a Social Democrat who had been removed from office by the Nazis.
106Article IV (7), Military Government Law No. 1, reprinted in Hemken, Sammlung.
107On the 1935 revision of § 2 StGB, see footnote 47 above.
of *nulla poena* preclude application of KRG 10 or otherwise protect Nazi perpetrators from prosecution. But, the Allies' intentions were largely irrelevant: the unequivocal language and harsh penalty contained in Military Government Law No. 1 deterred agnostics, stiffened the resolve of committed positivists, and provided a convenient pretext for the obstructionists who wanted nothing to do with punishing Nazis.\footnote{See the telling comments of a principled opponent of extra-positivism: Hodenberg, "Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch die deutschen Gerichte," p. 119.}

Thus, despite the frequency with which KRG 10 and natural law were invoked by some courts, many other courts were reluctant to violate *nulla poena*. Judicial resistance to retroactivity took several forms. One court, ironically, cited natural law as its reason for refusing to apply KRG 10. *Nulla poena*, said the Landgericht Siegen, was itself an inviolable element of natural law which no state (or occupation power) could disregard.\footnote{LG Siegen, 4 Js 80/46, *Monatsschrift für Deutsches Recht* (1947): 203-5 (204). The ruling was overturned on appeal: OLG Hamm, Ws 81/47, *Monatsschrift für Deutsches Recht* (1947): 205. The counterpoint to the Landgericht's initial ruling was the decision by the Oberlandesgericht Hamburg in which that court approved the retroactive application of KRG 10 on the grounds that there was no such thing as natural law and could therefore be no extra-positive *nulla poena* guarantee. (OLG Hamburg, *Monatsschrift für Deutsches Recht* (1947): 241.)} There were also scattered hints of 'empirical' legal positivism.

Several courts dismissed charges brought against Nazi perpetrators on the grounds that the defendants' actions, though contrary to written law, were clearly congruent with the wishes of the state leadership of the time.\footnote{For example: OLG Braunschweig, decision of August 15, 1947, reported in Zentral-Justizamt für die Britische Zone, ed., *Rechtsprechung deutscher Gerichte. Entscheidungen aus den Jahren 1945-1948*, 2nd ed. (Hamburg: 1949): 102; and, LG Osnabrück, as discussed by the Oberster Gerichtshof in OGHSt 2, 209 (211). Also, arguably: OLG Kiel, Ws 12/47, Schleswig-holsteinische Anzeigen (1947): 143-4.} The Landgericht Hildesheim, for example, refused to convict a band of Nazi hooligans of having breached the peace.\footnote{LG Hildesheim, 4 KSs 50/47, *Niedersächsische Rechtspflege* (1949): 118. The court did, however, convict some of the defendants of deprivation of liberty under § 239 StGB.} There was no doubt that those on trial, who had assaulted members of the Communist and Social Democratic parties soon after Hitler assumed power, had in fact committed acts of mayhem nominally punishable under § 125 StGB. But, as the court noted, the thugs had acted "in concert with the responsible state authorities." State aegis was, said the court, legally decisive. Official sanction meant that the defendants had "not destroyed public peace and order but attempted instead to enforce ... that order which the government envisioned." Though the court did not refer to *nulla poena* explicitly,
the implication was unmistakable: punishing the defendants for their actions would in effect subject them to retroactive legislation, § 125 StGB’s continuous existence notwithstanding. It was, after all, obvious that the Nazi regime had not considered the defendants’ behavior to be criminal at the time; and, in the court’s words, the Nazi regime “was the only regime that Germany had.” On this view, sovereign might was a more important determinant of positive law than was statutory language.

It is difficult to estimate the full extent of empirical legal positivism, for it is in some sense a dog that does not bark: if prosecutors subscribe to empirical legal positivism, no charges are brought and there is no public record of the case. It is only if charges are brought under some other legal theory and a court subsequently dismisses the indictment on ‘empirical’ grounds that the case shows up. Still, despite such measurement problems, it is safe to say that empirical legal positivism, while not entirely absent, played only a minor role in the early postwar period.

If a postwar court acknowledged the reality of Nazi rule and what that meant for positive law in the Third Reich, the court was forced to choose between two diametric alternatives, each of which was—for differing reasons—unappealing to most judges. The court could, on the one hand, invoke natural law (or KRG 10) in order to convict Nazi perpetrators, but doing so meant an explicit repudiation of *nulla poena*. The court could, on the other hand, espouse empirical legal positivism and refuse to convict Nazi perpetrators on *nulla poena* grounds. This tack, however, was liable to incur Allied displeasure. Given postwar political realities (i.e. the Allies’ stated interest in the punishment of Nazi perpetrators and the Allies’ ability to dismiss defiant judges), most jurists were inclined to finesse rather than confront the *nulla poena* issue.¹¹³

Judicial resistance to overt retroactivity tended, therefore, to express itself as ‘reinterpretable’ legal positivism. At least two distinct variants of reinterpretivist reasoning can be

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¹¹³ In actual practice, the Allies exercised considerable self-control and intervened rarely in German court cases. (See: Loewenstein, “Justice,” in Litchfield, ed., *Governing Postwar Germany*, pp. 244-5.) The most conspicuous exception was when the French military government dismissed the judge who had refused to try Heinrich Tillessen, the murderer of the Weimar finance minister Matthias Erzberger, under KRG 10. (For a concise discussion of the Tillessen case, see: Broszat, “Siegerjustiz oder strafrechtliche ‘Selbstreinigung’,” pp. 496-500; for an exhaustive discussion, see: Cord Gebhardt, “Der Fall des Erzberger-Mörder Heinrich Tillessen,” (dissertation, Frankfurt, 1994).)
found in verdicts from the period. Which approach was taken depended on the malefaction in question and its relation to written law. In some instances, courts interpreted general statutory clauses (such as “public order”) as if Nazi Germany had been a liberal democracy. In other instances, courts applied nominal statutory language (such as the prohibition on murder) literally, without regard to either Nazi legislative intent or Hitler's constitutional status in the Third Reich. Common to each reinterpretivist tack was a disregard for the legal significance of the Nazi revolution and a corresponding presumption that a “true” positive law existed independent of actual praxis in the Third Reich. Reinterpretivism demanded a tenacious indifference to historical reality, but it offered something valuable in exchange: it allowed the courts “to portray the punishment of all Nazi crimes as an ordinary, not retroactive application of penal law.”

Reinterpretivism thus provided a jurisprudential refuge for postwar judges who were reluctant to challenge their Allied occupiers yet loathe to explicitly jettison *nulla poena*.

The reinterpretivist stratagem was facilitated by the fact that the Nazis retained (in general) the criminal code that they had inherited from the Weimar Republic. This nominal continuity enabled those postwar courts that were inclined to pretend that the meaning of statutes, like their wording, had remained constant despite the dramatic change in political power. Such willful oblivion to the legal ramifications of the Nazi revolution was apparent in many verdicts stemming from the *Kristallnacht* pogrom. Most courts were—at least as a matter of legal doctrine—prepared to convict *Kristallnacht* rioters under § 125 StGB. In other words, most courts held that participation in the pogrom was illegal under positive law as it had existed

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115 This point is made forcefully in Kim, *Verfassungsumsturz oder Rechtskontinuität?* Kim is one of the very few scholars to recognize—albeit without using the term—reinterpretivism for what it is. Kim (p. 69) argues that postwar jurisprudence “retroactively but silently disposed of the essence of Nazi law.” Kim’s trenchant analysis emphasizes that the meaning of a statute and the content of positive law depend largely upon the historical-constitutional context, and not upon statutory language alone. The dimensions and ramifications of early postwar reinterpretivism are—again, without using the term—also usefully discussed in: Clea Laage, “Die Auseinandersetzung um den Begriff des gesetzlichen Unrechts nach 1945,” *Kritische Justiz* (1999): 409-432 (esp. 418-23). The criticism that reinterpretivism is disingenuously extra-positivist does not appear to have been made at the time, at least not explicitly. The criticism is, however, implicit in the contents of defense attorneys who argued that their clients’ actions had been justified by Hitler’s orders.

116 Kim, *Verfassungsumsturz oder Rechtskontinuität?*, p. 70; and, Moritz and Noam, *NS-Verbrechen vor Gericht*, pp. 28-9, 91-237.
at the time. This is a striking conclusion. The statute under which the participants were charged, § 125 StGB, did not outlaw arson or assault. Rather, it protected public order as guaranteed by the state against popular disturbances. Hence, in order to conclude that Kristallnacht participants had violated § 125 StGB, the courts had to assume that anti-Semitic attacks were a breach of the public order as established by the Third Reich. This the courts did, despite the acknowledged fact that the Kristallnacht pogrom had been orchestrated by the highest state authorities. The courts were acting as if the Nazi seizure of power was legally irrelevant.

Reinterpretivism was also evident in important ‘euthanasia’ verdicts. The court of first instance to hear most ‘euthanasia’ cases was the Landgericht Frankfurt. As discussed above, the Landgericht had made a point of convicting the accused on natural law grounds. Those convicted appealed to the Oberlandesgericht Frankfurt. The Oberlandesgericht (‘OLG’) upheld the convictions, but avoided the lower court’s extra-positivist reasoning. “There is,” the OLG stated, “no need to discuss the question of whether and to what extent positive law can or must be declared invalid when it conflicts with putative natural law claims.” Rather than invoke natural law, the OLG maintained that ‘euthanasia’ had been illegal under positive law as it stood at the time. The court began by noting that § 211 StGB, which outlawed homicide, made no exception for euthanasia. Therefore, said the court, the only relevant issue was whether Hitler’s ‘euthanasia’ decree had—§ 211 StGB notwithstanding—somehow legalized the sanatoria killings. It had not, said the OLG. According to the Weimar constitution, which was never formally abrogated by the Nazis, executive orders had to be countersigned by the relevant minister and published in the Imperial Gazette. Since Hitler’s decree met neither of these conditions, it was,

\footnote{See, for example: LG Wiesbaden, 2 Kls 11/46, published in Moritz and Noam, NS-Verbrechen vor Gericht, pp. 123-7. Even the Oberster Gerichtshof adopted this line (while simultaneously convicting Kristallnacht rioters under KRG 10). See: OGHSt 1, 284; and, OGHSt 2, 209.}

\footnote{See pages 53-4 above.}

\footnote{The various Oberlandesgerichte were the highest appellate courts in the American zone, which had no equivalent to the OGH.}

\footnote{This pattern—of natural law being invoked by the Landgericht and reinterpretivist legal positivism being employed by the Oberlandesgericht—was repeated three times. (See: the trial verdicts LG Frankfurt, 4 Kls 15/46, 4 Kls 1/48, and 4 Kls 7/47 and the corresponding appellate decisions OLG Frankfurt, Ss 92/47, Ss 206/47, and Ss 160/48 in conjunction with Ss 188/48, published in Rüter, Justiz und NS-Verbrechen, Vol. 1, pp. 135-86, 223-83, and 307-79 respectively.) The following discussion is based on OLG Frankfurt Ss 92/47 since it was there that the OLG developed its position in greatest detail. Ultimately, the Landgericht adopted the OLG’s reinterpretivist line. (See: LG Frankfurt, PKs 1/47, published in Rüter, Justiz und NS-Verbrechen, Vol. 2, pp. 187-212.)}

\footnote{OLG Frankfurt, Ss 92/47, published in Rüter, Justiz und NS-Verbrechen, Vol. 1, p. 173.}
said the court, invalid under written law. But, because the Weimar constitution had been so clearly overtaken by historical events, the court felt compelled to evaluate the validity of Hitler's decree under "the constitutional conditions of those years."\textsuperscript{122} Or so it claimed. In fact, however, the OLG brazenly ignored what it itself admitted to be historical reality. Thus, even though the court acknowledged that secret directives issued on Hitler's authority were an integral part of Nazi rule, it refused to recognize their legal standing.\textsuperscript{123} In the court's view, Hitler's 'euthanasia' decree

was not a law and did not have the effect of such. It was nothing more than a license issued by the actual possessor of power authorizing a particular circle of people to commit the crime of murder. It was a license which, because of the actual power of he who issued it, \textit{de facto} but not \textit{de jure} protected these people from criminal prosecution.\textsuperscript{124}

In other words, as far as the OLG was concerned, § 211 StGB had—as a matter of positive law—remained in full force throughout the Third Reich even though secret decrees mandating systematic homicide were a distinguishing characteristic of the Nazi regime.

The reinterpretivist tendency to substitute an idealized version of 'positive' law in the place of law as it had actually been practiced can also be seen in various verdicts arising from the summary executions that were carried out in the final days of the Third Reich.\textsuperscript{125} Typical in this regard is the verdict of the Landgericht Weiden in the case of Johann Josef Schwarz, a former judge who had presided over a summary trial in which two civilians were condemned to death (and subsequently executed) for having publicly urged a peaceful surrender to the approaching Allies.\textsuperscript{126} Schwarz’s victims had been charged with "undermining military potential", a crime punishable by death under the \textit{Kriegssonderstrafrichtsverordnung} (the "Decree on Extraordinary Criminal Regulations in Wartime" commonly referred to by the German abbreviation


\textsuperscript{123}The court argued that secret "laws" are never legally valid because, by virtue of their secrecy, they cannot gain the habituated recognition of the general populace. This argument assumes—without warrant and against historical experience—that popular recognition is a prerequisite of legal validity in all constitutional systems.

\textsuperscript{124}OLG Frankfurt, Ss 92/47, published in Rüter, \textit{Justiz und NS-Verbrechen}, Vol. 1, p. 175.

\textsuperscript{125}In addition to the verdict discussed immediately below, see for example: LG Heilbronn (KLs 49-51/47) and LG Stuttgart (III Ks 154/47), published in Rüter, \textit{Justiz und NS-Verbrechen}, Vol. 1, pp. 505-19 and 701-5 respectively.

Broadly written, loosely interpreted and harshly applied, the KSSVO was a notorious instrument of juridicized terror in the Third Reich. Thus, far from aberrant, the death sentences imposed by Schwarz conformed to the standard judicial practice of the time. Nonetheless, the Landgericht found that Schwarz had deliberately misapplied the KSSVO and was therefore guilty of having perverted justice under § 336 StGB. According to the Landgericht, the victims’ behavior had, at most, constituted a “less severe” instance of undermining military potential. In such cases, the court noted, the KSSVO allowed a judge to order imprisonment rather than execution. It was, the Landgericht asserted, “a violation of the [KSSVO] to have not made use of the possibility to impose a prison sentence.” The court fails to provide a single citation from the Third Reich to substantiate its claim that Schwarz was obligated under the provisions of the KSSVO to exercise his judicial discretion in a lenient manner. This is not surprising, for there was no empirical basis to the claim. What the Landgericht had done was substitute its own reading of the KSSVO for that which was dominant at the time. Rather than either exculpate Schwarz or invalidate the KSSVO on extra-positivist grounds, the court accepted the KSSVO’s validity but then proceeded to interpret it as if it were the enactment of a liberal state.

At the same time that the reinterpretivist disregard for actual legal practice paved the way for numerous convictions, the reinterpretivist willingness to accept the validity of all duly promulgated laws placed limits on which malefactions could be prosecuted successfully. Nowhere is this duality better illustrated than in cases arising from the deportation of Jews to the eastern gas chambers. Prior to 1950, as a result of jurisdictional restrictions imposed by the Allies, the actual genocide lay beyond the reach of German courts. But, because they had occurred on German soil, the preceding deportations were (arguably) punishable as deprivations of liberty under § 239 StGB. The systematic deportation of Jews from Germany began in 1941.

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127 Reichsgesetzblatt, Vol. I (1939): 1455. (The English rendering of the decree’s title is Deborah Lucas Schneider’s translation in Müller, Hitler’s Justice, p. 188.)
128 See: Müller, Hitler’s Justice, pp. 184-91; and, Bundesminister der Justiz, Im Namen des deutschen Volkes, pp. 211-3.
However, under the regulations issued by the Reichssicherheitshauptamt, the agency responsible for organizing the Holocaust, certain ‘privileged’ Jews (such as decorated WWI veterans and those married to non-Jews) were generally exempt from mandatory ‘resettlement’.¹³¹ ‘Privileged’ Jews could be deported, but only if they broke a law (for example, by having failed to wear the obligatory yellow star). In Hesse, the regional party chief was uninterested in such distinctions. He wanted his district rid of all Jews, ‘privileged’ or not, and directed the local Gestapo to act accordingly. After the war, several Gestapo agents were prosecuted for their role in these “illegal” deportations.

The resulting trials highlight both the prosecutorial limits and the interpretive contortions of reinterpretivism. The first thing to note is that the Gestapo agents were not tried for their participation in the earlier, mass deportations because those had been permitted under the governing regulations of the time. Thus, even though he had been directly involved in the deportation of over ten thousand other Frankfurt Jews, Gestapo officer Heinrich Baab was prosecuted in only eighty-eight cases, each of which involved a ‘privileged’ Jew.¹³² This was a reflection of the fact that, as far as reinterpretivism was concerned, any statute or regulation—no matter how despicable—was valid so long as it was enacted according to formally correct procedure. The implications of this doctrine were made clear in the trial of Georg Albert Dengler, a Gestapo officer indicted on twelve counts of deprivation of liberty for his role in the arrest and subsequent deportation of ‘privileged’ Jews from Darmstadt.¹³³ Dengler was acquitted in five cases, including that of Emmi Henkel, who died within two months of being sent to Auschwitz. According to the Landgericht Darmstadt, under the applicable Reichssicherheitshauptamt regulations, Henkel’s arrest and deportation were legal (and Dengler was therefore not culpable) because Henkel had neglected to sign her ration coupons with the name “Sara”, as all female Jews were required to do under Nazi law.¹³⁴

¹³¹ Moritz and Noam, NS-Verbrechen vor Gericht, p. 7.
¹³² Schwurgericht Frankfurt, 51 Ks 1/50, published in Moritz and Noam, NS-Verbrechen vor Gericht, pp. 239-56. The case was an anomaly in that Baab was charged not only with deprivation of liberty, but with murder (and assorted other crimes) as well. He was convicted on all charges. Moritz and Noam (p. 239) attribute the “unusually harsh” verdict to Baab’s extraordinary brutality.
¹³³ LG Darmstadt, 2 a Ks 1/49, published in Moritz and Noam, NS-Verbrechen vor Gericht, pp. 281-92.
¹³⁴ LG Darmstadt, 2 a Ks 1/49, published in Moritz and Noam, NS-Verbrechen vor Gericht, p. 287.
But, if the Landgericht’s verdict revealed the positivist dimension of reinterpretivism, it also underscored the tremendous discrepancy between the law as actually practiced in the Third Reich and the law as subsequently interpreted in the postwar period. Although acquitted on five of the counts he faced, Dengler was convicted on the remaining seven. This would not have happened during the Third Reich: Dengler would never have been charged, let alone convicted. The arrest and deportation of ‘privileged’ Jews who had not broken any law violated the letter of official regulations, but it was both consistent with overall Nazi policy and done with the consent of the Reichssicherheitshauptamt. Nevertheless, the Landgericht maintained that Dengler’s actions had been illegal even under the Nazis’ own conception of law. After noting that Dengler had acted on the instructions of his superiors, the court states:

In issuing such an arbitrary detention order, each of the defendant’s superiors violated positive law which—even after the February 28, 1933 Decree for the Protection of the People and the State had suspended basic rights of personal liberty—by no means permitted arbitrary arrests by the police. According to the interpretation of the former state leadership as expressed in the statutes governing the organization of the Gestapo and the corresponding decrees issued by the Minister of the Interior, restrictions on liberty were permissible only to the extent that they were necessary either for the protection of the person involved or for the prevention of a political danger to the security of the state. Since anything beyond that was also illegal under the Third Reich’s own conception of law, there can be no doubt that the arrests ... were illegal.

The Landgericht’s claim was, to say the least, fanciful. Applied by the Third Reich’s judiciary as it was intended by the Nazis, the Decree for the Protection of the People and the State had given the Gestapo carte blanche. Pretending otherwise enabled the Landgericht and other postwar courts to punish (certain) malefactors (for a narrowly circumscribed set of misdeeds) without recourse to either natural law or KRG 10, but such pretense was exactly that: pretense.

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135 That the Reichssicherheitshauptamt knew of the arrests and authorized the deportations is documented in: Schwurgericht Frankfurt, 51 Ks 1/50, published in Moritz and Noam, NS-Verbrechen vor Gericht, p. 242-4.
136 Moritz and Noam remark that “the reliance ... on the National Socialist conception of illegality is problematic, especially given the fact that by the end of the Nazi regime law had long since been perverted to nothing more than an instrument of power. Moreover, during the Nazi period, the distinction between legal and illegal acts became ever less important.” (Moritz and Noam, NS-Verbrechen vor Gericht, p. 8.)
137 LG Darmstadt, 2 a Ks 1/49, published in Moritz and Noam, NS-Verbrechen vor Gericht, p. 290.
138 Verordnung zum Schutze von Volk und Staat, Reichsgesetzblatt I (1933): 83. The decree, issued on the day after the Reichstag fire, was, in Muller’s words, “not only the foundation of National Socialist rule but also the end of Germany as a constitutional state.” See: Muller, Hitler’s Justice, pp. 29, 46-9; and, Helmut D. Fangmann, “Faschistische Polizeirechtslehren,” in Udo Reifner and Bernd-Rüdiger Sonnen, eds., Strafjustiz und Polizei im Dritten Reich (Frankfurt/M: Campus Verlag, 1984): 173-207.
KRG 10 Adé

The Federal Republic of Germany was established in 1949, four years after the defeat of the Third Reich. Though Allied occupation did not end immediately, the adoption of the Grundgesetz, the West German constitution, marked a major step toward the restoration of German sovereignty. Moreover, it cast doubt on whether German courts could—reluctantly or otherwise—continue to apply KRG 10. Article 103, Paragraph 2 of the Grundgesetz ('Art. 103 II GG') stipulated that "an act can be punished only if it was defined as a criminal offense under the law before the act was committed." Constitutional status had thus been bestowed upon the nulla poena principle.

Nonetheless, KRG 10 was still applied even after the founding of the Federal Republic. Within months of the Grundgesetz having taken effect, the Oberster Gerichtshof declared that Art. 103 II GG "did not preclude application of KRG 10."\textsuperscript{139} The OGH gave two reasons why this was so, one rooted in political theory and the other rooted in practical politics. On a philosophical level, the court reiterated its oft stated view that the retroactive punishment of Nazi maleficence was required by "the dictates of justice and legal certainty."\textsuperscript{140} Given nulla poena's anti-absolutist rationale, the court argued, KRG 10 violated neither nulla poena's underlying purpose nor, by (dubious) extension, the explicit injunction of Art. 103 II GG.\textsuperscript{141} On a pragmatic level, the OGH acknowledged the constitutional realities of continuing Allied occupation. KRG 10 was enacted by the Allies and therefore "immune from German interference."\textsuperscript{142} No German law, not even the Grundgesetz, said the court, could invalidate KRG 10 or preclude its application. Indeed, according to the OGH, German courts in the British Zone were not merely permitted to apply KRG 10, but were actually obligated to do so.

\textsuperscript{139}OGHSt 2, 231 (231). See also: OGHSt 2, 335; and, OGHSt 2, 361.
\textsuperscript{140}OGHSt 2, 231 (233).
\textsuperscript{141}OGHSt 2, 361 (364); and, OGHSt 2, 334 (335). In each of these decisions the OGH simply alluded to the argument that it had developed more fully in OGHSt 1, 1 and OGHSt 1, 297.
\textsuperscript{142}OGHSt 2, 361 (362).
whenever an alleged malefaction fell within its ambit. As a result, KRG 10 continued to be the basis for numerous convictions even after the founding of the Federal Republic.

Still, judicial resistance to KRG 10 grew steadily in the period following adoption of the Grundgesetz. Lower courts especially became increasingly hesitant to apply KRG 10. There was, as a consequence, an ever increasing number of acquittals. In the words of one contemporary observer, “the OGH had its hands full reversing acquittals and sending the cases back for retrial.” Those courts that did continue to convict individuals under KRG 10 frequently provided an alternative justification for the conviction based on a reinterpretivist application of the StGB. Even the Oberster Gerichtshof, which was replaced by the newly constituted Bundesgerichtshof (Federal Court of Appeals) in October 1950, began to shy away from the application of KRG 10 toward the end of its life. Article 103 had clearly stiffened the resolve of those opposed to extra-positivist prosecutions. One court, the Landgericht Göttingen, flatly refused to apply KRG 10 unless and until the Bundesgerichtshof ordered it to do so. The Bundesgerichtshof never did. Instead, it simply waited until the point became moot. Finally, in August 1951, the British and French occupation authorities revoked the license of German courts to use KRG 10. “As necessary as KRG 10 was,” said one German jurist at the time, “it was always a foreign body, which many greeted with a sigh and which few will be sad to see go.”

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143 OGHSt 2, 334 (335); and, OGHSt 2, 361 (362).
144 In 1950, West German courts (excluding those in the Saarland) convicted 589 people under KRG 10; in the first eight months of 1951, they convicted an additional 141 people. (Bundesjustizministerium, Die Verfolgung nationalsozialistischer Straftaten im Gebiet der Bundesrepublik Deutschland seit 1945 (Bonn: 1964); 40.) No complete data on KRG 10 convictions prior to 1950 are available. For partial data from the earlier period on a state-by-state basis, see: Laage, “Die Auseinandersetzung um den Begriff des gesetzlichen Unrechts nach 1945,” pp. 429-432.
145 In 1950, in West German courts (excluding those in Berlin and the Saarland), the conviction rate under KRG 10 was approximately 35%. By 1951, the rate had fallen to approximately 28%. These numbers were calculated on the basis of the data provide in: Bundesjustizministerium, “Bericht über die Verfolgung nationalsozialistischer Straftaten,” p. 16.
149 Landgericht Göttingen, 3 Ks 2/50, Monatsschrift für Deutsches Recht (1951): 312.
It was the end of an era. Allied occupation—through the dissolution of the Reichsgericht and the fragmentation of zonal administration—had encouraged considerable jurisprudential diversity. Not only had some courts been authorized to use KRG 10 while others had not, but even those judges operating within a common statutory framework could, in the absence of a national supreme court, adopt highly divergent views without there being a mechanism to resolve those differences. Under such conditions, natural law, empirical legal positivism and reinterpretivism could readily coexist. The creation of the Bundesgerichtshof meant that the (West) German judiciary was once again subject to the homogenizing force of a single, authoritative institution. Henceforth, the range of judicial voices would become ever more uniform. The critical conjuncture of the early postwar period was at a close.

Once they had lost the authority to apply KRG 10, those German courts that still wanted to punish Nazi perpetrators had either to invoke natural law or rely on a reinterpretivist rendering of the Strafgesetzbuch. Although the invocation of natural law did not end instantly, judicial proclivities and the constraints imposed by Art. 103 II GG insured that reinterpretivism would dominate subsequent trials.
Chapter 3: Repositivization in the Postwar Period

Overview

Despite *nulla poena*’s incorporation in the 1949 *Grundgesetz*, natural law tendencies did not vanish overnight. Various courts, including both the Federal Court of Appeals (the Bundesgerichtshof) and the Federal Constitutional Court (the Bundesverfassungsgericht), invoked natural law on several occasions. Indeed, natural law never disappeared entirely. Yet, as the postwar period wore on, reinterpreting legal positivism grew increasingly ascendant.

The number of people prosecuted in (West) German courts for Nazi crimes peaked in 1948. Prosecutions dropped sharply thereafter, and hovered near zero until 1958. After 1958, the number of trials gradually increased, though the number of people tried in a given year never again approached the immediate postwar levels.

By the time the second wave of Nazi trials commenced in the late-1950s, reinterpretingism had become the hegemonic doctrine. Though still good for a rhetorical flourish, natural law no longer carried the jurisprudential weight. In the major verdicts of the period, the punishment of Nazi perpetrators rested primarily on reinterpretingist argumentation.

Art. 103 II GG: An Absolute Ban on Retroactive Legislation

As mentioned in the previous chapter, the 1949 *Grundgesetz* banned retroactive legislation. Article 103, Paragraph 2 was quite clear on the matter: "An act can be punished only if it was defined as a criminal offense under the law before the act was committed." It made no exceptions. Yet, Art. 103 II GG alone does not explain why (reinterpreting) legal positivism came to dominate postwar West German jurisprudence. First of all, the inclusion of Article 103 in the *Grundgesetz* must itself be explained. Adoption of the clause in its absolute form is highly puzzling in light of Nazi maleficence and the subsequent trials (at which many perpetrators plausibly argued that their actions were justified by the law as it had stood at the time). The positivist rule that no one should be punished for an act that was not explicitly criminalized at the time it was committed is, under normal circumstances, a reasonable principle that tends to limit
capricious state action. However, in the aftermath of legalistic state repression, such as that practiced by the Nazis, its potential effect is to juridically validate morally indefensible behavior. The Grundgesetz could have taken this into account. It was possible, as was done in subsequent international accords, to qualify the nulla poena injunction by excluding human rights abuses and those who committed them from Article 103’s sphere of protection.¹

Indeed, at the time the Grundgesetz was drafted there was recent constitutional precedent for such an approach. The constitutions that had been adopted by the German states in the American zone of occupation between 1946 and 1948 suspended all constitutional guarantees, including nulla poena, in cases arising under the “Law for the Liberation from National Socialism and Militarism”.² Although principally concerned with denazification, and therefore primarily an instrument of administrative rather than criminal sanctions, the so-called ‘Liberation Law’ did in fact authorize the imprisonment of Nazi perpetrators for up to ten years.³ Thus, by specifically exempting the Liberation Law from all constitutional strictures, the state constitutions had, in theory, permitted the retroactive punishment of Nazi perpetrators—and only Nazi perpetrators—while simultaneously recognizing nulla poena as an otherwise generally applicable principle. This might have pointed the way to a constitutional circumscription of nulla poena at the federal level. Indeed, the Grundgesetz itself contained an analogous provision (Article 139).

But, like the corresponding clauses found in the various state constitutions of the American zone, Article 139 suspended constitutional guarantees only in those cases that arose under the Law for the Liberation from National Socialism and Militarism.⁴ Given the fact that the law was, whatever

its theoretical potential, of no practical importance for criminal prosecutions (and of ever diminishing relevance to administrative purges), Article 139 left *nulla poena* effectively untouched.\(^5\)

The *Grundgesetz*’s unqualified recognition of *nulla poena* is surprising not only given the strength of the natural law renaissance in the immediate postwar period, but also in light of the fact that elements of natural law can be said to have been positivized in the first twenty articles of the *Grundgesetz*.\(^6\) It is astonishing to note that not a single member of the *Parlamentarischer Rat*, the legislative body responsible for writing the *Grundgesetz*, proposed limiting the scope of *nulla poena* protection.\(^7\) Indeed, a review of the relevant protocols reveals that at no point during the drafting of the *Grundgesetz* was there any discussion whatsoever of the effect Art. 103 might have on the prosecution of Nazi perpetrators.\(^8\)

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\(^6\) Under Art. 79 III GG, none of first twenty articles (which codify basic rights) may ever be amended. That is to say, they are considered to be eternally valid principles that lie beyond the disposition of any future constitutional legislator. See the discussion in: Wolf Rosenbaum, *Naturrecht und positives Recht. Rechtssoziologische Untersuchungen zum Einfluss der Naturrechtslehre auf die Rechtspraxis in Deutschland seit Beginn des 19. Jahrhunderts*. (Neuwied: Luchterhand, 1972): 116-20.


Early Cases: Some Natural Law Claims Recognized, Despite Art. 103 II GG

Art. 103 II GG notwithstanding, West German courts invoked natural law on several notable occasions in the early 1950s. In one of its very first decisions, the Federal Constitutional Court (the Bundesverfassungsgericht or 'BVerfG') recognized "the existence of extra-positive law that is also binding on the constitutional legislator" and declared itself responsible for measuring the Grundgesetz against such extra-positive standards. In that decision and others, the court alluded to the Nazi experience and cited the Radbruch formula. According to the court, strict legal positivism was passé:

The unrestricted validity of the ... principle that the original constitutional legislator may arrange everything as he sees fit would ... represent a return to the mentality of a value free legal positivism, an attitude that has long since been overcome in both legal scholarship and legal practice. The National Socialist era made clear that even the legislator can ordain injustice. It made clear that the practical exercise of law cannot remain defenseless against such historically conceivable developments and that, in extreme cases, there must be the possibility of giving the principle of substantive justice higher priority than that of legal certainty.

Though striking, the significance of the BVerfG's natural law jurisprudence is—from the perspective of this dissertation—limited both by the fact that the enactments in question were ultimately upheld after examination on Radbruchian criteria and by the fact that the cases involved were not criminal cases (and therefore not subject to the restrictions of nulla poena).

Our attention is more properly focused on the jurisprudence of the Federal Court of Appeals (the Bundesgerichtshof or 'BGH'), the Federal Republic's highest criminal court. Natural law played a prominent role in several early BGH decisions in which Nazi perpetrators

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9 An overview of natural law jurisprudence in the early years of the Federal Republic can be gained from: Björn Schumacher, "Rezeption und Kritik der Radbruchschen Formel." (dissertation, Göttingen, 1985): 69-102; Rosenbaum, Naturrecht und positives Recht, pp. 124-30; Albrecht Langner, Der Gedanke des Naturrechts seit Weimar und in der Rechtssprechung der Bundesrepublik (Bonn: H. Bouvier, 1959): 134-143; and, Hans-Joachim Kerkau, "Der Naturrechtsgedanke in der Rechtssprechung des Bundesgerichtshofes in Strassachs." (dissertation, Kiel, 1965). The works of Schumacher and Rosenbaum are, by far, the most sophisticated of the lot. Schumacher is sympathetic to natural law tendencies; Rosenbaum is harshly critical. Langner's book is a useful resource that is long on quotation and short on analysis. Though poorly written and analytically pedestrian, Kerkau's dissertation provides helpful references to scholarly criticism.

10 Bundesverfassungsgericht, Entscheidungen des Bundesverfassungsgerichts, Vol. 1 (Tübingen: J. C. B. Mohr (Paul Siebeck)): 18. NB: Following German practice, references to BVerfG decisions that appear in the official collection of decisions will be cited as BVerfGE [volume number], [starting page number] ([specific page reference]). Using this convention, the location of the passage quoted here would, for example, be given as BVerfGE 1, 14 (18). The decision taken as a whole would be referred to as BVerfGE 1, 14.

11 BVerfGE 1, 14; BVerfGE 3, 58; BVerfGE 3, 225; and, BVerfGE 6, 132.

12 BVerfGE 2, 225 (232).
were accused of criminal offenses. Two of the cases involved former police officials who had participated in the mass deportation of Jews. Charged with being accessories to murder and the deprivation of liberty, the defendants argued that their actions had been legal under the 1933 Decree for the Protection of the People and the State and the derivative Reichssicherheitshauptamt regulations.\textsuperscript{13} They were acquitted at trial. The BGH, however, reversed the acquittals. In two virtually identical decisions, the BGH declared unequivocally that state sovereignty was limited by certain natural law principles and that positive enactments to the contrary were null and void.\textsuperscript{14}

The freedom of a state to determine what is and is not legal within its territory may be considerable, but it is not unlimited. Notwithstanding all the manifold differences apparent in the various national legal systems, there is in the consciousness of all civilized nations a certain core region of the law that, according to universal legal conviction, may be violated neither by statute nor by any other official measure.\textsuperscript{15}

This core region, said the BGH, comprises inviolable principles that “are legally binding even if individual provisions of municipal law appear to permit their transgression.”\textsuperscript{16} Though the BGH acknowledged the difficulty of placing precise boundaries on state sovereignty, the court had no doubt that the deportation regulations issued by Reichssicherheitshauptamt were well beyond the pale of what was permissible. “Such directives,” the court stated, “must be denied all exculpatory power.”\textsuperscript{17}

The two deportation decisions were not the only instances in which the BGH invoked natural law as grounds for convicting Nazi perpetrators. In another pair of early rulings, each of which involved participants in summary justice, the BGH held that there are certain minimal procedural requirements in capital cases which no state may disregard.\textsuperscript{18} Any death sentence imposed either without a trial or as the result of a trial which contravened those minimal standards

\textsuperscript{13}Verordnung zum Schutze von Volk und Staat, Reichsgesetzblatt I (1933): 83.
\textsuperscript{14}BGHSt 2, 234; and, BGHSt 3, 357. ‘BGHSt’ refers to Entscheidungen des Bundesgerichtshofs in Strafsachen, the official collection of BGH decisions. The citational convention is mutatis mutandis identical to that described in footnote 10 for Entscheidungen des Bundesverfassungsgerichts.
\textsuperscript{15}BGHSt 2, 234 (237).
\textsuperscript{16}BGHSt 2, 234 (237).
\textsuperscript{17}BGHSt 3, 357 (363). The BGH invoked Radbruch’s ‘disavowal’ thesis, according to which an enactment is invalid if the legislator, when legislating, either consciously renounced individual equality or did not even attempt to realize justice.
\textsuperscript{18}BGHSt 2, 173; and, BGHSt 2, 333.
was, said the court, illegal. According to the BGH, no one may be executed without first having been given a trial in which, among other things, that person’s guilt was established by an independent judge who made a good faith inquiry into the facts of the case. Requiring that an execution be preceded by a meaningful trial was, said the court, a fundamental rule “which allowed no exceptions and which was valid independent of its explicit recognition in either international agreements or municipal statutes.”

Whether the executions in question were, as the defendants maintained, permissible under positive law as it stood at the time was, in the BGH’s view, immaterial because those who ruled the National Socialist state promulgated numerous regulations and decrees which claimed to set law and to correspond to law but which nonetheless lacked all legal character because they violated those legal principles that are valid regardless of recognition by the state and that are stronger than any contrary governmental act.

Having posited the existence of immutable procedural norms in capital cases, the court proceeded to find the defendants guilty (of, respectively, manslaughter and being an accessory to murder).

Despite the obvious nulla poena ramifications of these decisions, the BGH offered no explanation of how they could be reconciled with Art. 103 II GG. In light of the BGH’s silence, one can only surmise what, if anything, the court was thinking. Two possibilities suggest themselves: The first rests directly on the supposed trans-historical validity of natural law. On this imputed view, the punishment of Nazi perpetrators was permissible, nulla poena notwithstanding, because the perpetrators’ actions were illegal all along under natural law itself. The second, more likely variant relies on the fact that the Strafgesetzbuch, under which deportations and summary executions were prima facie illegal, had retained nominal force throughout the Nazi era. The BGH clearly believed that those Nazi enactments which seemingly legalized the defendants’ actions were in fact—qua violations of natural law—invalid from the start.

On this assumption, Art. 103 II GG did not preclude punishment because the defendants’ actions had remained illegal under positive law as codified in the StGB. Either way, the court’s implicit

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19 BGHSt 2, 333 (334).
20 BGHSt 2, 173 (177).
assumption that Art. 103 II GG was irrelevant to the cases at hand begged the central question that haunted all postwar prosecutions. As one observer notes, the BGH’s failure to address the *nulla poena* issue means that “the moral conflict which routinely accompanies the juridical confrontation with Nazi injustice remains obscured.”

The BGH’s obvious reluctance to directly confront Art. 103 II GG is telling. It suggests that the court was uncomfortable basing its decisions on natural law grounds. This inference is strengthened by close examination of those decisions in which the court invokes natural law. Though the two deportation opinions are thoroughly extra-positivist, in the two decisions concerning summary justice that culminated in executions, the BGH supplements natural law with reinterpreтировist reasoning. Thus, alongside the Radbruch formula and the postulate of inviolable procedural norms, there is a parallel argument that turns on the jurisdictional provisions of the 1938 *Kriegsressonstrafrechtsverordnung* and the extent of Hitler’s powers under a particular Reichstag proclamation. This ambivalence in argumentation is indicative of the repositivization that would occur in the postwar period.

*Reinterpretivism Emergent*

The structure of reinterpretivist logic, which was to dominate subsequent jurisprudence, became clearly visible in a series of BGH decisions concerning Gestapo informants. The decisions stand in sharp contrast to earlier decisions involving Gestapo informants. In the immediate postwar period, those Gestapo informants who were punished were punished on unambiguously extra-positivist grounds. Informants prosecuted in the British zone of occupation

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21 Schumacher, “Rezeption und Kritik der Radbruchschen Formel,” p. 100. Schumacher goes on to remark: “As much as the morally inspired decisions of the BGH are to be commended in their results, they at times fail to display the necessary balance and tightness of reasoning.”

22 BGHSt 2, 173 (177-8). The duality of the court’s argumentation has been noted by others. See: Frank Scholderer, Rechtsbeugung im demokratischen Rechtsstaat: Zur Rekonstruktion des § 336 StGB für die Gegenwart (Frankfurt/M: Nomos, 1993): 470; and, Günter Spedel, “Justiz und NS-Verbrechen: Die Standgerichtsverfahren gegen Admiral Canaris u.a. in der Nachkriegsrechtsprechung,” in Günter Spedel, ed., Rechtsbeugung durch Rechtsprechung (Berlin: de Gruyter, 1984): 97.

23 Indeed, when the court revisited the case that had been at issue in BGHSt 2, 173 just a few years later, the repositivization was complete. Referring to the later decision [= BGH I SR 50/56], Spedel remarks: “There is ... no longer any discussion of extra-positive norms that could be violated. The weight of the verdict’s reasoning is instead shifted to the more than positivist question” of whether the summary trial fulfilled certain procedural minutiae. See: Günter Spedel, “Rechtspositivismus und Strafjustiz nach 1945,” Juristenzeitung (1987): 584.
were charged with crimes against humanity under KRG 10.\textsuperscript{24} Although those so accused were often acquitted at trial for (a supposed) lack of evidence, appellate courts routinely found that denunciation was indeed an 'atrocities' retroactively criminalized by KRG 10.\textsuperscript{25} In the American zone, where German courts lacked authorization to apply KRG 10, informants were prosecuted under the \textit{Strafgesetzbuch}. Charged with either deprivation of liberty or being an accessory to murder (depending on their victim's fate), the informants argued that they bore no criminal liability for the sentences imposed by Nazi courts upon their victims because those they denounced had in fact broken laws that were valid at the time. This defense was rejected on Radbruchian grounds: the laws under which the victims had been sentenced were deemed sufficiently unjust as to have been null and void (and thus incapable of exculpating the informants' behavior).\textsuperscript{26}

By 1952, however, overt extra-positivism was waning rapidly. KRG 10 was no longer applicable, and invocations of natural law were increasingly rare. The deportation decisions discussed above were anomalous rather than indicative, mere vestiges of a natural law renaissance that had been eclipsed by reinterpretable legal positivism. The emergence of reinterpretable positivism as the dominant judicial paradigm was confirmed by three informant-related decisions handed down by the BGH between 1952 and 1956.\textsuperscript{27} The cases concerned Gestapo informants whose victims had been sentenced to death by Nazi courts. Each informant was prosecuted under the \textit{Strafgesetzbuch}, charged (depending on the facts of case) with either attempted murder or being an accessory to murder.\textsuperscript{28} In each instance the BGH found that the informant in question was—in theory at least—legally culpable, but neither because the act of denunciation itself was inherently inhumane nor because the Nazi law under which the informant's

\textsuperscript{27}BGHSt 3, 110; BGHSt 4, 66; and, BGHSt 9, 302.
\textsuperscript{28}In two of the cases (BGHSt 3, 110 and BGHSt 9, 302), the informant was also charged with either the deprivation of liberty or being an accessory to the deprivation of liberty.
victim had been sentenced constituted a gross violation of human rights. Rather, the BGH held that the informants were criminally liable because the Nazi courts that had sentenced their victims had misapplied the Nazis' own law.

To reach this conclusion, the BGH explicitly rejected the authoritative interpretation of Nazi law that had been articulated at the time by the Reichsgericht (the Imperial Court) and its military counterpart, the Reichskriegsgericht (the Imperial Court Martial). In place of the official, contemporaneous interpretation of Nazi law, the BGH substituted its own, narrower interpretation. Two of the informants' victims had been sentenced to death under the Kriegssonderstrafrechtsverordnung (‘KSSVO’). The KSSVO, whose legal validity was presupposed by the BGH, made it a crime to “publicly undermine or paralyze the will of the German ... nation for martial self-assertion.” As the BGH itself acknowledged, the highest courts of the Third Reich had routinely interpreted the term ‘publicly’ in a very loose manner. According to both the Reichsgericht and the Reichskriegsgericht, an utterance—even one made behind closed doors—was ‘public’ and therefore punishable under the KSSVO whenever the person making it had reason to assume that the person to whom it was made would repeat it to a third party. Well established though it may have been, this expansive conception of ‘public’, said the BGH, exceeded the bounds of “defensible statutory interpretation.” According to BGH, an utterance was properly considered ‘public’ only if the person making it not only had reason to assume, but in fact did assume that the person to whom it was made would repeat it to a third party. Since the victims of denunciation had been convicted by courts employing the

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29 'In theory at least' because the BGH decides matters of law, not fact. Thus, even if the BGH overturns a lower court acquittal (as it did in BGHSt 3, 110), the defendant is not automatically convicted. Instead, the case is sent back for retrial. Although the lower court is then bound by the BGH’s doctrinal holding, it might still find the defendant innocent on factual grounds. In BGHSt 4, 66, the informant had been convicted under KRG 10. Since KRG 10 was no longer applicable by the time the case reached the BGH, the court remanded the case for retrial under the StGB. In BGHSt 9, 302, the BGH upheld a lower court conviction.

30 BGHSt 3, 110; and, BGHSt 4, 66. In the third case (BGHSt 9, 302), the victim had been sentenced under § 91b StGB. Enacted by the Nazis in 1934, § 91b StGB penalized ‘Feindbegünstigung’ (giving aid to the enemy).


32 BGHSt 3, 110 (117); BGHSt 4, 66 (69). BGHSt 9, 302 turned on the Nazis’ habitually loose interpretation of the term ‘Feindbegünstigung’. For a sense of the uses to which § 91b StGB was put, see (in addition to BGHSt 9, 302): Bundesminister der Justiz, ed., Im Namen des deutschen Volkes. Justiz und Nationalsozialismus. (Cologne: Verlag Wissenschaft und Politik, 1989): 214.

33 BGHSt 3, 110 (118).
impermissibly broad conception of ‘public’, those convictions were, in the eyes of the BGH, “an illegal and abusive application” of the KSSVO. In other words, according to the BGH, the Third Reich had misinterpreted its own law.

Indeed, the BGH maintained that the application of the KSSVO had—on the law’s own terms—been faulty in another regard as well. The KSSVO permitted a range of penalties, from imprisonment to death. This fact, the BGH held, had made it incumbent upon Nazi judges to impose a sentence that was proportionate to the severity of the defendant’s infraction.

If a penal statute permits such a broad scope of penalties, as did § 5 KSSVO, and thus itself acknowledges that its conditions may be fulfilled by actions of very different degrees of guilt and wrongdoing, it simultaneously establishes the sentencing principle that the maximum penalty permitted may be imposed only in those instances in which the degree of wrongdoing ... is especially high and the guilt or dangerousness of the perpetrator is especially great. According to the BGH, even if the individuals who had been denounced for making disparaging remarks about the Nazi leadership had actually violated the KSSVO properly understood, their statements constituted (at most) ‘less severe’ instances of undermining German military potential. Thus, under the principle of proportionate sentencing that the BGH had derived from the KSSVO, the denounced individuals should not have been sentenced to death. The fact that they were, the BGH stated, was not merely erroneous, but illegal.

By redefining what constituted the proper application of Nazi law, the BGH made it possible to punish Gestapo informants under the Strafgesetzbuch without recourse to overt extra-positivism. In general, someone is considered an accomplice to a crime under the Strafgesetzbuch if they willfully perform an act that enables another person to commit a crime. Because their act of betrayal had delivered an individual into the hands of a Nazi court that subsequently imposed an ‘illegal’ sentence upon that person, Gestapo informants could be tried—again, depending on the victim’s fate—as accomplices to murder, attempted murder or the deprivation of liberty. Indeed, in particularly egregious cases, the informant could be charged

34BGHSt 3, 110 (118).
35BGHSt 3, 110 (118-9). A similar statement appears in BGHSt 4, 66 (69).
36The BGH held that an informant bore legal responsibility for the victim’s fate if the informant either knew or could have known that the Nazi court might return “a judgment that conflicted with the true legal situation.” The BGH asserted that under the prevailing circumstances possession of such knowledge “did not require the insight of a legal expert.” (BGHSt 3, 110 (110-1, 128)) The BGH’s position is noteworthy in two regards: First, the claim that the average person would better understand the proper
as a primary perpetrator rather than mere accessory. Thus, despite having acknowledged that
denunciation was not *per se* illegal and that individuals generally had the right to report suspected
crimes to the appropriate authorities, the BGH concluded that during the Third Reich individuals
were as a matter of positive law legally obligated to refrain from notifying the Gestapo of
unlawful anti-Nazi utterances.

The BGH’s informant jurisprudence exhibits the characteristic duality of reinterpretive
legal positivism: on the one hand, it is effectively extra-positive; on the other hand, it restricts
the scope of possible prosecutions. When considering the legal liability of informants, the BGH
carefully avoided natural law. Thus, despite having ample opportunity (and, arguably, ample
cause) for doing so, the BGH chose not to invalidate the Nazi laws under which the informants’
victims had been sentenced. There was, said the court, no need to question the validity of the
laws because the sentences imposed upon the informants’ victims had been illegal even on the
assumption that those laws were valid. One might think that the court was merely making its
decision on the narrowest grounds necessary to decide the cases at hand and not definitively
forswearing natural law. But, three things argue against this supposition. First, the strict
avoidance of natural law was a clear departure from the court’s jurisprudence in the summary
justice cases discussed above. Second, the court never again invoked natural law as the sole
basis for convicting Nazi malefactors. Finally, the court stated explicitly that it accepted the
legality of sentences imposed under § 5 KSSVO—and thus, implicitly, recognized the validity of
the law itself—if those sentences met certain criteria. It is precisely this willingness to accept

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37 This was the case in BGHSt 3, 110. The informant, who had grown tired of her husband, reported his
anti-Nazi utterances to the Gestapo in order to be rid of him.
38 BGHSt 3, 110 (121-2).
39 BGHSt 3, 110 (116); and, BGHSt 9, 302 (307).
40 In those cases the court, by its own reasoning, could have convicted the defendants on reinterpretivist
grounds alone. But, it instead chose to invoke natural law as the primary basis for conviction. See
pages 75-6 above.
41 The court also accepted the fundamental validity of § 91b StGB. See: BGHSt 9, 302 (305).
the fundamental validity of Nazi law that placed limits on the reinterpretivist prosecution of Nazi malefactors. According to the BGH, if an individual who made disparaging remarks in private about the Nazi leadership actually assumed (and not only had reason to assume) that those remarks would be repeated to a third party, then the Volksgerichtshof could properly conclude that the remarks were 'public' and therefore illegal under § 5 KSSVO.42 So long as the resulting sentence was 'proportionate', that sentence was permissible and neither the informant nor the judges of the Volksgerichtshof were criminally culpable.

The BGH's informant jurisprudence is disingenuous: it ignores empirical reality and thus effectively imposes extra-positive standards of behavior while denying its own retroactive nature. When defining the 'proper' application of Nazi law, the BGH disregards an essential empirical truth, namely the fact that the Nazis conceived of law not as an autonomous system of formal rules, but rather as a substantive instrument of political domination.43 Thus, there is more than a modicum of absurdity when the BGH proclaims that a death sentence which had been imposed by the Volksgerichtshof, the Nazis' highest political court, was "illegal because it sought ... to intimidate political dissidents with excessive severity and thereby secure the domination of the political leadership of the time."44 Of course the Volksgerichtshof applied the KSSVO in a manner designed to intimidate political opponents. That was the purpose of the Volksgerichtshof and the KSSVO.45 From the perspective of the Third Reich, the silencing of regime opponents was not "an abuse" of criminal law, as the BGH maintained, but its very fulfillment.46 When the BGH states that the death sentence imposed upon an individual who

42BGHSt 4, 66 (68-9).
44BGHSt 4, 66 (70).
45The Volksgerichtshof was established by the Nazis precisely because they considered the Reichsgericht, the traditional supreme court, ideologically suspect and insufficiently draconian. On the political purposes of the Volksgerichtshof and the KSSVO, see: Müller, Hitler's Justice, pp. 140-52, 184-91; and, Bundesminister der Justiz, Im Namen des deutschen Volkes, pp. 152-3, 211-3.
46BGHSt 9, 302 (307). In the words of Otto Thierack, the minister of justice in 1942 and previously the chief justice of the Volksgerichtshof, "The judge is the direct assistant of the state leadership." [Quoted in: Bernd-Rüdiger Sonnen, Strafrechtsbalken—Unrechtsurteile als Regel oder Ausnahme?," in Udo Reinier and Bernd-Rüdiger Sonnen, eds., Strafjustiz und Polizei im Dritten Reich (Frankfurt/M: Campus Verlag, 1984): 57.] On the instrumentalization of justice in the Third Reich, see: Ralph Angermund,
dared deprecate the Nazi leadership was "no longer an application of law but tyranny," the BGH would have one believe that the two were mutually exclusive, that positive law could not be tyrannical.\textsuperscript{47} But clearly it could. In its desperate effort to avoid overt extra-positivism while simultaneously distancing itself from the judicial practice of the Third Reich, the BGH is forced to pretend that some sort of pure, idealized positive law continued to exist independent of the Nazi regime.\textsuperscript{48} That is what it means when the BGH speaks of verdicts that were in conflict with the "true legal situation."\textsuperscript{49} It is precisely this sort of reinterpretivist reasoning, in which the BGH substitutes its own, ahistorical interpretation of Nazi law in place of actual Nazi legal practice, that would come to typify later trials.

\textit{Prosecutorial Activity after 1951}

Regardless of which legal theory the judiciary espouses, if no one is indicted, no one can be convicted. Thus, the number of people punished by the courts depends not only on jurisprudence, but on prosecutorial activity as well. Though itself partly a function of jurisprudence (since prosecutors tend not to bring cases that they know they will lose), prosecutorial activity nonetheless possesses independent explanatory power when accounting for the number of people ultimately punished.

Prosecutorial activity in the postwar period was anything but constant. Relatively vigorous in the immediate postwar period, it abated sharply after the establishment of the Federal Republic, before increasing once again at the very end of the 1950s.\textsuperscript{50} In 1950, West

\begin{itemize}
  \item \textsuperscript{47}BGHSt 3, 110 (120).
  \item \textsuperscript{48}For a similar critique, see: Michael Kim, \textit{Verfassungsumsturz oder Rechtskontinuität? Die Stellung der Jurisprudenz nach 1945 zum Dritten Reich, insbesondere die Konflikte um die Kontinuität der Beamtenrechte nach Art. 131 GG} (Berlin: Duncker & Humbolt, 1972): 15, 71.
  \item \textsuperscript{49}BGHSt 3, 110 (110-1); and, BGHSt 4, 66 (69).
  \item \textsuperscript{50}Prosecutorial activity in (what became) East Germany displays a slightly different temporal pattern. As in the West, convictions reached their zenith in 1948 (when 4,549 people were convicted) and then dropped sharply the next year. Unlike in the West, however, the number of convictions in the East increased dramatically again in 1950 (when 4,092 people were convicted), before falling to zero in 1956. Between 1957 and 1964, the last year for which there is published data, the annual number of convictions never again exceeded 10. The 1950 upsurge is the attributable to the fact that after the establishment of the German Democratic Republic (in September 1949) the Soviet occupation authorities closed their internment camps and transferred control over those detained to the new East German government with instructions that they be prosecuted. In the summary trials that resulted, each of the several thousand defendants was convicted. Those trials, which became known as the 'Waldheimer Prozesse', were sharply condemned in the West for gross procedural improprieties. Though many of those convicted were undoubtedly guilty of having participated in Nazi atrocities, some were presumably
\end{itemize}
German prosecutors opened 2,495 criminal investigations into alleged Nazi malice in 1957, they opened only 238 such investigations. Not coincidentally, the number of convictions dropped precipitously as well: whereas 809 people were convicted in 1950, only 43 were convicted in 1957. The number of Nazi perpetrators prosecuted in West German courts peaked in 1948, the year prior to the creation of the F.R.G., when 1,819 people were convicted for their role in Nazi malice. The annual number of convictions fell precipitously thereafter.

In 1955, at the nadir of prosecutorial activity, only 21 people were convicted of Nazi malfeasance. Prosecutorial activity intensified after 1958. The annual number of convictions rose once more, but the numbers attained never again approached the levels recorded in the late 1940s. In fact, only 29 people were convicted on average each year during the 1960s. This number, however, is not directly comparable to those from the preceding periods because by 1960 the statute of limitations had expired on all crimes but murder. When one considers only those people found guilty of homicide, thus controlling for the effect had by the statute of limitations, the periodized...
prosecutorial pattern emerges quite clearly: between 1946 and 1951, an average of 16.5 people were convicted of homicide annually; between 1952 and 1959, the average number of annual homicide convictions dropped to 6.1; between 1960 and 1965, the rate jumped to 26.5 convictions per year.\textsuperscript{54}

What accounts for this pattern of diminishing and then increasing prosecutorial activity? Part of the answer lies, at least proximately, within the law itself. There is, for example, no doubt that procedural factors—such as the jurisdictional rules within German federalism—played a role in both the decline and subsequent reinvigoration of prosecutorial activity. Much of the answer, however, lies outside the law. The trials of Nazi malefactors were from the very beginning politically charged. Though never a mere epiphenomenon, the intensity of prosecutorial activity did tend to reflect the (often hostile) political environment of the day.

Soon after the founding of the Federal Republic, Allied restrictions on West German jurisdiction vis-à-vis Nazi atrocities were lifted. Thus, as of January 1, 1950, German courts could in theory prosecute malefactions committed in the East against non-Germans.\textsuperscript{55} But, the expansion of German jurisdiction had no immediate effect on prosecutorial activity. On the contrary: the number of prosecutions fell dramatically in the early 1950s. The decline is in part attributable to legal impediments, both procedural and substantive. As already mentioned, the Allies revoked the Germans’ authorization to apply KRG 10 in August 1951. The consequent inability to rely on KRG 10’s broadly worded and explicitly retroactive provisions limited what German prosecutors could successfully pursue. Nonetheless, given the availability of ad hoc natural law and—more significantly—reinterpretivist doctrine as alternative bases for prosecution, the loss of KRG 10 did not eliminate all prosecutorial possibilities. Therefore, it alone cannot account for the sudden drop in prosecutions. Procedural hindrances were partially responsible too.

\textsuperscript{54} Data derived from that found in: Oppitz, \textit{Strafverfahren und Strafvollstreckung bei NS-Gewaltverbrechen}, p. 30. I have chosen the periods that I have because: a) 1951 was the last year in which KRG 10 could be applied by the German courts; and, b) 1960 was, given investigatory lag time, the first year that cases initiated by the \textit{Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung von nationalsozialistischen Gewaltverbrechen} (a national prosecutorial office whose 1958 establishment is discussed below) came to court.

The potential significance of allowing German courts to try all Nazi atrocities regardless of where and against whom they were committed was rendered largely meaningless by the rules of prosecutorial jurisdiction within West Germany's federal system. Under the rules, a prosecutor can bring charges in a particular case only if the crime is committed, the perpetrator lives or the perpetrator is captured within the prosecutor's territorial district.\footnote{See: §§ 7-9 Strafprozeßordnung (= Paragraphs 7-9 of the Code of Criminal Procedure).} Since all of the acts committed in the East lay beyond the borders of the F.R.G., no West German prosecutor had geographic jurisdiction over the acts themselves. Thus, the only way charges could be brought against those who had perpetrated genocide in the East was if local prosecutors pursued those individual perpetrators who happened to reside in (or pass through) their respective jurisdictions. The pursuit of individual perpetrators, however, required that their deeds, identity and whereabouts be known. Local prosecutors rarely possessed such knowledge. Often it was not known who exactly had participated in a particular facet of the Holocaust, and even when the name of a specific perpetrator was known, the massive dislocation that accompanied the collapse of the Third Reich (and the tendency of some perpetrators to adopt aliases) meant that the perpetrator’s whereabouts were frequently not known. Unless a private criminal complaint was filed against a specific individual present in his district, the local prosecutor had no reason to believe that any particular perpetrator came under his jurisdiction. Without jurisdiction over the acts themselves and lacking concrete suspicions against any particular individual, local prosecutors were not required and generally not inclined to investigate instances of Nazi malefaction that had occurred in the East.\footnote{Rückerl, NS-Verbrechen vor Gericht, pp. 127-8.} There was, in a sense, a collective action problem: though the West German courts taken as a whole had regained jurisdiction over Nazi maleficence in the East, no one prosecutor had an institutional incentive to launch the costly yet necessary investigations.

As a consequence, the majority of trials held prior to 1960 were the result of private criminal complaints rather than official prosecutorial initiative.\footnote{Rückerl, “NS-Prozesse: Warum erst heutzutage?,” p. 19.} Of course, since the overwhelming majority of them had been killed, those who had suffered the worst Nazi atrocities (i.e. those
perpetrated in the eastern extermination camps) were generally unable to file complaints. The complaints that were filed tended to focus therefore on lesser, non-lethal forms of maleficence.59 Moreover, the number of private criminal complaints fell markedly after 1949.60 Many of the complaints were filed by foreigners who had been deported to Germany during the war as either slave laborers or political prisoners. By 1950, most such victims had either returned home or emigrated overseas. As their ranks dwindled, the number of complaints lodged with German prosecutors diminished. Some victims, particularly those who were themselves Germans, chose to remain in Germany, but they too filed ever fewer complaints. They were, one might suppose, increasingly preoccupied with rebuilding their shattered lives. In any case, as the number of private criminal complaints fell, so too did the number of prosecutions.

At the same time that the number of private criminal complaints was dropping, the statute of limitations began to expire on various crimes under the Strafgesetzbuch. On May 8, 1950, five years after Germany's capitulation, the statute of limitations expired on all crimes for which the maximum term was five years or less.61 Five years later, the statute of limitations

59Some complaints, those charging 'euthanasia' for example, did involve acts resulting in death. These, I presume, were filed by surviving relatives. Most private criminal complaints, however, concerned acts of denunciation or acts of violence that occurred either shortly after the 1933 seizure of power or during the 1938 Kristallnacht pogrom. See: Fritz Bauer, "Im Namen des Volkes. Die Strafrechtliche Bewältigung der Vergangenheit," in Helmut Hammerschmidt, ed., Zwanzig Jahre danach. Eine deutsche Bianz 1945-1965. Achtundreißig Beiträge deutscher Wissenschaftler, Schriftsteller und Publizisten (Munich: Desch, 1965): 304.

60Bundesjustizministerium, Die Verfolgung nationalsozialistischer Straftaten im Gebiet der Bundesrepublik Deutschland seit 1945 (Bonn: 1964): 49; and, Rückerl, NS-Verbrechen vor Gericht, p. 127.

61Rückerl, NS-Verbrechen vor Gericht, p. 127. Under German law [§ 69 StGB a.F./§ 78 StGB n.F.], the length of the statute of limitations for a given crime depends on the penalty that may be maximally levied for that crime. The statute of limitations on crimes that carry a maximum penalty of between one and five years in prison is, for example, five years. Thus, the statute of limitations for a minor infraction committed during the course of the 1938 Kristallnacht pogrom would normally have expired in 1943 (i.e. even before the collapse of the Third Reich). If, however, there is a legal impediment to prosecution, the statute of limitations is considered to be suspended for the duration of that impediment. If, for instance, the legislature enacts an amnesty that is subsequently repealed, the statute of limitations is extended by the length of time that the amnesty was in effect. According to postwar statute and postwar jurisprudence, the statute of limitations for all acts of Nazi maleficence was deemed to have been suspended from January 30, 1933, the day Hitler took power, until May 8, 1945, the day on which the Third Reich collapsed. The suspension of the statute of limitations was initially based on a set of identical laws (the so-called Ahndungsgesetze) passed under Allied direction throughout the western zones of occupation. Subsequently, however, the suspension came to rest upon the Bundesgerichtshof's declaration that there had been a legal impediment to the prosecution of Nazi malefaction during the Third Reich. According to the BGH, the legal impediment resulted from the fact that Hitler's will—which obviously inhibited the prosecution of Nazi malefaction—was considered law in the Third Reich. This (empirically correct) finding permitted the prosecution of Nazi perpetrators despite the statute of limitations. But, it also flagrantly violated a necessary assumption of postwar reinterpretivism, viz. the presumption that Hitler's will was not law and therefore lacked exculpatory power. The court never addressed, let alone resolved, this fundamental contradiction. See: BGHSt 2, 251; BGH, 1 StR 299/62, Neue Juristische Wochenschrift (1962): 2308; and, the excellent discussion in: Gerald Grünwald, "Zur Frage des Ruhens der Verjährung von DDR-Staftaten," Strafverteidiger (1992): 333-8.
expired on all crimes for which the maximum jail term was ten years or less. Thus, by May 8, 1955, the only charges that could be brought (if no prosecutorial investigation had been initiated against a named defendant prior to that date) were those involving manslaughter and murder.\textsuperscript{62} As the range of actionable misconduct narrowed, the extent of prosecutorial activity diminished.

Allied occupation of West Germany ended in 1955 with the adoption of the so-called ‘Überleitungsvertrag’ (or ‘Transition Treaty’).\textsuperscript{63} Article 3 Paragraph 3(b) of the Überleitungsvertrag stipulated that West German courts enjoyed full jurisdiction except in those instances in which the investigation of the alleged criminal act had already been brought to a definitive conclusion by a prosecutorial agency of one of the occupying powers.\textsuperscript{64} Though this provision prevented German courts from hearing the appeals of Nazi perpetrators who had been convicted by Allied military tribunals, it also prevented German prosecutors from reopening investigations that had been closed without indictment. Thus, even if previously unknown incriminating evidence emerged, German prosecutors were unable to bring charges against anyone who had been investigated by the Allied authorities. Though its full impact became apparent only later, during the second wave of trials, it is clear that the Überleitungsvertrag imposed constraints on what German prosecutors could do.\textsuperscript{65}

Each of the legal factors mentioned thus far—i.e. the effective revocation of KRG 10, the distribution of jurisdictional authority within the federal system, the expiration of the statute of limitations, and the jurisdictional provisions of the Überleitungsvertrag—constrained prosecutorial activity in the abstract. That is to say, had a conscientious prosecutor sought to indict as many perpetrators as possible, that prosecutor would have been limited by the factors discussed above. Whether these theoretical constraints ever impinged upon actual prosecutorial activity is, however, open to question. A case can be made that they did in fact, to some degree at least,

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\textsuperscript{62} Rückerl, NS-Verbrechen vor Gericht, p. 138.
\textsuperscript{65} Rückerl, NS-Verbrechen vor Gericht, pp. 138-9.
\end{flushleft}
stifle prosecutions. There is no doubt that the rapid drop in prosecutions in the early 1950s coincided with significant changes in the relevant legal parameters. KRG 10 was no longer available to German prosecutors, and the statute of limitations had begun to expire for certain crimes under the Strafgesetzbuch. Furthermore, although the reduction in private criminal complaints was not a legal factor per se, its effect was amplified by the rules governing prosecutorial jurisdiction. Though correlation does not equal causation, it would be inappropriate to dismiss legal factors as altogether irrelevant. It would, however, also be wrong to exaggerate the importance of such factors when explaining the changing level of prosecutorial activity. According to Fritz Bauer, for many years prosecutor general in Hesse and arguably the most energetic of postwar prosecutors, procedural difficulties were little more than pretext for prosecutorial indolence. There is considerable evidence to support Bauer's assertion. Thus, for example, even though some of the potential suspects were known by name and there were no procedural barriers to prosecution once German jurisdiction had been extended (in January 1950) to atrocities committed in the East, Berlin prosecutors failed to initiate a criminal investigation of the Reichssicherheitshauptamt until 1963.

Whatever the exact contribution of purely legal factors to the sharp decline in prosecutorial activity after 1949, the primary explanation clearly rests elsewhere. "The deficiencies of the prosecutorial efforts," says Fritz Bauer, cannot be understood without considering the politics of the years that followed the collapse of the tyrannical state. The considerable passivity of the criminal justice system reflects the domestic and foreign policies of the Federal Republic.

66See for example: Christa Hoffmann, Stunden Null? Vergangenheitsbewältigung in Deutschland 1945/1989 (Bonn: Bouvier Verlag, 1992): 113-7; and, Rückerl, NS-Verbrechen vor Gericht, pp. 123-39. Neither Hoffmann nor Rückerl (who was the chief prosecutor responsible for the pursuit of Nazi perpetrators from 1966 to 1986) claims that such factors alone were responsible for the drop in prosecutions. Hoffmann, however, does assert (p. 117) that formal constraints were the primary barrier to prosecutorial activity. This conclusion is typical of Hoffmann's book which, although a very useful overview of how postwar Germany alternately confronted and evaded its Nazi past, definitely tends toward the apologetic. The official apology, in which yet other factors (such as the fact that some perpetrators committed suicide before being tried) are cited as causes for the post-1948 prosecutorial slowdown, is found in: Bundesjustizministerium, Die Verfolgung nationalsozialistischer Straftaten, pp. 47-52.

67Moreover, the statute of limitations may well have contributed to the diminishing number of private complaints.

68Bauer, "Im Namen des Volkes," p. 304.


70Bauer, "Im Namen des Volkes," p. 308.
The basic political fact was this: the trials of Nazi perpetrators were extremely unpopular.\textsuperscript{71} That direct participants in Nazi maleficence were opposed to the trials requires no explanation. Opposition to the trials, however, extended far beyond those immediately implicated in specific instances of Nazi malefaction. An opinion poll conducted in 1952 found that only one German in ten approved of the trials.\textsuperscript{72}

There were multiple and overlapping reasons for this near universal hostility to the trials. Public antipathy was partly a result of the fact that the trials were perceived to be something ‘political’. After years of hyper-politicization, many Germans harbored a pronounced aversion toward anything political. The general political indifference was simultaneously reflected in and reinforced by the widespread preoccupation with economic reconstruction that gripped postwar Germany.\textsuperscript{73} The fact that the trials of Nazi perpetrators were referred to, both officially and colloquially, as ‘war crimes trials’ not only masked the singularity of Nazi maleficence but added to the popular perception that the trials were something political.\textsuperscript{74} Even though it was apparent that the Allies had themselves committed (genuine) war crimes—arguably the Americans and the British in bombing Dresden, indisputably the Soviets in murdering Polish POWs—no Allied officials were ever prosecuted as a result. There was, therefore, compelling evidence of a double standard when it came to the prosecution of Allied and German war crimes. But, the severity of the apparent double standard was grossly exaggerated by the fact that all forms of Nazi maleficence—most of which had nothing to do with war crimes—were inappropriately subsumed under the ‘war crimes’ label. The terminological inaccuracy thereby helped fuel a general sense that Germans were being unfairly victimized by politically motivated victor’s justice.


\textsuperscript{72} Frank M. Buscher, \textit{The U.S. War Crimes Trial Program in Germany, 1946-1955} (Westport, CT: Greenwood Press, 1989): 91.

\textsuperscript{73} Rückerl, \textit{NS-Verbrechen vor Gericht}, pp. 111-2.

(even when it was German courts that were conducting the trials). Opposition to the trials was also, in part, a by-product of the overwhelmingly negative reaction to denazification. Whatever its merits in theory, the denazification process was plagued by inefficiency and inequities, and because the distinction between administrative denazification and criminal prosecution was blurred, the faults of denazification redounded to the detriment of criminal prosecution. Moreover, the requirement that all adults, regardless of their role in the Third Reich, complete a denazification questionnaire fostered solidarity between those who had been mere conformists and those who had actually participated in specific atrocities. The result was a prevalent feeling that “an entire nation had been put in the dock.” That was one place that Germans did not want to be.

The trials made the average German highly uncomfortable. Whether out of opportunism or agreement, nearly every German who was not perceived to be an ideological or racial enemy of the Third Reich had made some sort of accommodation with the Nazi regime. Such accommodation ranged from the relatively innocuous to the genocidal. But whatever the nature of their own involvement, most Germans liked to believe, or at the very least liked to claim, that they were the unwilling victims of an overpowering totalitarian system. On this view, no individual—other than Hitler himself and, perhaps, the members of his immediate circle—bore personal responsibility for his or her own actions. Those accused of involvement in specific atrocities, such as the systematic slaughter of Soviet Jews, typically argued that their participation had been coerced: they argued that they had not only been following orders, but that they themselves

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would have been killed had they disobeyed those orders. This defense, the duress defense, was (if proven) a recognized defense under § 52 StGB.\textsuperscript{77} Since the duress defense was an obvious extension of the Germans' cherished belief in an irresistible tyranny, each time a Nazi perpetrator was convicted, the conviction represented more than the rejection of a particular defense strategy. Each conviction constituted an implicit repudiation of the underlying exculpatory myth.\textsuperscript{78} Thus, by assigning individual responsibility for acts committed under Nazi rule, the trials undermined an important postwar psychological defense mechanism.\textsuperscript{79} Whether mere conformists or direct perpetrators, most Germans did not want to be reminded of—let alone called to account for—their immediate past. They desperately wanted to forget what had they had done and what had been done in their names. But, postwar society could not suppress the uncomfortable truths and unpleasant memories if there were a steady stream of trials. At root, popular opposition to the trials stemmed from a common desire for collective amnesia.

Popular opposition, mediated by the dynamics of electoral competition, led to lax prosecutorial efforts. It is indicative that one of the very first acts of the Bundestag, the West German parliament, was the issuance of an amnesty that intentionally if not expressly benefited minor Nazi perpetrators.\textsuperscript{80} The December 1949 amnesty, which covered only those acts that were committed prior to the establishment of the Federal Republic, required that prosecutors


\textsuperscript{78}That it was in fact a myth is incontrovertible. There are numerous (even if distressingly few) instances in which individuals refused to participate in Nazi maleficence. Contrary to the common claim of life-threatening duress, those who refused to participate did so without suffering serious consequences. There is not a single documented instance in which the refusal to participate in the commission of an atrocity was punished severely. To cite just one example: when Judge Lothar Kreyssig refused to condone the 'euthanasia' killings that were being committed in his district even after he was shown Hitler's secret decree, Kreyssig was simply forced to retire (with full pension). Despite the fact that coercion was never actually proven, many postwar courts nonetheless accepted the duress defense. On the Kreyssig case, see: Lothar Gruchmann, "Euthanasie und Justiz im Dritten Reich," Vierteljahresschrift für Zeitgeschichte (1972): 245-55; and, Bundesminister der Justiz, ed., Im Namen des deutschen Volkes, pp. 201-3. On the complete absence of documented cases of coercion, see: Hinrichsen, "Befehlsnmutstand," pp. 131-60; Jäger, Verbrechen unter totalitärer Herrschaft, pp. 158-9; and, Hans Buchheim, "Befehl und Gehorsam," in Hans Buchheim, Martin Broszat, et al., eds., Anatomie des SS-Staates, Vol. 1 (Munich: Deutscher Taschenbuch Verlag, 1967 [Freiburg: Walter Verlag, 1965]): 213-318. On the undue willingness of courts to accept the duress defense, see: "Entschließung der Königsteiner Klausurtagung," in Ständige Deputation des Deutschen Juristenrates, ed., Verhandlungen des 46. Deutschen Juristenlages, Vol. 2 (Munich/Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1967): C9.


\textsuperscript{80}Gesetz über die Gewährung von Straffreiheit, Bundesgesetzblatt I (1950): 37.
drop all cases in which a jail sentence of less than 6 months was to be expected (even if a longer sentence were possible). The amnesty was “broadly interpreted” and had “a far wider effect than one would assume from its text.”\textsuperscript{81} A second, more extensive amnesty was enacted by the Bundestag in July 1954.\textsuperscript{82} It pardoned, among other things, all “crimes that were committed under the influence of the exceptional circumstances” which accompanied the collapse of the Third Reich and in which a jail sentence of less than 3 years was to be expected. Though murder and manslaughter were otherwise excluded from the amnesty’s provisions, acts of manslaughter committed in the final months of the Third Reich were specifically included.\textsuperscript{83} The Bundestag did not restrict itself to the issuance of amnesties for crimes committed under the \textit{Strafgesetzbuch}. Although the Adenauer government managed to stave off formal action in deference to Allied sensitivities, there were persistent calls from the floor of the Bundestag for the Allies to pardon the Nazi perpetrators who had been convicted by military tribunals under KRG 10.\textsuperscript{84}

The Allies, who had initially encouraged the trials, reversed course as the Cold War set in. There was a perceptible change in the Allied attitude as early as 1948.\textsuperscript{85} The British encouraged a rapid conclusion to all KRG 10 prosecutions, saying that new indictments should be brought only in “truly serious cases.”\textsuperscript{86} In 1949, American occupation officials demonstrated their eagerness “to pacify German public opinion on the war crimes issue” by paroling some of those who had been convicted at the follow-on trials in Nuremberg.\textsuperscript{87} By the end of 1949, the Americans had freed sixty Nazi perpetrators. As the Cold War intensified, West German politicians made the release of Nazi perpetrators convicted by Allied courts a precondition for West German rearmament.\textsuperscript{88} The Allies, suddenly more concerned with Communists to the East than former Nazis in the West, acceded to demand. Although they refused to grant a general

\textsuperscript{83}Rückerl, \textit{NS-Verbrechen vor Gericht}, p. 135.
\textsuperscript{84}Buscher, \textit{The U.S. War Crimes Trial Program in Germany}, pp. 115-53. The Nazi perpetrators were almost invariably referred to as either ‘war criminals’ or, more insidious yet, ‘POWs’. See the telling 1952 debate recorded in: \textit{Bundestagprotokolle}, 1. Wahlperiode, pp. 14,492-15,509.
\textsuperscript{85}Broszat, “Siegerjustiz oder strafrechtliche ‘Selbstreinigung’,” p. 518.
\textsuperscript{86}Broszat, “Siegerjustiz oder strafrechtliche ‘Selbstreinigung’,” p. 534.
\textsuperscript{87}Buscher, \textit{The U.S. War Crimes Trial Program in Germany}, p. 60.
\textsuperscript{88}Rückerl, \textit{NS-Verbrechen vor Gericht}, p. 130; and, Buscher, \textit{The U.S. War Crimes Trial Program in Germany}, pp. 69-89.
amnesty to all Nazi perpetrators, the Allies did adopt a very liberal case-by-case clemency policy.\textsuperscript{89} In fact, the Allies dispensed pardons so readily that Robert Kempner, a German émigré who had returned to serve as an American prosecutor at Nuremberg, subsequently characterized the policy as "mercy mania."\textsuperscript{90} As a result of Allied leniency, the number of prisoners held in Allied jails fell rapidly after 1949. By October 1951, half of all Nazi perpetrators convicted by Allied military tribunals had been freed.\textsuperscript{91} The number of Allied prisoners continued to drop throughout the 1950s. By 1958, all Allied prisoners, other than the few held in joint custody with the Soviet Union, had been released.\textsuperscript{92}

It is the adverse political environment that best explains the sharp drop in prosecutorial activity after 1948. The Bundestag amnesties and the Allied pardons inhibited prosecutorial activity, both directly and indirectly. By absolving certain perpetrators of criminal liability outright, the Bundestag amnesties precluded a whole range of prosecutions. At one level, therefore, the amnesties were simply another formal barrier to prosecution, much like the statute of limitations and the rules of jurisdiction. But, the parliamentary amnesties and Allied clemencies operated at an important symbolic level as well. If a local prosecutor was to undertake what was bound to be a costly and time-consuming investigation into organized Nazi maleficence, the prosecutor needed the backing of his or her immediate superiors and the support of their political bosses.\textsuperscript{93} The amnesties and clemencies, however, were an obvious indication that the necessary support would not be forthcoming. They made it clear to prosecutors that ardent in the exercise of duty was unwelcome.\textsuperscript{94}

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\textsuperscript{89}Buscher, \textit{The U.S. War Crimes Trial Program in Germany}, pp. 50-68, 131-57.
\textsuperscript{91}Buscher, \textit{The U.S. War Crimes Trial Program in Germany}, p. 74.
\textsuperscript{92}Bundesjustizministerium, "Bericht über die Verfolgung nationalsozialistischer Straftaten," p. 11. The release of those who had been convicted by the International Military Tribunal at Nuremberg would have required quasipartite agreement, something quite impossible under the conditions of the Cold War.
\textsuperscript{93}Rückert, \textit{NS-Verbrechen vor Gericht}, pp. 129-34.
\textsuperscript{94}According to Karl Bader, prosecutor general in Freiburg for several years after the war: "Much was left undone because the representatives, ministers and high officials, and recently entered politics demonstrated neither interest nor enthusiasm for effectively strengthening the justice system in its efforts to punish the political-historical injustice of the immediate past. And the currency reform, political authorities had first and foremost to relieve the misery, to deal with the food and housing shortages. After 1948, however, even enlightened politicians lost interest in the pursuit of Nazi felons to an alarming extent. ... Encouraging and supporting the punishment of past political guilt made one unpopular among voters. Ministers too, even exalted ministers of justice, could—and I speak out of personal
end to the trials was reinforced while the initiative of those inclined to pursue Nazi malefactors was obstructed.95

The legal constraints and political inhibitions that undermined prosecutorial activity after 1948 were compounded by the failure of denazification. By 1949, a combination of factors—
including the need for trained bureaucrats and the indulgent attitude toward Nazi perpetrators that pervaded postwar Germany—had brought an effective if not official end to denazification.96 The Grundgesetz was neutral vis-à-vis denazification and the civil servants of the Third Reich: on the one hand, Art. 139 GG exempted denazification regulations from constitutional challenge; on the other hand, Art. 131 GG allowed the Bundestag to reinstate Nazi civil servants en masse if it so chose. Wholesale reinstatement is precisely what occurred. In 1951, the Bundestag enacted a law (‘G 131’) which gave the vast majority of former civil servants the right to be reinstated.97 Not surprisingly, many exercised that right. As a result, by the early 1950s, West German public experience—be quite annoyed if one brought them a ‘hot potato’ at the wrong time." See: Karl S. Bader, "Politische und historische Schuld und die staatliche Rechtspredung," Vierteljahreshefte für Zeitgeschichte (1962): 124.

95Prosecutors were not the only ones affected by the political climate. Though somewhat more insulated from the vagaries of electoral dynamics, judges—who of course drink from the same zeitgeistliche cup as everyone else—modified their behavior over the postwar period as well. This is evident both in the increasing lenience of sentences imposed for a given crime and in the increasing frequency with which courts employed the ‘subjective’ elements of statutory law in order to minimize a perpetrator’s criminal liability. Thus, for example, the average sentence imposed for aggravated breach of the peace (‘schwerer Landfriedensbruch’) under § 125 StGB fell from nearly two years in the period 1945-1947 to under one year in the period 1950-1955. Similarly, by the 1950s, courts routinely deemed even those homicidal malefactors who had enjoyed considerable autonomy to be mere accessories rather than primary perpetrators on the grounds that they had not willed their acts as their own. On the increasing leniency of sentences, see: Moritz and Noam, NS-Verbrechen vor Gericht 1945-1955, pp. 22-6; and, Õppitz, Strafverfahren und Strafvollstreckung bei NS-Gewaltverbrechen, pp. 41-2. On the exculatory use of subjective factors (the ‘subjektive Tatseite’), see: Ernst Friesenhahn, "Probleme der Verfolgung und Abhnull von nationalsozialistischen Gewaltverbrechen," in Ständige Deputation des Deutschen Juristentages, ed., Verhandlungen des 46. Deutschen Juristentages, Vol. 2 (Munich/Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1961); C22; and, Barbara Just-Dahlmann and Helmut Just, Die Gehilfen. NS-Verbrechen und die Justiz nach 1945 (Frankfurt/M: Athenäum, 1988).


97Gesetz zur Regelung der Rechtsverhältnisse der unter Artikel 131 des Grundgesetzes fallenden Personen, Bundesgesetzeblatt I (1951): 307. This law was the subject of an extraordinarily bitter controversy between the Bundesverfassungsgericht and the Bundesgerichtshof. The Bundesverfassungsgericht maintained: a) that Nazi law had as an empirical matter displaced Weimar law as the basis for civil servants’ rights; and, b) that civil servants’ life tenure had therefore been extinguished at the moment that the Third Reich ceased to exist. The Bundesgerichtshof maintained: a) that Nazi civil service law was invalid because it violated natural law; and, b) that the life tenure guaranteed civil servants under Weimar law had therefore remained in continuous force from Weimar to the Federal Republic. Although fascinating in its own right and closely related to the issues discussed here, the controversy lies outside the bounds of this dissertation. Because it concerned administrative rather than criminal sanctions, nulla poena was not at issue. On the so-called ‘G 131’ dispute, see: Bundesminister der Justiz, Im Namen des deutschen Volkes, pp. 353-88; Kirn, Verfassungsuntersuchung und Rechtskontinuität?, pp. 111-275; BGHZ [= Entscheidungen des Bundesgerichtshofes in Zivilsachen] 13, 265; BVerfGE 3, 58; and BVerfGE 6, 132.
administration was saturated with people who had served the Third Reich. Needs to say, judges, prosecutors and police officers who were themselves potentially implicated in Nazi maleficence were unlikely to demonstrate particular zeal in the pursuit of Nazi perpetrators. As the trials petered out, many Germans willingly believed what many other Germans maliciously propagated, namely the myth that all major Nazi perpetrators were either dead or had already been tried.

In spite of these inauspicious circumstances, the trials never came to a complete halt. Although subject to political oversight and various indirect influences, the postwar criminal justice system enjoyed substantial institutional autonomy. A conscientious prosecutor, of which there were a few, could therefore continue to bring cases if he or she was sufficiently determined. Moreover, notwithstanding the considerable decline in their numbers, private criminal complaints never disappeared completely. Hence, even in the mid-1950s, at the height of political resistance to the trials of Nazi perpetrators, there was some impulse for prosecutorial activity. And, although most court officials shared the popular aversion to the trials, the rules of criminal procedure meant that they "were unable to suddenly halt the prosecutorial process once it had begun." Thus, short of an overt, blanket amnesty—which was (for primarily international reasons?) not feasible—the trials could not be stopped entirely despite the political pressures discussed above. Insofar as a confrontation with the Nazi legacy could not be avoided altogether, it was, from the government's perspective, advantageous that the judicial system remained active.

99Müller, Hitler's Justice, pp. 208-18; and, Bundesminister der Justiz, Im Namen des deutschen Volkes, pp. 363-4.
100Though Rückerl teards lightly when it comes to judges and prosecutors, he does acknowledge the degree to which the police in particular had been compromised. (Rückerl, NS-Verbrechen vor Gericht, pp. 130, 164.) For differing views on the postwar judiciary and its relationship to the Nazi past, see: Gotthard Jasper, "Wiedergutmachung und Westintegration. Die halberzige justizile Aufarbeitung der NS-Vergangenheit in der frühen Bundesrepublik," in Ludolf Herbst, ed., Westdeutschland 1945-1955. Unterwurfung, Kontrolle, Integration (Munich: Oldenbourg, 1988): 183-202; and, Bernhard Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit," in Bernhard Diestelkamp and Michael Stolleis, eds., Justizalltag im Dritten Reich (Frankfurt: 1988): 131-149. While it is certainly true that many of those who had served the Third Reich were opportunists rather than dedicated Nazis, and therefore willing to serve the Federal Republic when political fortunes changed, that hardly made them enthusiastic supporters of vigorous prosecutorial activity vis-à-vis Nazi perpetrators.
101Moritz and Noam, NS-Verbrechen vor Gericht 1945-1955, p. 35.
assume the politically onerous task. However reluctantly they may have borne the burden, "the courts relieved other social institutions of the need to deal with the Nazi past."102

Despite undiminished political opposition, there was a sustained resurgence in prosecutorial activity after 1958. The impetus for the prosecutorial revival was the Ulm Einsatzgruppen trial, a trial in which several members of a mobile execution squad active in occupied Soviet territory were prosecuted for their participation in tens of thousands of murders.103 The trial came about by chance when a former high ranking police officer, Berhard Fischer-Schweder, sued for reinstatement under G 131. When Fischer-Schweder's suit was reported in the press, a private criminal complaint was filed against him by someone who recognized him as a leading participant in the mass murder of Lithuanian Jews. The ensuing investigation quickly expanded to include other participants as well. The subsequent trial, which received extensive press coverage, made it embarrassingly obvious that many mass murderers were alive and well and as yet untouched by the criminal justice system.104 The Ulm Einsatzgruppen trial signaled a turning point. In addition to providing (highly publicized) incontrovertible proof that many Nazi atrocities remained unpunished, the trial demonstrated that the successful prosecution of those atrocities would require "criminal investigations on a scale that far exceeded all previously known detective work."105 The trial spurred the creation of a national prosecutorial office devoted exclusively to the pursuit of Nazi perpetrators: the Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen (known as the 'Zentrale Stelle' or 'ZS').106

Establishment of the Zentrale Stelle inaugurated an entirely new approach to the prosecution of Nazi malefaction.107 The creation of a national prosecutorial office meant that the

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103 Rückert, NS-Verbrechen vor Gericht, pp. 140-1; Hoffmann, Stundennull?, pp. 121-3.
105 Rückert, NS-Verbrechen vor Gericht, p. 142.
106 Rückert, NS-Verbrechen vor Gericht, p. 142; Hoffmann, Stundennull?, p. 124.
jurisdictional barriers that had previously hampered investigatory efforts (or had, at the very least, served as a convenient pretext for inaction) were eliminated at almost one stroke. Unlike local prosecutors who had jurisdiction over only those acts that were either committed within their territorial district or committed by someone living in their territorial district, the Zentrale Stelle could investigate Nazi malefaction wherever it occurred regardless of the perpetrator's domicile. The removal of jurisdictional barriers was especially important for the prosecution of acts committed outside what had become West Germany, acts which of course included the most horrific of Nazi atrocities (viz. the mass extermination camps such as Auschwitz). Prior to the establishment of the ZS, trials were typically the result of a private criminal complaint having been lodged against a particular individual. The earlier trials had, therefore, been essentially random, isolated events. That changed with the creation of the Zentrale Stelle. Rather than relying on the haphazard denunciation of individual suspects, the ZS initiated a systematic investigation of the atrocities themselves. The ZS began by scouring academic histories and official records in order to methodically catalog Nazi iniquities. As the atrocities were registered, ZS prosecutors researched the organizational structure of the Third Reich in order to determine which agencies and which units were responsible for the various atrocities. By situating each outrage within a historical and organizational context, the ZS prosecutors were able to systematically identify those potential suspects whose identities were not already known. Once a suspect was identified and his or her whereabouts were ascertained, the ZS forwarded the relevant investigatory material to the local prosecutor in whose district the suspect resided. As a result of the Zentrale Stelle's efforts, thousands of investigations were initiated and hundreds of indictments were brought in the years following 1958.

The unmistakable upsurge in prosecutorial activity came despite enduring opposition to the trials of Nazi perpetrators. Those who proposed creation of a national prosecutorial office—

108 Initially, the Zentrale Stelle's investigatory jurisdiction was limited to Nazi malefaction that was committed outside the Federal Republic's borders. (It was the pursuit of these crimes that suffered the most under the jurisdictional rules of Germany's federal system.) In 1964, its jurisdiction was expanded to include almost all Nazi malefaction, including that perpetrated within the Federal Republic's borders. The only Nazi maleficence that did not fall under the ZS's purview were: i) genuine war crimes; and, ii) the acts of the Reichssicherheitshauptamt. The latter remained the responsibility of the Berlin prosecutorial authorities. See: Rückerl, "NS-Prozesse: Warum erst heute?", p. 23.
foremost Erwin Schüle, the lead prosecutor in the Ulm Einsatzgruppen trial and ultimately the Zentrale Stelle's first director—encountered considerable resistance to the idea within the state ministries of justice.\textsuperscript{109} And though the Zentrale Stelle was finally established, its work was hindered in a variety of ways, particularly during the first years of its existence. The ZS, which was entirely dependent upon the detachment of prosecutors from the various states, remained woefully understaffed until the late 1960s. The exact number fluctuated, but prior to 1965 there were never more than ten prosecutors assigned to the ZS. In 1965, the states agreed to increase the number of prosecutors to fifty, but it was still several years before that number was even approximately reached.\textsuperscript{110} In addition to the personnel shortage, for which the state governments were responsible, the ZS also suffered from obstructionist behavior by the federal government. Although East European archives contained important documentary evidence relating to the Holocaust, the federal government prevented ZS prosecutors from conducting systematic research in Eastern Europe until 1964, even though the Polish and Soviet authorities had offered their cooperation.\textsuperscript{111} Such politically motivated impediments reflected an abiding public aversion to the trials. Although pollsters recorded a distinct increase in support for the prosecution of Nazi perpetrators immediately after the Ulm Einsatzgruppen trial, the shift in public opinion proved largely ephemeral. By 1963, a majority of the German population once again favored an end to the trials.\textsuperscript{112}

Nonetheless, the resumption of prosecutorial activity continued through the 1960s and beyond.\textsuperscript{113} The establishment of the Zentrale Stelle was undoubtedly facilitated by the momentary shift in public opinion that accompanied the Ulm Einsatzgruppen trial. But once established, the ZS had sufficient independence to pursue its organizational mandate regardless of public opinion (and bureaucratic obstruction). Ultimately, at the very end of the 1970s, after

\textsuperscript{109}\scriptsize{Streim, "Die juristische Aufarbeitung der NS-Vergangenheit," pp. 11-2; Hoffmann, \textit{Stunden Null?}, p. 124.}
\textsuperscript{110}\scriptsize{Rückerl, \textit{NS-Verbrechen vor Gericht}, pp. 144, 178.}
\textsuperscript{111}\scriptsize{Rückerl, \textit{NS-Verbrechen vor Gericht}, pp. 157-60; Streim, "Die juristische Aufarbeitung der NS-Vergangenheit," p. 12}
\textsuperscript{113}\scriptsize{In 1996, there were still 5,500 open investigations into Nazi maleficence. Source: <GERMNEWS@LISTSERV.GMD.DE> (February 23, 1996).}
time had passed and the postwar generation had come of age, a majority of Germans began to support the trials of Nazi perpetrators.\textsuperscript{114} For many years, however, the ZS toiled in popular contempt. Yet, over the course of the 1960s, there was a growing disjunction between popular and elite opinion. Persistent popular animosity toward the trials contrasted with increasing elite support.\textsuperscript{115} Though such an explanation remains within the realm of speculation, it appears likely that the emergent discrepancy between popular and elite opinion was at least in part the result of a greater sensitivity among the elite to international pressure. In any event, it seems that the transformation of elite opinion can be traced to two spectacular trials: the 1961 Eichmann trial in Jerusalem and the 1964 Auschwitz trial in Frankfurt.\textsuperscript{116} Both trials were in many ways like the earlier Ulm Einsatzgruppen trial only more powerful. They were more powerful because of the tremendous international publicity which they generated and “the determination of the courts and the prosecutors to broach the entire issue of the ‘final solution’ and to use the trials as a way of not only prosecuting particular perpetrators but of illuminating an entire criminal complex.”\textsuperscript{117} The Eichmann trial and the Auschwitz trial demonstrated conclusively (such that it did not have to be proven again) that there were major Nazi malefactors who had still to be punished.

A series of parliamentary debates concerning the statute of limitations illustrates the incremental shift in elite opinion.\textsuperscript{118} By 1960, the statute of limitations had already expired on all crimes committed by the Nazis under the Strafgesetzbuch other than manslaughter and murder. The statute of limitations for manslaughter was due to expire on May 8, 1960, fifteen years after the collapse of the Third Reich. Since there was no chance of the newly established and understaffed Zentrale Stelle evaluating more than a minute fraction of the vast evidence available

\begin{thebibliography}{9}
\bibitem{114} Steinbach, "Nationalsozialistische Gewaltverbrechen in der deutschen Öffentlichkeit nach 1945," p. 29.
\end{thebibliography}
to it prior to that date, it seemed certain that many perpetrators would escape punishment. In order to prevent that from happening, a junior prosecutor in the Zentrale Stelle, Barbara Dahlmann, publicly implored the Bundestag to extend the statute of limitations.\textsuperscript{119} Her efforts were for naught. There was insurmountable opposition to an extension, both within and without the governing conservative coalition. As a result, the statute of limitations for manslaughter expired as scheduled. Thereafter, murder was the only form of Nazi malefaction still subject to prosecution under German law. It was not until November 1964 that the federal government finally allowed ZS prosecutors to systematically examine East European archives. Given the vast quantities of material and the logistical difficulties involved, thorough evaluation of the East European archives would take several years at a minimum. Thus, when the statute of limitations for murder was due to expire in May 1965, it was once again clear that many Nazi perpetrators were likely to escape punishment unless the statute of limitations was extended.\textsuperscript{120} Nonetheless, the Christian Democratic government (like the population at large) remained adamantly opposed to an extension. But, an \textit{ad hoc} coalition of opposition Social Democrats and renegade Christian Democrats—prodded by ZS prosecutors, elite entreaties and international pressure—was able to enact a four year extension over the government’s strenuous objections.\textsuperscript{121} By the time the extension was scheduled to expire in 1969, the Social Democrats had come to power and the statute of limitations on premeditated murder was easily extended once again, this time for ten years. In 1979, under strong international pressure and after a dramatic swing in German public opinion, the Bundestag voted to abolish the statute of limitations on premeditated murder altogether.\textsuperscript{122}

\textsuperscript{119}Hirsch, “Anlaß, Verlauf und Ergebnis der Verjährungsdebatten,” p. 44.
\textsuperscript{120}Rückerl, \textit{NS-Verbrechen vor Gericht}, pp. 169-76.
Reinterpretivism Ascendant

Unlike the trials held in the immediate postwar period, which tended to focus on the Kristallnacht pogrom and acts of denunciation, trials held after 1960 were much more likely to focus on the Holocaust. There are several reasons for this shift in prosecutorial emphasis. Prior to 1950, jurisdictional restrictions imposed by the Allies precluded the prosecution of acts committed outside Germany. Because most of the killing had occurred in Poland and the Soviet Union, the jurisdictional restrictions meant that German courts were initially unable to prosecute those directly involved in the Holocaust. By 1960, when the second wave of trials was getting under way, the jurisdictional restrictions had been eliminated and West German courts were able to pursue the eastern genocide. During the second wave, most trials resulted from investigations initiated by the Zentrale Stelle. Since the Zentrale Stelle's mandate was at first limited to the investigation of acts committed outside the borders of the Federal Republic (i.e. to regions where genocide was the preeminent form of Nazi malefaction), many of the indictments that were brought focused on the Holocaust. The shift in prosecutorial emphasis was reinforced by the expiration of the statute of limitations. After the statute of limitations for manslaughter was allowed to expire in May 1960, murder was the only crime still actionable under German law.

The crucial question faced by the West German courts was whether killing Jews was illegal at the time of the Holocaust. The systematic annihilation of European Jewry was obviously not a wildcat action. The slaughter, which required a massive bureaucratic effort involving large parts of the German state, was sanctioned by none other than Hitler himself. It is, of course, precisely this imprimatur that calls the illegality of the killings into question. On the one hand, intentionally killing another individual—other than in self-defense, during battle or on the basis of a judicial death sentence—constituted murder under the Strafgesetzbuch. On the other hand, the

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123 Those trials held after 1960 that did not involve the systematic extermination of Jews typically concerned the killing of Russian POWs, the murder of political prisoners in domestic concentration camps, or instances of lethal summary justice in the final days of the war. See the overview of cases in: Rütger, Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945-1966, Vol. 16-22.
124 On the ZS's purview, see footnote 108 above.
Holocaust was mandated by Hitler, the Third Reich's "supreme legislator".\textsuperscript{125} Hence the question: had Hitler's orders legalized the Holocaust?

There was unanimous agreement among West German courts that Hitler's orders did not legalize the Holocaust. Some courts invoked natural law to reach this conclusion, saying that Hitler's orders were invalid because they contravened an "inviolable core region of law."\textsuperscript{126} Other courts simply assumed without discussion that any homicide committed during the course of the Holocaust was murder.\textsuperscript{127} "The illegality," said the Landgericht Karlsruhe, "is self-evident."\textsuperscript{128} The standard tack, however, was a two-track approach in which reinterpretivist logic was supplemented by (ultimately redundant) natural law reasoning.\textsuperscript{129} According to this line of argumentation, Hitler's orders were invalid under the Nazis' own procedural rules and would have been invalid in any case because they violated natural law. The decisive fact from the reinterpretivist perspective was the secrecy of Hitler's orders. In its verdict against the commandant of the Treblinka extermination camp, a verdict that is typical of the two-track approach, the Landgericht Düsseldorf stated that Hitler's decree mandating the annihilation of the Jews must be denied the status of law "because it was neither published in the Imperial Gazette nor otherwise publicly promulgated."\textsuperscript{130} According to the court, secret orders lacked legal validity even under the Nazis' own conception of law:

It is true that the legislative procedure stipulated by the Weimar constitution was to a large degree amended during the National Socialist regime, for example through the Enabling Act. But, one never dispensed with the publication of laws enacted by Hitler or the Imperial Government. Even minor laws and regulations were always published in the Imperial Gazette. The provision in the Weimar constitution that required the publication of laws in the Imperial Gazette did not lose its meaning even in the constitutional reality of the Third Reich. ... Thus, Hitler's secret orders can never be ascribed the force of law.\textsuperscript{131}

\textsuperscript{125} The phrase is used by the LG Düsseldorf in the verdict 8 I Ks 2/64, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 22, p. 175
\textsuperscript{127} See, for example: LG Dortmund 10 Ks 1/61, LG Nürnberg-Fürth 1070 Ks 7/62, and LG Kiel 2 Ks 1/64, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 17, pp. 749-88; Vol. 19, pp. 319-58; and, Vol. 19, pp. 773-813 (respectively).
\textsuperscript{128} LG Karlsruhe VI Ks 1/60, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 19, p. 620.
\textsuperscript{129} See, for example: LG Münster 6 Ks 2/60, LG Hannover 2 Ks 1/63, and LG Braunschweig 2 Ks 1/63, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 17, pp. 1-50; Vol. 19, pp. 485-555; and, Vol. 20, pp. 23-100 (respectively).
\textsuperscript{130} LG Düsseldorf 8 I Ks 2/64, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 22, p. 175.
\textsuperscript{131} LG Düsseldorf 8 I Ks 2/64, reprinted in Rüter, Justiz und NS-Verbrechen, Vol. 22, p. 176.
Lest there be any uncertainty, however, the court hastened to add that “even if the Führer's order for the final solution of the Jewish question had been published in the Imperial Gazette, it would not have established law on account of its content.”\(^{132}\) By the mid-1960s, the two-track approach of primary reinterpretivism bolstered by auxiliary extra-positivism had been ratified by the BGH and endorsed by most academics, and was thus firmly established as the dominant jurisprudential technique for dealing with Hitler's genocidal decrees.\(^{133}\)

The claim that the Holocaust was illegal even under the Nazis' own conception of law rests in large measure on Hans Buchheim's expert testimony at the Frankfurt Auschwitz trial.\(^{134}\) Buchheim, a historian, distinguished between normative (i.e. legal) and extra-normative (i.e. ideological) obligations in the Third Reich. According to Buchheim, participation in the Holocaust was an ideological rather than legal duty. On this view, killing Jews was an act of "devotion" toward Hitler that "remained illegal under valid law."\(^{135}\) The problem with Buchheim's position is that it ignores empirical reality. Buchheim's argument is less historical than definitional. He erroneously equates valid law with codified law. On the facts he presents, it seems more reasonable to conclude that during the Third Reich there was both codified law and ideological law, with the latter being superior to the former much as constitutional law is superior to statutory law in a liberal state.\(^{136}\) As Buchheim himself acknowledges, a participant in the Holocaust "could


\(^{136}\)By 'ideological law' I mean rules, derived from perceived political imperatives, that are deemed legally valid and always superior to contrary provisions of codified statute. Nazi ideological law might be
be sure that he would never be held accountable under the law during the Third Reich.”  

In denying the legality of the Holocaust, Buchheim and the courts which adopted his historiographic perspective place greater weight on nominal statute than they do on the systematic behavior of the German state over an extended period of time. Buchheim’s distinction between two categories of obligation—one legal and the other not—is, in the words of one scholar, “a retrospective construct which distorts the actual situation.”

The reinterpretivist assertion that Hitler’s secret orders lacked legal validity under Nazi law by virtue of their secrecy is equally problematic. Scholarly commentaries from the period are of little help in resolving the matter: for every contemporary citation that can be adduced in support of the claim, there is another that can be offered against the claim. Official decrees, however, suggest that contrary to the reinterpretivist view, Hitler’s power was not formally limited by procedural constraints. Consider, for example, a 1942 Reichstag proclamation that was published in a leading legal journal under the banner headline “All Power to the Führer”. The Reichstag declared that Hitler “in his capacity as leader of the nation, commander of the armed forces, head of the government, supreme executive power, supreme judicial officer and leader of the party” must always be in a position to compel all Germans to fulfill their duties “using all means” he deems appropriate “without being bound by existing legal regulations.” Actual judicial praxis provides overwhelming evidence that Hitler’s orders were in fact deemed law during the Third Reich regardless of their formal promulgation. In 1941, after various local prosecutors began acting on private criminal complaints filed by the relatives of ‘euthanasia’ victims, the ministry of justice convened a meeting attended by the chief judge and prosecutor

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139 See the battling citations in: Welzel, “Gesetzsmäßige Judenlösungen?”; and, Redeker, “Bewältigung der Vergangenheit als Aufgabe der Justiz.”
140 Reichsgesetzblatt I (1942): 247, reprinted in: Martin Hirsch, Dieter Majer, and Jürgen Meinck, Recht, Verwaltung und Justiz im Nationalsozialismus. Ausgewählte Schriften, Gesetze und Gerichtsentcheidungen von 1933 bis 1945 (Cologne: Bund-Verlag, 1984): 187. In an edict issued just a few months later, Hitler announced that he had instructed the minister of justice to construct “a National Socialist system of justice” and that the minister was empowered to “deviate from existing law” in order to fulfill the task. (Reichsgesetzblatt I (1942): 535, reprinted in: Hirsch et al., Recht, Verwaltung und Justiz im Nationalsozialismus, p. 189.)
general of each judicial district. Franz Schlegelberger, the ministry's highest official, told the assembled jurists that it was necessary in light of the unwelcome prosecutorial efforts to familiarize them with Hitler's secret 'euthanasia' decree. "Otherwise," said Schlegelberger, "it is inevitable that judges and prosecutors will ... take action against measures that they innocently but mistakenly believe to illegal." None of those in attendance demurred, and the criminal investigations that had been initiated were promptly terminated. Thus, for postwar courts to distinguish between secret orders and published decrees is to "completely miss the conception of law and the constitutional reality" that existed at the time. Ascribing the force of law to one but not the other is a spurious differentiation, the absurdity of which was best captured by Adolf Arndt. "Is it true," he asked, "that the 'Führer' could do everything, just not abolish the Imperial Gazette?"

A common assumption of all courts, regardless of whether they invalidated Hitler's order to exterminate the Jews on reinterpreivist or natural law grounds, was that the Strafgesetzbuch retained full legal force throughout the Third Reich. This assumption, which does not follow automatically from the invalidity of Hitler's orders, constitutes a special case of the 'continuity thesis'. According to the continuity thesis, which Kirn has characterized as a "fundamental dogma" of postwar jurisprudence, an ideal version of positive law that was unaffected by Nazi pretensions remained in continuous effect from Weimar to the Federal Republic. This proposition was, for example, explicitly endorsed by Hans Hofmeyer, the presiding judge in the Frankfurt Auschwitz trial. In his oral announcement of the Landgericht's verdict, Hofmeyer emphasized that the German state "has existed since 1871 ... and has always had the same

142Redeker, "Bewältigung der Vergangenheit als Aufgabe der Justiz," pp. 1097-8. There were some jurists who maintained that Hitler's orders did have to be published in order to be law, and there were some who thought that it would have been best if the orders had been published. In the end, however, these views failed to carry the day and the validity of the secret decree was recognized in practice. See: Gruchmann, "Euthanasie und Justiz im Dritten Reich," pp. 235-79.
criminal laws." The Landgericht acknowledged that Nazi perpetrators had been granted immunity from prosecution during the Third Reich. But, rather than taking this as a sign that the Strafgesetzbuch had in fact been partially suspended by the Nazis, the court insisted that Hitler had simply used his de facto power to illegitimately prevent enforcement of valid law. Presupposing the uninterrupted validity of the Strafgesetzbuch was important for it enabled the Landgericht—and all other courts—to subsume the Holocaust under § 211 StGB (i.e. under that paragraph of the penal code which defined certain forms of homicide as murder). This meant that statutory law was always the immediate basis for punishing Nazi killers even when natural law had been invoked to invalidate Hitler's orders.

The statute under which Nazi killers were prosecuted and convicted, § 211 StGB, was routinely applied in a brazenly reinterpretivist manner. The statute was amended by the Nazis in 1941. The previous version had defined murder as any premeditated homicide. Under the new version, a murderer was someone who killed another person out of 'base motives' or in a particularly 'cruel' or 'treacherous' manner. Some courts employed all three elements, characterizing the Holocaust as cruel, treacherous and base. Many courts, however, were satisfied with describing the Nazi genocide as having been committed out of base motives. Needless to say, all reasonable people can agree that the Holocaust was indeed committed out of base motives. The problem, however, lies in the fact that the applicable version of § 211 StGB had been enacted by the Nazis, as unreasonable a bunch of people as one is likely to encounter. Clearly, the Nazis themselves did not consider either racism in general or anti-Semitism in particular to be a 'base motive'. On the contrary: in the Nazi worldview, the pursuit of racial purity was a civic virtue and the annihilation of the Jews was an act committed "for the love

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147 LG Frankfurt 4 Ks 2/63, reprinted in Rütter, Justiz und NS-Verbrechen, Vol. 21, p. 444. The BGH too depicted Nazi rule as nothing more than a practical obstacle to proper law enforcement. See: BGHSt 23, 137 (141).
148 Reichsgesetzbblatt I (1941): 549.
of our people."¹⁵⁰ As abhorrent as this valuation may be, it cannot be ignored when applying Nazi law. According to the principles of Nazi legal theory, "all indeterminate concepts" were "to be applied unconditionally and without reservation in the spirit of National Socialism."¹⁵¹ This interpretive rule was in fact dictated by promulgated law. Under the 1933 "Law to Secure the Unity of the Party and the State", the Nazi party was designated official "representative of German public philosophy" and declared to be "insolubly combined with the state."¹⁵² There can, therefore, be no doubt that as a matter of positive law anti-Semitic motives did not make a homicide murder at the time of the Holocaust.¹⁵³ Thus, despite the courts' nominal reliance on positive statute, the reinterpretivist subsumption of the Holocaust under § 211 StGB constitutes a blatantly retroactive imposition of exogenous legal standards.¹⁵⁴

The West German courts were completely silent on the issue of retroactivity during the second wave of postwar trials of Nazi perpetrators. Article 103 II GG was not mentioned once in the dozens of verdicts that were returned after 1960 despite the obvious nulla poena implications of prosecuting individuals who had acted at the behest of the former state leadership. The silence is made all the more conspicuous by the fact that the courts did occasionally discuss Art. 103 iii GG. Art. 103 III GG prohibits double jeopardy. The courts found it necessary, whenever faced with such a case, to explain why Art. 103 III GG did not preclude the prosecution of an individual who had previously been penalized by a denazification board for membership in a 'criminal organization'.¹⁵⁵ One can only speculate as to why the courts did not feel compelled to

¹⁵⁰The phrase is Himmler's and is taken from his notorious 1943 speech to SS commanders in Posen. Excerpts are quoted in: LG Ulm Ks 2/57, in Rüter, Justiz und NS-Verbrechen, Vol. 15, p. 33.
¹⁵²Reichsgesetzblatt I (1933): 1015.
¹⁵³This point is developed at greater length by Hanack. See: Ernst-Walter Hanack, Zur Problematik der gerechten Bestrafung nationalsozialistischer Gewaltverbrecher (Tübingen: J. C. B. Mohr (Paul Siebeck), 1967): 10-3.
¹⁵⁴At the same time that it violates nulla poena, the reliance on interpreted positive statute places a theoretical limit on prosecutions. Even those courts which invoke natural law to invalidate Hitler's order to exterminate the Jews refrain from making natural law the immediate basis of punishment. On the courts' articulation of natural law, Hitler could not legally order genocide. But, the courts do not assert that the Third Reich was under a natural law obligation to punish either homicide in general or genocide in particular. Thus, there is nothing in the courts' logic that would have allowed punishment of genocidal killers in the absence of a statute outlawing homicide. This is true of all verdicts that rest on the continuity postulate, and is especially true of any verdict that invalidates Hitler's order on reinterpretivist grounds alone.
¹⁵⁵See, for example: LG Ulm Ks 2/57, and LG Aurich 2 Ks 1/62, in Rüter, Justiz und NS-Verbrechen, Vol. 15, p. 229; and, Vol. 19, p. 396 (respectively).
discuss Art. 103 II GG. Yet, had they been pressed to reconcile the punishment of Nazi killers with the constitutional ban on retroactive legislation, the courts would almost certainly have invoked the 'continuity thesis'. On this view, which is clearly implicit in the various post-1960 verdicts, punishing Nazi killers is permissible under Art. 103 II GG because punishment rests on § 211 StGB and § 211 StGB was never repealed by valid law. This claim is doubly suspect. There is, of course, the obvious problem of denying legal validity to Hitler's secret orders even though they were considered law by the Third Reich. If Art. 103 II GG truly permits the retroactive nullification of what had been considered positive law, then Article 103's *nulla poena* guarantee is utterly meaningless. Furthermore, even if one accepts the (dubious) proposition that invalidating Hitler's orders is somehow compatible with Art. 103 II GG, it still does not follow that § 211 StGB remained in effect throughout the Third Reich. One could just as well argue that if one invalidates Nazi law—whether under natural law or reinterpretivist criteria—what then remains is a legal vacuum, not previous law.\(^{156}\) And, if there is indeed an absence of law, then all prosecutions are precluded under *nulla poena*.

*Reasons for Postwar Repositivization*

Though natural law had not disappeared entirely, by the 1960s reinterpretive legal positivism had become the dominant judicial paradigm for dealing with Nazi maleficence. In the major trials of the second prosecutorial wave, such as those dealing with the extermination camps at Auschwitz and Treblinka, reinterpretivism was the primary means by which Hitler's orders were denied legal validity. Even in those verdicts in which natural law was the sole grounds for invalidation, punishment ultimately rested on a reinterpretivist reading of § 211 StGB. The contrast with the immediate postwar period is striking. Between 1945 and 1951, natural law—whether in the form of KRG 10 or judicial pronouncement—flourished. By 1960, the natural law

\(^{156}\)This is the position taken by Coing when discussing the criminal liability of judges who apply statutes that violate natural law. See: Helmut Coing, "Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze," *Süddeutsche Juristenzeitung* (1947): 61-64. Also see the discussion in: Günther Jakobs, *Strafrecht. Allgemeiner Teil.*, 2nd ed., (Berlin: de Gruyter, 1991): 68-9, 115-6, 121.
renaissance had passed. “We have,” Jürgen Baumann observed at the time of the Auschwitz trial, “become more positivist.”

There are several reasons why reinterpretivism gradually drove its natural law rival from the doctrinal field. There were of course the effects of the Grundgesetz. Not only did the *nulla poena* guarantee of Art. 103 II GG delegitimize bald invocation of natural law, but the positivization of natural law principles in Articles 1-20 and 79 meant that the perceived need for non-positivized natural law was, at least as far as the future was concerned, greatly reduced. This perception was reinforced by the ever increasing degree to which the stability of West German democracy could be taken for granted. Moreover, whatever reinterpretivism’s faults, there was a certain superficial plausibility to the reinterpretivist claim that Nazi atrocities could be subsumed under the *Strafgesetzbuch*, thereby obviating the need to invoke natural law.

At the same time, natural law—which had been highly controversial even in the earliest postwar period—was falling into increasing disrepute among German legal scholars. After the Allies revoked German authorization to use KRG 10 in 1951, the only form natural law could take was that of *ad hoc* judicial pronouncement. But the notion of judges declaring duly enacted law to be invalid collided with a historic mistrust of judicial review in continental legal thought. Continental theorists, to a far greater degree than their American counterparts, tended to view judicial scrutiny of legislative enactments as an undemocratic constraint on popular sovereignty. And if the vetting of legislative enactments using constitutional standards was suspect, the use of natural law standards was all the more so. Natural law, was in the words of one postwar critic, tantamount

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158 Even as it invoked natural law vis-à-vis the Third Reich in the early 1950s, the Bundesgerichtshof emphasized that the moral limits on state sovereignty “are today defined by Art. 1-19 of the *Grundgesetz.*” See: BGHSt 2, 234 (238); and, BGHSt 3, 357 (362). This point is also made in: Kerkau, “Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofes in Strafsachen,” p. 153.
161 Though perhaps vague, constitutional standards had at least originated in a legislative act. Natural law standards, by contrast, were even less well defined and enjoyed no legislative endorsement whatsoever.
to "judicial caprice". Academic aversion to natural law jurisprudence was reinforced by the perceived failure of postwar courts to develop a coherent set of natural law principles. One scholar, speaking for many, characterized postwar natural law as "a truly jumbled, often contradictory and confusing multiplicity of value judgements." Critics, particularly those from the left, often objected to the substantive uses to which natural law was put in the postwar period. For example, scorn was frequently heaped upon the BGH's 'Beamtenurteil', a decision in which a civil panel of the Bundesgerichtshof used natural law to give Nazi civil servants a right to continued public employment in the Federal Republic. The use of natural law in the postwar period was not limited to issues arising from the aftermath of the Third Reich. Extra-positive standards were also applied on occasion to phenomena entirely endogenous to the social life of the Federal Republic. For example, in a 1954 decision (which concerned an engaged couple), the BGH invoked natural law to criminalize all forms of extra-marital sex. In yet another case from the same year, the BGH deemed assisting suicide illegal even though there was no statutory ban on the practice. Natural law opponents frequently attacked the social conservatism that underlay these rulings.

But perhaps more than anything else, it was increasing historical knowledge that gradually undermined academic support for natural law in the postwar period. The natural law renaissance had been sparked by Gustav Radbruch's 1946 article, "Statutory Injustice and Extra-Positive Law". A central element of Radbruch's justification for natural law was his contention that legal positivism had "rendered German jurists defenseless against statutes of a tyrannical and criminal

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165 BGHSt 6, 46.
166 BGHSt 6, 147.
167 See for example: Rosenbaum, Naturrecht und positives Recht, p. 174.
nature." Yet, as historical research into the rise and nature of Nazism advanced over the postwar period, this claim was called into ever greater question. Radbruch's thesis, which portrays the judiciary as an unwilling instrument of an irresistible legislator, was increasingly denounced as an apologia that erroneously and insidiously absolved judges of all responsibility for Nazi maleficence. If not convinced Nazis, most judges were, according to Radbruch's critics, at the very least opportunist conservatives who readily conformed to Nazi expectations. The critics argued that the Weimar judiciary was not as firmly wedded to statutory text as Radbruch's claim implied, and, furthermore, that the legal depravity that occurred under the Nazis could in fact have been avoided if judges had actually stuck to the narrow letter of the law as required by strict positivism. On the revisionist view, it was the wanton interpretation of indefinite terms (such as 'public') and the invocation of extra-positive principles (such as 'racial law') that accounted for judicial malefaction during the Third Reich. Radbruch's historiographic critics turned his argument on its head. Extra-positivism was, in their view, a tool of rather than a bulwark against tyranny.

As a result, they tended to oppose any judicial invocation of natural law.

By the late-1980s, on the eve of German reunification, the prosecution of Nazi perpetrators was virtually over. Forty years had passed since the collapse of the Third Reich. Most malefactors were dead, as were most eyewitnesses. Though several thousand files remained open, future trials were increasingly unlikely. The jurisprudential issues that the trials had

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171 Though accurate in many ways, Radbruch's critics overstate their case. Some Nazi enactments—such as the Nuremberg laws—were irredeemably unjust. No matter how narrowly a judge might have interpreted them, their application was necessarily odious. As Arthur Kaufmann observes, the Nazis were unprincipled instrumentalists. They used whichever legal theory best furthered their aims at any given moment. "[T]hey invoked extra-positive natural law when they declared that judges were not strictly bound by pre-revolutionary law, and they invoked positivism when they demanded that Nazi laws—including unjust laws—be strictly adhered to." See: Arthur Kaufmann, "Die Radbruchschwe Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht," Neue Juristische Wochenschrift (1995): 81.

172 The policy conclusion is not a necessary consequence of the historiographic correction. Even if legal positivism was not to blame for judicial depravity during the Third Reich, the retroactive nullification of Nazi law was necessary if Nazi perpetrators were to be held accountable afterward for their actions. The only forthright way to achieve such nullification is via natural law.
raised were long settled. Case law was overwhelmingly reinterpretivist, and those vestiges of natural law that remained were generally dismissed as unnecessary and unwise. It was in this precedential context that the West German courts subsequently dealt with East German perpetrators.
Chapter 4: Reunification and the Continuity of Law

Overview

German reunification in 1990 meant that the Federal Republic was confronted with the remnants of a dictatorial regime for the second time in less than fifty years. Once again the Federal Republic had to decide whether state sponsored human rights abusers would be held criminally accountable for their actions.

The post-reunification period is marked by a peculiar pattern of punishment and non-punishment. Some communist malefactors have been called to book for their misdeeds. Others have been punished, but for acts that were at best tangentially related to human rights abuses. Yet others—including some of the worst human rights abusers—have escaped punishment altogether.

As a result of legislative inaction, responsibility for defining the scope of post-transitional justice was left with the criminal justice system. By 1994, prosecutors had initiated tens of thousands of investigations into communist maleficence and had indicted several hundred former East German officials. Ultimately, however, the decisive factor in determining the extent of post-reunification punishment was to be the jurisprudence of the Bundesgerichtshof.

Reunification triggered a vigorous debate among German legal scholars. Although most participants urged a reinterpretivist approach to post-transitional justice, there were several notable (and diametric) exceptions. Reinterpretivism was simultaneously challenged by advocates of empirical legal positivism on the one hand, and by proponents of natural law on the other.

Despite the academic controversy that reunification loosed and a number of historical factors that might have inclined the court toward increased extra-positivism, the BGH has approached communist perpetrators in much the same way it had previously approached Nazi perpetrators. Reinterpretivism remains the dominant jurisprudential mode. Whatever departure there has been from earlier case law has been in the direction of increased positivism.
The use of natural law in the post-reunification period has been highly circumscribed. Though invoked on occasion, natural law never stands alone: it is always accompanied by an independent line of reinterpretivist logic. Moreover, natural law has been used in only the most extreme of cases, and even then its use has been limited to the invalidation of particular legal justifications. Natural law itself is never the immediate basis for punishment; punishment always rests upon a statute that had (at least nominally) existed under positive law.

One can, therefore, speak of “reunification and the continuity of law” in two distinct senses. First, there is the continuity of case law. The BGH has assumed a stance toward communist malefaction that is very similar to that which it had previously taken vis-à-vis Nazi malefaction. Second, there is the BGH’s unswerving commitment to the ‘continuity thesis’. According to this highly problematic postulate, an idealized version of ‘positive’ law remains valid regardless of divergent empirical reality. It is this assumption which allows the court to construe East German statutes in a way never intended by the GDR itself and (in one instance) to declare East German law to have been null and void under extra-positive standards while steadfastly denying any conflict with *nulla poena*.

The course of post-reunification justice was to a degree over-determined. Though some sought a severe reckoning with communist malefactors and others preferred no reckoning at all, most Germans favored a middle course. The general sense, especially among the political elite, was that the courts should do something, but not too much. Had the courts been inclined to proceed differently, politicians would probably have taken corrective action, particularly if the courts had been inclined to treat former East German officials harshly. As it was, however, the BGH’s natural inclination was toward a middle course. Not only do the court’s justices tend to share the predispositions of the country’s political elite as a whole, but they subscribe to a set of jurisprudential beliefs that were almost certain to foster moderation in post-reunification justice. Having dealt with Nazi perpetrators throughout the preceding postwar period, the BGH had already developed a relatively fixed approach to dealing with totalitarian malefactors prior to reunification. An essential element of that approach was a particular (albeit problematic) reading
of Art. 103 II GG. According to the court’s understanding of Art. 103 II GG, an act committed under a prior regime is punishable if, but only if, there was a duly enacted statute that could be interpreted as having criminalized that act.\(^1\) This tenet allows post-transitional prosecutions to occur, but only within rather narrowly drawn bounds. Although courts will depart from precedent on occasion, there is a strong tendency—even in a civil law system—for courts to respect established case law. Given the court's propensity toward jurisprudential continuity and the absence of strong countervailing political pressure, there was little chance that the current treatment of communist maleficence would differ greatly from the previous treatment of Nazi maleficence.

**Pattern of Post-Reunification Punishment**

Cases concerning criminal liability for communist maleficence will almost certainly continue to occupy the courts of the Federal Republic for years to come. Thus, any statement as to the scope or nature of post-transitional justice in the wake of reunification is at this point necessarily provisional. Nonetheless, the rough outlines of post-reunification justice—as delimited by the Bundesgerichtshof—are already clear.

Since 1990, approximately 200 former East German officials have been convicted of crimes.\(^2\) These convictions present a puzzling pattern. Some, such as convictions for electoral fraud or for manslaughter in the deaths of would-be refugees killed trying to leave their country, are clearly germane. Others are not: ex-officials have faced trial for relatively petty offenses and for serious offenses, but ones not directly related to political repression. At the same time, many odious practices characteristic of communist rule, such as domestic surveillance and judicial repression, have gone largely or entirely unpunished.\(^3\)

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\(^1\) For a sense of the interpretive lengths to which the BGH has sometimes gone, see pages 155-7 and 161-3 below.

\(^2\) Unfortunately, reliable comprehensive data is not available. One press report states that 170 individuals have been convicted (of 340 indicted). The report does not provide a source for those numbers. [See: Rick Atkinson, "Germany Judges the Deadly Role of Communism," *The Washington Post National Weekly Edition* (October 9-15, 1995): 18.] The slightly higher figure I offer is an estimate derived from a combination of published and unpublished sources. See footnotes 21, 32 and 39 and pages 126-31 below.

\(^3\) The malefactors who have escaped punishment are by no means exclusively low-level subordinates. Most high-ranking officials, including both members of the Politburo and generals of the secret police, have escaped punishment.
Though one can of course dispute the wisdom of there being any post-transitional justice at all, it seems clear that if there is to be post-transitional justice, then it should at least focus on significant human rights abuses committed by the former regime in the name of the former regime. Some trials in post-reunification German do exactly that. The Berlin Wall was not only an inhumane construct in and of itself, but was—by effectively imprisoning the entire population—the linchpin of all other cruelties perpetrated by the communist regime. Thus, it is proper that those responsible for the many deaths at the Berlin Wall, from the top political leadership to the border guards themselves, be punished for their actions. Similarly, since free and honest elections are a necessary condition for political liberty in a large polity, it is on the face of it appropriate to punish those who systematically rigged East German elections.

Other elements of post-reunification justice are far harder to comprehend. Take, for example, the case of Harry Tisch, the first former GDR official to stand trial after reunification. Tisch was a member of the Politburo and the longtime head of the Freier Deutscher

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4 According to information supplied the author by the Berlin Senatsverwaltung für Justiz (letter from Uta Fölster, ministerial spokesperson, October 5, 1994), Berlin prosecutors had charged 79 border guards with manslaughter or attempted manslaughter as of October 5, 1994. Of those indicted, 23 had been convicted and 8 acquitted at trial as of that date. Of those convicted, all but two were given suspended sentences. The remaining cases had yet to reach a conclusion. (Since then, approximately two dozen other border guards have been charged.) Although a few border shootings occurred along the ‘inner German border’ (i.e. the border between East Germany and West Germany proper), most shootings occurred along the Berlin Wall. Thus, given the principles of territorial jurisdiction in Germany’s federalized system, the Berlin trials represent the vast majority of border guard trials to be held. Border guards are not the only ones who have been prosecuted in connection with border shootings. Indictments have also been brought against former high-ranking members of the East German leadership. In May 1992, the GDR’s penultimate communist ruler, Erich Honecker, and five other top officials were charged with manslaughter. Though Honecker and two others were ultimately declared unfit for trial, the three remaining defendants were convicted, and their convictions were subsequently upheld by the BGH. They were sentenced to between five and seven and a half years in prison. One of those convicted, the former East German minister of defense, Heinz Keßler, has appealed his conviction to the Federal Constitutional Court. The court has yet to rule on his appeal. [See: LG Berlin, (527) 2 Js 26/90 Ks (10/92), in Neue Justiz (1994): 210-4; BGHSt 40, 218; and, Uwe Wesel, Ein Staat vor Gericht. Der Honecker Prozeß. (Frankfurt: Eichhorn, 1994.)] Trials in connection with the border killings are currently under way against former members of the Politburo and various commanding generals. [See: “DDR-Generäle wegen der Schüsse an der Mauer vor Gericht,” Frankfurter Allgemeine Zeitung (August 18, 1995): 5; “Führung der Grenztruppen vor Gericht,” Frankfurter Allgemeine Zeitung (October 28, 1995): 4; and, “An der Aufrechterhaltung der Grenzanlagen aktiv beteiligt,” Frankfurter Allgemeine Zeitung (November 10, 1995): 4.] The Berlin prosecutorial office intends to bring charges against individuals responsible for the border shootings at each level of the East German command structure. “We are proceeding layer by layer,” says Christoph Schaeffgen, the prosecutor responsible for pursuing East German malfeasance in Berlin. [Quoted in: “Leben mit Litzen,” Der Spiegel (August 14, 1995, p. 57).]

5 In two highly publicized trials, the former mayor (Wolfgang Berghofer) and the former regional party chief (Hans Modrow) of Dresden were each convicted of electoral fraud. Their convictions have been upheld by the BGH and by the Bundesverfassungsgericht. [See: BGHSt 39, 94; BGHSt 40, 307; and, Bundesverfassungsgericht, 2 BvR 292/93, Neue Zeitschrift für Strafrecht (1993): 432-3] There have been numerous other, lower profile electoral fraud trials as well. [See, for example, the trials reported in: “Urteile wegen Verfälschung der DDR-Kommunalwahl,” Frankfurter Allgemeine Zeitung (April 29, 1992): 5; and, “Zehn Monate Gefängnis auf Bewährung für Krack,” Frankfurter Allgemeine Zeitung (September 9, 1993): 2.]
Gewerkschaftsbund, the East German trade union federation. As such, he was responsible for weaving an intricate web of institutional structures that helped neutralize potential resistance to communist rule. But, neither his elevated position in the SED leadership nor his active role in stabilizing the communist dictatorship was the subject of his post-reunification trial. Instead, he was punished for having misappropriated (a comparatively small amount of) union funds for personal gain, specifically in order to have his dascha renovated.\(^6\)

The case of Erich Mielke is similarly odd. For over 30 years, Mielke was head of the notorious Ministry for State Security (better known as the 'Stasi'). The Stasi was, simultaneously, the East German secret police and the East German foreign intelligence agency. Thus, as its chief, Mielke was in charge of both domestic repression and international espionage.\(^7\) He and his subordinates were very successful in each of these endeavors for many years. Not only did his spies infiltrate many West German institutions, but his agents managed to squelch almost all internal dissent. And indeed, when tried, Mielke stood accused of serious charges: double murder. But, the murders for which he was tried and ultimately sentenced were committed in

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\(^6\) Tisch's indictment had been prepared by East German prosecutors after the opening of the Berlin Wall but prior to German reunification. It was, in the words of one observer, part of a last ditch effort "to save the SED from the pressure of the streets." [Rainer Frenkel, "Die DDR vor Gericht," Die Zeit (January 21, 1994): 40.] During the 1989/1990 interregnum, as the communist party tried to salvage what it could, GDR prosecutors brought corruption charges against various erstwhile high-ranking officials. With the exception of a few indictments charging electoral fraud, indictments relating to human rights abuses were not filed. By focusing on economic impropriety rather than political repression (in which they themselves were of course implicated), prosecutors sought to deflect reformist demands. The implicit suggestion was that whatever problems existed in the GDR were attributable to a few venal individuals rather than the communist system itself. [See: Christa Hoffmann, Stunden Null? Vergangenheitsbewältigung in Deutschland 1945/1989 (Bonn: Bouvier Verlag, 1992): 235-8; and, Thomas Ammer, "Umschau," Deutschland Archiv (1990): 659, 1010, 1168-9, 1331-2.] The corruption charges were pursued even after the GDR had been absorbed by the FRG. This was partly a result of institutional inertia: once initiated, a criminal investigation assumes a life of its own (especially if an indictment has been lodged). But it was also a result of prosecutors' political goals: the former East German prosecutors who had retained their jobs continued to pursue their apologetic mission, while their West German colleagues who had been sent east were glad of any instrument that promised to reach the former GDR leadership. Thus, Harry Tisch was not the only senior communist official to have been tried after reunification for the misappropriation of funds. According to data provided the author by the state prosecutorial offices, approximately three dozen party officials had been similarly charged as of July 1993. For a sense of the trivialities involved, see the following press reports: "Prozeß gegen zwei ehemalige DDR-Funktionäre eröffnet," Tagesspiegel (November 19, 1991): 4; "Sonderkonto für Jagdwaffen," Berliner Zeitung (February 7, 1992): 4; "Prozeß gegen Suhler SED-Chef eröffnet," Südwestdeutsche Zeitung (September 25, 1992): 5; and, "Jagdhütte bringt Hallenser SED-Chef vor Gericht," Südwestdeutsche Zeitung (May 15, 1993): 5.

1931, nearly two decades prior to the establishment of the East German state! He was, in the words of one prominent commentator, sentenced "for the wrong deed."8

It is interesting to note the paradoxically divergent fate of the Stasi’s two types of officers in the years immediately following reunification. Stasi agents who had engaged in international spying, that is to say, individuals who had participated in a practice that violates no democratic norm, were prosecuted vigorously with the Bundesgerichtshof’s explicit approval.9 By contrast, Stasi agents who tormented dissidents, and thus flagrantly violated basic principles of democracy, have remained essentially untouched. Very few were prosecuted, and those that were prosecuted were ultimately acquitted by the BGH.10 Though the Bundesverfassungsgericht, the Federal Constitutional Court, ultimately placed very tight limits on the extent to which international spies may be prosecuted, the fact remains that foreign espionage agents may (under certain circumstances) be punished while agents of domestic repression appear to have escaped scot free.11

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8Friedrich Karl Fromme, "Für die falsche Tat," Frankfurter Allgemeine Zeitung (October 27, 1993): 1. A brief overview of the case—which concerned the murder of two Prussian policemen—can be found in: “Mord und Mörder in den Jahren der Freiheit” Frankfurter Allgemeine Zeitung (October 27, 1993): 1. Mielke was subsequently indicted for his part in the border regime and other forms of political repression, but the courts found him (at least temporarily) unfit to stand trial again. See: "Auf Mielke kommen weitere Anklagen zu," Frankfurter Allgemeine Zeitung (October 30, 1993): 5; "Das Verfahren gegen Mielke wird eingestellt," Frankfurter Allgemeine Zeitung (November 4, 1994): 1; and, "Mielke-Verfahren wird nicht eingestellt," Frankfurter Allgemeine Zeitung (December 16, 1995): 5. When the author of this dissertation interviewed Rainer Eppelmann—who is a member of the Bundestag, was at the time chairman of the Bundestag’s committee of inquiry into the East German dictatorship, and had been a leading dissident in the GDR—Eppelmann did not know that Mielke had subsequently been indicted on Stasi-related charges (interview, July 4, 1994). If someone as well-placed and well-informed as Eppelmann did not know, how would the average former East German know? Eppelmann’s ignorance demonstrates the irreparable (public psychological) damage done by having first indicted and prosecuted Mielke on irrelevant charges dating from the Weimar Republic.


10BGHSt 40, 8; and, BGH, Großes Senat für Strafsachen 1/95, in Neue Justiz (1996): 93-4. These decision are discussed on pages 169-70 below.

11Under the court’s ruling (Bundesverfassungsgericht, 2 BvL 1991, 2 BvR 1206/91, 2 BvR 1584/91, 2 BvR 2601/93), GDR spies can be prosecuted if and only if they operated outside the Soviet bloc. Following the constitutional court’s ruling, the BGH reversed Markus Wolf’s initial conviction (BGH 3 StR 324/94). [See footnote 9.] A new indictment against Wolf, concerning acts dating from the 1950s, has since been lodged (Der Generalbundesanwalt, "Mitteilung des Generalbundesanwalts beim
Secret police officers are not the only malefactors to have escaped post-reunification justice. For example, the BGH has ruled that Stasi informants are, at least in general, not criminally liable for their actions.\textsuperscript{12} Thus, an individual who—either gratuitously or for personal benefit—thwarted another person’s bid for freedom need not fear being held criminally responsible for his or her action. Likewise, GDR judges who jailed would-be refugees and nonviolent dissidents will generally not have to pay for their role in communist tyranny.\textsuperscript{13}

The peculiar pattern of post-reunification punishment is a complex outcome that requires a complex explanation. No single factor can fully account for both the number and distribution of convictions. The set of causal factors includes: the political Zeitgeist, Germany’s federalist structure, the contingencies of available evidence and the BGH’s jurisprudential commitments. Consider, for instance, the case of Erich Mielke. Why was the infamous head of the East German secret police prosecuted for an event that took place during the Weimar Republic? The reasons are several. There was—given his nefarious activity during the life of the GDR—a widely held desire that he be punished on some grounds or other; evidence pertaining to the 1931 murders was easily obtained; and, prosecutors rightly believed that the courts would be unsympathetic to a natural law indictment. As this example suggests and as the rest of the chapter shall show, political interests and legal ideas have each played an important and autonomous role in determining the course of post-transitional justice in reunified Germany.

\textit{Criminal Justice System Delimits Post-Reunification Punishment}

Of all the issues raised by reunification, one of the thorniest was whether East Germans should be held criminally liable for their part in the communist regime. Had it had the will, the Bundestag could have decided the issue itself. It could have amended Art. 103 II GG and passed a retroactive law along the lines of Kontrollratsgesetz Nr. 10. Alternatively, it could have passed an amnesty which explicitly absolved all individuals of criminal liability for acts committed

\textsuperscript{12}BGHSt 40, 125. This decision is discussed on pages 168-9 below.
\textsuperscript{13}BGHSt 40, 30; and, BGHSt 40, 272. GDR judges may be punished in exceptional circumstances. [See: BGH 5 StR 713/94; and, BGH 5 StR 747/94.] The various decisions are discussed on pages 162-8 below.
in the GDR. But, the Bundestag choose neither of these routes. What the Bundestag did do was ratify the Unification Treaty.\textsuperscript{14}

The Unification Treaty, however, evades the critical question. As of 1968, the GDR had a penal code (‘StGB-DDR’) of its own.\textsuperscript{15} At the moment of reunification, the East German criminal code was abrogated and replaced by that of the FRG. Thus, unlike the situation immediately after 1945, there could be no facile assumption of statutory continuity: the existence of distinctive East German legislation had to be acknowledged. The Unification Treaty stipulates that all crimes committed in the GDR are to be punished according to GDR law, unless—extra-territoriality notwithstanding—they were already punishable under FRG law even prior to reunification.\textsuperscript{16}

Indeed, there are a few crimes (such as espionage against the Federal Republic and genocide) which are punishable under FRG law under all circumstance no matter where they are committed.\textsuperscript{17} Aside from such exceptions, however, the application of FRG law to acts committed outside the FRG is generally limited to a very narrow range of circumstances and always presupposes that the act in question was also punishable under local law at the time it was committed.\textsuperscript{18} Thus, according to the provisions of the Unification Treaty, acts committed in

\textsuperscript{14}Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag—vom 31.8.1990, Bundesgesetzblatt II (1990): 889ff. Dannecker points out that the Bundestag ratified the Unification Treaty with a greater than two-thirds majority. This majority would have been sufficient to amend Art. 103 II GG. See: Gerhard Dannecker, “The Role of Criminal Law in Dealing with East Germany’s Past: The Criminal Responsibility of Judges, Spies, and Other Officials,” in Werner F. Ebke and Detlev F. Vagts, eds., Democracy, Market Economy, and the Law (Heidelberg: Verlag Recht und Wirtschaft, 1995): 204ff.


\textsuperscript{16}Article 315 Einführungsgesetz zum Strafgesetzbuch in der Fassung des Einigungsvertrags Anlage I (B) Kapitel III Sachgebiet C Abschnitt II Nummer 1 (b), Bundesgesetzblatt II (1990): 954ff (referred hereafter to as ‘Art. 315 EGStGB’).

\textsuperscript{17}§§ 5-6 StGB.

\textsuperscript{18}According to § 7 StGB, FRG law applies (under certain circumstances) to acts committed abroad if the victim is a ‘German’, if the perpetrator is a ‘German’, or if the perpetrator subsequently becomes a ‘German’. Obviously, a lot turns on who is considered a ‘German’. The West German constitution never recognized the legal division of Germany. On the contrary: the Grundgesetz was, according to its original preamble, enacted on behalf of all Germans, including “those Germans who were denied the right to participate” in its drafting. For constitutional purposes, therefore, East Germans were considered ‘Germans’. Whether they were also ‘Germans’ for matters of criminal law was another matter. Were East Germans considered ‘Germans’ within the meaning of § 7 StGB, FRG penal law would have applied to all acts committed by GDR citizens against other GDR citizens within the GDR. This was widely perceived to be an untenable result, especially after the 1972 Grundlagenvertrag, the treaty in which the two Germanys implicitly recognized each other's sovereignty. Consequently, by the 1980s, in criminal matters a ‘German’ was—at least among academics—generally understood to mean a citizen of the Federal Republic. [Some courts, including the BGH, continued to adhere to an earlier, nationalist interpretation in a limited range of cases even after the Grundlagenvertrag. On the scholarly consensus and the judicial divergence therefrom, see: Volker Kray and Norbert Arenz, “Schutz von DDR-Bürgern durch das Strafrecht der Bundesrepublik Deutschland?,” Juristische Rundschau (1985): 399-408. Of course, the issue was largely moot so long as the GDR existed and its citizens remained beyond the reach of
the GDR are generally punishable after reunification if and only if they were punishable under GDR law at the time they were committed. This, however, brings us back mutatis mutandis to the very same issue that lurked beneath many postwar trials: what exactly was valid law at the time? Was it all procedurally validated statute, but only such statute? And if so, statute interpreted how? Or, did binding GDR law consist only of those procedurally validated statutes that were not null and void qua human rights violations?

Given the absence of definitive legislative guidance, these were questions that the criminal justice system would have to answer for itself. They way in which it answered them would define the scope of post-transitional justice in reunified Germany. One can speculate as to why the Bundestag failed to provide detailed direction. Perhaps the politicians were satisfied with the expected course of events; perhaps the politicians wanted to avoid responsibility for what was to come. But, whatever the reason, it was the criminal justice system rather than the legislature that would set policy vis-à-vis communist malefactors in the wake of German reunification. The first move was in the hands of prosecutors. They had to decide which individuals, if any, could be charged with which crimes. Ultimately, however, it was the courts—and the BGH in particular—that would decide who could be held accountable for acts committed in the GDR. When called upon to decide, the BGH remained firmly within the reinterpretivist paradigm that had emerged from the postwar confrontation with Nazi perpetrators.

West German prosecutors. Prior to 1990, the theoretical applicability of the StGB to acts committed in the GDR was relevant only if an East German perpetrator entered the FRG. Though rare, this did occasionally happen. [See, for example: LG Stuttgart, Ks 14/63, Juristenzeitung (1964): 101-5. The case, discussed on pages 143-4 below, involved an East German border guard who had shot a would-be refugee but then himself subsequently defected to the West.] When the possibility of widespread prosecution became real after reunification, however, the question of the StGB’s supposed reach acquired considerable practical significance. Reunification presented a major problem: suddenly all (former) East Germans had become citizens of the FRG. Thus, even under the narrowest interpretation of § 7 StGB, FRG law would now seem to apply to all acts that had been committed in the GDR. Most analysts reject this conclusion precisely because it would vitiate the principle that in general GDR law should be applied to acts committed in the GDR. [See, for example: Jürg Arnold and Martin Köhler, “Forum: Probleme der Strafbarkeit von Mauerschützen,” Juristische Schlauf (1992): 991-7; Gerald Grunwald, “Die strafrechtliche Bewertung in der DDR begangener Handlungen,” Strafverteidiger (1991): 31-7; and, Joachim Renzikowski, “Vergangenheitsbewältigung durch Vergeltung?—Zur Strafbarkeit der Informanten der Staatssicherheitsdienste der ehemaligen DDR nach § 241 a StGB,” Juristische Rundschau (1992): 270-4. For the dissenting view, see: Georg Kürper and Heiner Wilms, “Die Verfolgung von Straftaten des SED-Regimes,” Zeitschrift für Rechtspolitik (1992): 91-6.] But even if one did suppose that former East Germans are now ‘Germans’ within the meaning of § 7 StGB, § 7 StGB specifies that FRG law applies to acts committed outside the FRG only if that act was punishable under local law at the time it was committed. Thus, no matter how one approaches it, with the exception of those acts covered by §§ 5-6 StGB, FRG law is applicable to acts committed in the GDR prior to reunification only if GDR law had already criminalized those acts. [See: Rudolf Wassermann, “Verbrechen unter totalitärer Herrschaft—Zur Rolle des Rechts bei der Aufarbeitung der DDR-Vergangenheit,” Neue Juristische Wochenschrift (1993): 896.]
Prosecutorial Activity in the Wake of German Reunification

Under German federalism, the administration of justice is, as has already been mentioned, generally a matter for the individual states. Terrorism, treason and espionage are the only crimes that fall under federal jurisdiction. Calls for the creation of an exceptional national prosecutorial office analogous to the Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen were rejected by the state ministers of justice.\textsuperscript{19} There was, it was argued, no need for such an office because the jurisdictional problems which had plagued the pursuit of Nazi maleficence did not affect the pursuit of communist maleficence. As a result, primary responsibility for the prosecution of most East German perpetrators rests with the five entirely new federal states, which the GDR had once comprised, and the state of Berlin, whose already existing western half incorporated what had previously been the East German capital. By the beginning of 1993, each of the six states with territorial jurisdiction over part of what had been East Germany had established a special prosecutorial office responsible solely for the investigation and prosecution of communist crimes within its region.\textsuperscript{20} Berlin’s special prosecutorial office is arguably the most important of the six because it—by dint of geography and the GDR’s centralized structure—has jurisdiction over the crimes committed at the highest echelons of the East German regime.

The special prosecutorial offices are staffed almost exclusively by Westerners. Of the slightly more than 100 prosecutors assigned to the offices in late 1993 and early 1994, only one


came from eastern Germany. Given the "conflicts of loyalty into which they would inevitably fall," former East German prosecutors, even if allowed to retain their jobs after reunification, are considered unsuited for assignment to the special prosecutorial offices. Many former East German prosecutors—including some who remain in the state's employ—are themselves objects of criminal investigation, and are in any case, if not suspects themselves, longtime friends and colleagues of individuals who are suspects.

The special prosecutorial offices have suffered from rather significant personnel problems since their inception. The vast majority of those initially assigned to the offices were on temporary loan from states in the West. Very few went east with the intention of settling there. Prolonged separation from their families and perceived harm to their careers induced many of those seconded to return home as quickly as possible. This resulted in what was at least initially a very high rate of turnover among the prosecutorial staff. The rapid turnover hampered prosecutorial efforts "because it takes a long time to familiarize oneself with the material, which is both legally and factually difficult." Other than in Berlin, where many of those working in the special prosecutorial office are still on temporary assignment from either the federal government or other western states, the turnover rate has gradually declined as positions are increasingly filled by permanent civil servants of the eastern states. Though all but one are originally from the West, the prosecutors now in place have chosen to make their careers in the East. Nonetheless, despite the greater stability in prosecutorial personnel, difficulties remain. A major concern among those heading the special prosecutorial offices is the fact that nearly all of their

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22 The specific words, though representative of each prosecutor interviewed, are those of Ulrich Meinerzhagen (interview, January 27, 1994).

23 The specific words, though again representative of each prosecutor interviewed, are those of Jan van Rossun (interview, June 14, 1994).
subordinates are young and correspondingly inexperienced. They are, furthermore, terribly overworked as a result of understaffing. The largest of the special prosecutorial offices, *Staatsanwaltschaft II* in Berlin, is supposed to have eighty prosecutors, of whom fifty are to be provided by the other western states and ten are to be provided by the federal government.\(^ {24} \) But, because the other western states have consistently failed to make good on their promises to Berlin, the actual number of prosecutors has remained persistently below the targeted level.\(^ {25} \) The special prosecutorial offices in the entirely new states have many fewer prosecutors than does the Berlin office. The smallest, that in Mecklenburg-Vorpommern, has four and even the largest, that in Sachsen, has only fifteen.\(^ {26} \) They are, by their own admission, unable to handle the thousands of criminal investigations that have arisen in the wake of reunification. Each prosecutor is working several hundred cases simultaneously. The case load "is simply unmanageable," says Ulrich Meinerzhagen, the (former) head of the special prosecutorial office in Sachsen.\(^ {27} \)

Exact, up-to-date prosecutorial data is unfortunately not available. Ultimately, such data can only come from the special prosecutorial offices themselves.\(^ {28} \) The author requested—both in writing and in person—data from each of the special prosecutorial offices between July 1993 and July 1994. The offices were generally unable to provide any data on prosecutorial activity in

\(^ {24} \) Peschel-Gutzzeit and Jenckel, "Der Weg zu einer funktionstüchtigen Justiz in Berlin und ihre Aufgaben fünf Jahre nach der Wiedervereinigung," p. 2675.

\(^ {25} \) This statement is based on information provided by the author by Christoph Schaelgen, now head of *Staatsanwaltschaft II* and at the time of the interview (June 15, 1994) head of the Arbeitsgruppe-Regierungskriminalität. According to Schaelgen, at any given moment the states have tended to provide only 40-42 of the 50 prosecutors that they had pledged to lend Berlin. Strictly speaking, the numbers that Schaelgen gave the author refer only to the Arbeitsgruppe-Regierungskriminalität and not to its successor, *Staatsanwaltschaft II*. That this situation has persisted to the present, however, can be surmised from Peschel-Gutzzeit and Jenckel, "Der Weg zu einer funktionstüchtigen Justiz in Berlin und ihre Aufgaben fünf Jahre nach der Wiedervereinigung," p. 2675. Peschel-Gutzzeit (the current minister of justice in the state of Berlin) and Jenckel speak of "eine Soli-Stärke" of 60 seconded prosecutors.

\(^ {26} \) One should not impute great significance to the relative number of prosecutors in the various states. Sachsen is the most populous of the eastern states; Mecklenburg-Vorpommern the least populous. Berlin needs many more prosecutors because it must contend with the misdeeds which emanated from the central state and party organs.

\(^ {27} \) Interview (January 27, 1994). Meinerzhagen returned to Baden-Württemberg, his home state, in April 1994 after spending three years on assignment in Dresden. Jan van Rossun, the head of the special prosecutorial office in Brandenburg, says, "I admit that we simply ignore lots of things and that this is a violation of the principle of mandatory prosecution, but we accept this gladly because we know that there is only one sensible, practical solution." Under the principle of mandatory prosecution (the 'Legaltätsprinzip' prosecutors are obligated to bring charges whenever they have credible grounds to believe that a crime has been committed.

\(^ {28} \) According to an official of the Federal Ministry of Justice, Ministerialrat Fieberg, the federal government has no data on the prosecution of former communist officials (telephone conversation, April 25, 1998).
the period prior to their establishment. Thus, the data they could provide was inherently incomplete. Though in principle willing to provide whatever data they had, several of the offices were (as a result of understaffing and disorganization) unable to provide detailed, comprehensive data even for the period subsequent to their creation. Moreover, since each office has its own accounting system, the data provided by one is not always commensurate with the data provided by another. Furthermore, that data which the offices did provide the author are by now somewhat dated. Published data is scarce, and that which has been published, although newer, is so aggregated as to be of only limited utility. The data that the author has been able to compile—whether on his own or from published sources—must therefore be treated with due caution. The following figures are offered simply to give a rough sense of the extent and the relative emphases of post-reunification prosecutorial activity.

Approximately 50,000 prosecutorial investigations were been initiated in the first five years after reunification. The number of individuals investigated, however, is substantially lower

29 The Arbeitsgruppe-Regierungskriminalität was the only office to commence work at the instant of reunification on October 3, 1990. The other offices were established between January 1992 (Sachsen) and January 1993 (Sachsen-Anhalt). Prior to the establishment of the special prosecutorial offices, no one prosecutorial office in particular had responsibility for the systematic pursuit of systemic communist malfeasance. To the extent that such cases were pursued, they were typically handled by whichever local prosecutor had jurisdiction. In Sachsen, special units devoted to the prosecution of communist maleficence were established within the Dresden, Leipzig and Chemnitz prosecutorial offices in mid-1991. By the end of the year, the difficulties of coordinating work across these offices prompted the state ministry of justice to order the centralization of the prosecutorial effort in Dresden, the capital of Sachsen.

30 For example, some offices count by the number of investigations (each of which may cover several people suspected of multiple offenses) while other offices count by the number of specific accusations (many of which might be lodged against a single individual).

31 And it too seems to suffer from problems of incommensurability across states. Nonetheless, I have of course made use of it to the extent possible.

32 This figure is derived from the semi-official data presented in: Bräutigam, "Die Situation der Justiz im Land Brandenburg," pp. 2678-9; Eggert, "Die Situation der Justiz in Mecklenburg-Vorpommern," p. 2683; Heitmann, "Fünf Jahre Aufbau des Rechtswesens im Freistaat Sachsen," p. 2687; Kretschmar, "Justiz in Thüringen," p. 2695; Peschel-Gutzzeit and Jenckel, "Der Weg zu einer funktionsstüchltigen Justiz in Berlin," p. 2675; and, Schubert, "Stand des Aufbaus der Rechtspflege in Sachsen-Anhalt," p. 2692. Four caveats are necessary: 1. The figure excludes treason and espionage investigations conducted by federal prosecutors. 2. As with the data collected by the author personally, it is uncertain that the numbers provided for one state are entirely commensurate with the numbers provided for another state. Thus, the derived figure of 50,000 might be something of an apples-and-oranges concoction. 3. The figure given by Heitmann for the number of investigations initiated in Sachsen (ca. 5,000) is suspiciously low. According to the head of the criminal division of Sachsen's state ministry of justice, Dr. Kühner, nearly 6,000 investigations had already been opened as of August 1993 (letter to the author [Aktenzeichen: 1410E—OR—667/93], August [no date], 1993). 4. The figure given by Peschel-Gutzzeit and Jenckel for Berlin (17,000) includes not only the number of investigations into communist malfeasance per se, but also the number of investigations into economic fraud allegedly committed during the course of reunification. Thus, it overstates somewhat the number of investigations into communist malefaction per se. According to information provided the author by their directors [see footnotes 20 and 21], Abteilung 51 and the Arbeitsgruppe-Regierungskriminalität (i.e. those precursor units to the Staatsanwaltschaft II that were exclusively concerned with communist malfeasance narrowly defined) had initiated approximately 13,000 investigations as of July 1994 and were continuing to open approximately 100 new investigations each month. One can therefore safely assume that more than
because many individuals are or were suspects in multiple investigations. The range of crimes under investigation runs a broad gamut. The list includes: murder, manslaughter, perversion of justice, deprivation of liberty, denunciation, electoral fraud, misappropriation of funds, extortion, coercion, assault, usurpation of official powers, embezzlement and espionage.

Despite the long list, approximately three-quarters of all investigations have focused on the perversion of justice (Rechtsbeugung). This fact is explained by two historical contingencies, the first of which has to do with the sort of East German refugee who was typically debriefed by West German authorities after 1961. After the construction of the Berlin Wall in 1961, the Federal Republic established a national registry (the Zentrale Erfassungsstelle in Salzgitter) in order to document instances of East German iniquity. The Erfassungsstelle interviewed many of the East Germans who made it to the Federal Republic. Since a disproportionate number of those who arrived in the West had been political prisoners in the GDR, the Erfassungsstelle recorded numerous instances of judicial malfeasance. After reunification, the relevant files were sent to the special prosecutorial offices. The second reason why perversion of justice cases figure so prominently in post-reunification prosecutorial activity has to do with two rehabilitation laws, one of which was enacted by the Volkskammer (the East German parliament) during the brief interregnum that followed the collapse of communism and preceded reunification, the other of which was enacted by the Bundestag after reunification.

Under the two laws, those who had been convicted by East German courts of political offenses can petition the (since reconstituted) courts for official rehabilitation. Though the re:ability

14,000 of the 17,000 investigations that had been initiated in Berlin as June 1995 concerned communist malfeasance per se.

33 According to Thomas Nehlert, for example, who was at the time head of Abteilung 51 der Staatsanwaltschaft bei dem Landgericht Berlin, approximately 1,000 distinct suspects were implicated in the roughly 10,000 investigations that his office had initiated between 1991 and 1994 (interview, July 27, 1994).

34 For example, of the 5,635 investigations initiated in the state of Sachsen-Anhalt between 1991 and June 1995, 4,291 (76.1%) concerned perversion of justice, 407 (7.2%) deprivation of liberty, 215 (3.8%) denunciation, 190 (3.4%) bodily harm, 22 (0.4%) murder or manslaughter, and 441 (7.8%) various other offenses. [See: Schubert, "Stand des Aufbaus der Rechtspflege in Sachsen-Anhalt," p. 2692.] Perversion of justice, defined as deforming the law to the advantage or disadvantage of a party to a case, is a crime under § 336 StGB.

35 Between 1963 and 1989 the Federal Republic purchased the freedom of approximately 33,000 East German political prisoners. See: Hoffmann, Stungen Null?, p. 230.

process is an administrative rather than criminal affair, each petition filed arguably contains prima facie evidence that Rechtsbeugung occurred. The petitions are, therefore, routinely forwarded to the special prosecutorial offices for criminal investigation. Thus, as a result of the Salzgitter files on the one hand and the rehabilitation petitions on the other, there has been a steady stream of Rechtsbeugung cases flowing into the special prosecutorial offices. For no other alleged crime is there a comparable, institutionally structured investigatory impulse. Ultimately, however, despite the skewed distribution of investigations, it is unlikely that three-quarters of actual prosecutions will involve perversion of justice charges. This is so for two reasons: First, a single individual—for example, a judge who sat on a notorious political court—is often at the heart of hundreds of Rechtsbeugung investigations. Rather than charge that individual with hundreds of separate counts, a prosecutor will usually select a few particularly egregious instances for trial and then close the remaining investigations. As a result, the vast majority of Rechtsbeugung investigations will be closed without an indictment, even if the allegations are substantiated and actionable. The second reason why Rechtsbeugung charges will likely represent fewer than three-quarters of all prosecutions is the fact that the Bundesgerichtshof has ruled that many alleged instances are not in fact actionable.\textsuperscript{37}

In the end, the vast majority of all investigations, not just perversion of justice investigations, will be closed without indictment. If present trends continue, more than of 97% of all investigations will ultimately be closed without indictment. Of the 4,250 investigations completed thus far in the state of Thüringen, only 30 (0.7%) have ended in an indictment; of the 5,500 investigations concluded in Brandenburg, only 28 (0.5%) have resulted in an indictment.\textsuperscript{38}

The rate of indictment in the other states, though perhaps somewhat higher, does not exceed 3% of completed investigations.\textsuperscript{39} Two of the reasons for this have already been mentioned: the

\textsuperscript{37}See pages 162-8 below.

\textsuperscript{38}Kretschmer, "Justiz in Thüringen," p. 2695; and, Bräutigam, "Die Situation der Justiz im Land Brandenburg," p. 2679.

\textsuperscript{39}Exact numbers are unavailable for the other states. In Sachsen, 47 indictments were brought and "more than 2,000" investigations were closed without indictment between October 3, 1990 (the day of reunification) and May 31, 1995. If one takes 2,000 as a conservative denominator, the 47 indictments brought represent less than 2.4% of completed investigations. In Berlin, 218 indictments have been brought and 8,000 investigations have been "closed, passed on or otherwise concluded." Since the Berlin special prosecutorial office conducts the preliminary investigation of all border shootings regardless of where they occurred, some of the cases that were "passed on" probably resulted in indictments being
folding of multiple investigations into one indictment, and the issuance of appellate rulings which preclude the prosecution of certain actions that prosecutors had initially thought criminal. Two other factors also come into play: in many instances there is insufficient evidence to bring an indictment, and in many other instances the alleged perpetrator is already dead.\textsuperscript{40}

Prosecutors brought several hundred indictments in the first five years following reunification. Regrettably, comprehensive data on the number of indictments since reunification for communist malefaction does not exist, not even in aggregated—let alone in disaggregated—form. Nonetheless, one can make a reasonable estimate as to the number of indictments lodged and a somewhat rougher estimate as to the number of individuals charged in those indictments. By the summer of 1995, approximately 440 indictments had been brought against former East German citizens for acts committed in the service of the communist regime.\textsuperscript{41} Since more than one person was often charged in a single indictment, the number of individuals indicted is probably in the vicinity of 800.\textsuperscript{42} The paucity of reliable prosecutorial data is especially acute brought in other states. To that extent, 218 presumably understates the effective number of indictments somewhat. However, 40 (18.3\%) of the 218 indictments brought by the Berlin authorities were for economic crimes committed in the course of reunification rather than for communist malefaction narrowly understood. It is impossible to know on the basis of the published data what percentage of the 8,000 closed investigations had been into communist malefaction per se and what percentage had been into economic crimes committed in the course of reunification. If less than 18.3\% of closed investigations concerned economic crimes committed in the course of reunification, then including such cases when calculating the rate of indictments to investigations would tend to overstate the rate of indictments for communist malefaction strictly defined. Be all that as it may, one can as a rough estimate assume that approximately 2.7\% (218/8,000) of completed investigations have resulted in an indictment in Berlin. (See: Heitmann, "Fünf Jahre Aufbau des Rechtswesens im Freistaat Sachsen," p. 2687; and, Peschel-Gutzeit and Jenckel, "Der Weg zu einer funktionstüchtigen Justiz in Berlin," p. 2675.) Since the worst of the GDR's Stalinist terror occurred in the early 1950s, it is not surprising that many perpetrators have in the meantime died.

\textsuperscript{41} This total was derived in the following manner: 1. For those states for which a specific number of indictments was provided in the pages of the \textit{Neue Juristische Wochenschrift} in the 1995 reunification anniversary issue [\textit{Neue Juristische Wochenschrift} (1995): 2673-94], that number was used (except as stipulated in 2 below). The figures provided in the \textit{NJW} are quasi-official: the author of each article is either the minister of justice or another high official of the respective state. 2. The number provided for Berlin (218) was reduced by 40, which is the number of indictments brought for economic crimes committed in the course of reunification rather than for communist malefaction per se. 3. For Sachsen-Anhalt, for which no data on indictments was provided in the \textit{Neue Juristische Wochenschrift}, the author assumed there to have been a total of 39 indictments. This is the number of individuals who, according to Wolfram Klein, head of the office, had been indicted by the state's special prosecutorial office as of August 1993 (interview, December 21, 1993). On the one hand, by using a figure that refers to the number of individuals charged, the number tends to overstate the number of indictments brought; on the other hand, by using a figure from 1993, the number tends to understate the number of indictments brought. 4. For federal indictments (on charges of espionage and the like), the number used (80) was taken from: "Nicht nur Markus Wolf mußte zu lange warten," \textit{Süddeutsche Zeitung} (May 22, 1995): 4. NB: The various cautionary statements made on pages 126-9 apply here. Thus, for example, the datum for indictments in Sachsen (supposedly) refers to the entire period after reunification; the datum for indictments in Thüringen (seemingly) refers only to the period after the establishment of the special prosecutorial office in December 1992.

\textsuperscript{42} In Brandenburg, 69 individuals were named in the 28 indictments brought; in Sachsen, 78 individuals were named in 47 indictments (Bräutigam, "Die Situation der Justiz im Land Brandenburg," p. 2679; and, Heitmann, "Fünf Jahre Aufbau des Rechtswesens im Freistaat Sachsen," p. 2687). In the 40 indictments brought against East German border guards as of October 5, 1994 by the Berlin special
when one attempts to disaggregate the data by type of malefaction. It is therefore impossible to make a definitive statement as to the distribution of indictments across the various forms of communist malefaction. Nonetheless, it is certain that the indictments have spanned a broad range of 'crimes'. Indictments have been brought against: members of the political leadership for having instituted the border regime; border guards for having shot would-be refugees; judges for having perverted justice; party officials for having engaged in electoral fraud and for having misappropriated funds; East German spies for having conducted espionage against the FRG; Stasi agents for having usurped official powers and for having committed embezzlement; and Stasi informants for having denounced fellow citizens. The decisive question, of course, is neither who is investigated nor who is charged, but rather: who is ultimately convicted? That depends, on the courts, and, above all, on the jurisprudence of the Bundesgerichtshof.

prosecutorial office, 79 individual border guards were charged (letter to the author from Uta Fölster, ministerial spokesperson, October 5, 1994). One published report places the number of indicted individuals at 340. This number, for which no source is given, seems low. (See: Atkinson, "Germany Judges the Deadly Role of Communism," p. 18).

43 What is known is the following: Of the 178 indictments brought by the special prosecutorial offices in Berlin, 58 involved acts of violence along the border, 54 involved the perversion of justice and related maleficence, 32 involved crimes of an economic nature, and 24 involved practices of the Ministry for State Security (Peschel-Gutzeit and Jenckel, "Der Weg zu einer funktionstüchtigen Justiz in Berlin," p. 2675). According to (what was acknowledged to be incomplete) information provided the author by the special prosecutorial office in Brandenburg, of 22 indictments brought in Brandenburg as of June 7, 1994, 12 involved electoral fraud, 5 involved killings at the border, 3 involved the perversion of justice, 1 involved bodily harm, and 1 involved coercion (letter to the author [Geschäftsnummer: 145-16], June 7, 1994). According to information provided the author by Christian Pick, head of the special prosecutorial office in Mecklenburg-Vorpommern, all 26 indictments that had been brought by his office as of July 28, 1994, were for the perversion of justice (interview, July 28, 1994). According to Eggert, 28 of the 35 indictments brought in Mecklenburg-Vorpommern as of mid-1995 were for the perversion of justice (Eggert, "Die Situation der Justiz in Mecklenburg-Vorpommern," p. 2683). This suggests that between the middle of 1994 and the middle of 1995, 7 indictments were brought, none of which concerned Rechtsbehauptung. What crimes were charged in those 7 indictments cannot be ascertained since Eggert provides no further information. According to information provided the author by the Sachsen ministry of justice, 37 individuals were indicted in Sachsen between reunification and August 1993 for their part in communist malefaction. Of the 37 indicted, 15 were charged with the perversion of justice, 8 with bodily harm, 6 with electoral fraud, 4 with the usurpation of official powers, 2 with denunciation and 2 with forgery (letter to the author, [Aktenzeichen 1410E—OR—667/93], August [no date], 1993). According to information provided the author by the special prosecutorial office in Sachsen-Anhalt, 38 individuals were indicted in Sachsen-Anhalt between reunification and June 17, 1993 for their role in communist malefaction. Of the 38 people charged, 8 were accused of bodily harm and coercing a statement, 8 were accused of usurping official powers, 8 were accused of misappropriating funds, 6 were accused of electoral fraud, 6 were accused of perverting justice, and 2 were accused of kidnapping (letter to the author, August 3, 1993). According to (what was acknowledged to be incomplete) information provided the author by the Thüringen ministry of justice, 44 individuals had been indicted in Thüringen on charges of electoral fraud as of April 1993 (letter to the author [Aktenzeichen: 32622/BE-2/93], July 7, 1993). Each of those indictments was apparently issued prior to the establishment of the state's special prosecutorial office. According to Franz Trost, head of the special prosecutorial office, his unit (which was established on December 1, 1992) had issued only 10 indictment as of July 14, 1994. Of those 10 indictments, 8 concerned the perversion of justice, 1 concerned a fatal shooting at the border, and 1 concerned denunciation. Though unable to provide an exact number, Trost reported that several indictments ("a half dozen in Erfurt alone") charging ex-communist officials with the misappropriation of funds had been brought prior to the creation of the special prosecutorial office (interview, July 14, 1994).
Academic Controversy

The BGH has not lacked for advice. Reunification loosed a torrent of scholarly polemics. The majority of legal academics have urged the court to adopt a reinterpreativist approach to communist maleficence. A noticeable minority, however, has dissented vigorously from the reinterpreativist view. The dissenters, whose ranks include several prominent scholars, fall into two distinct camps: One group has advocated a limited extra-positivist approach under which the exculpatory power of certain GDR laws would not be recognized. Another group has championed strict empirical legal positivism, arguing that there is no basis in positive law for the punishment of communist malefactors.

Those who favor the application of natural law in the context of post-reunification justice advocate a very circumscribed form of natural law. It is indicative of the repositivization that occurred over the postwar period that no one, not even those sympathetic to extra-positive claims, suggests that natural law itself can constitute the immediate basis of punishment. As Rudolf Wassermann, a natural law proponent notes, "the use of retroactive penal statutes in the confrontation with the past is today—unlike after 1945—out of the question." Contemporary natural law supporters argue that the potentially exculpatory legal justifications provided communist perpetrators under GDR law should be ignored whenever they conflict with universal principles of human rights. In their view, communist perpetrators should be punished on the basis of what remains of GDR law after its inhumane elements have been nullified on extra-

44 Given the tremendous number of pieces that have been published (and continue to be published) in many different places, it is impossible to provide a complete listing of all relevant works. The most important contributions to date are cited in the footnotes and bibliography of this dissertation.

45 Wassermann, "Verbrechen unter totalitärer Herrschaft," p. 896. Elsewhere Wassermann writes: "There is agreement that the ban on retroactive legislation contained in Art. 103 II GG—that is to say, the principle nulla crimen sine lege—may not be violated." (Wassermann, "Zur Aufarbeitung des SED-Unrechts," p. 7.)

positive grounds. Not surprisingly, natural law advocates have tended to focus their attention on the East German border regime.\(^{47}\) Several hundred would-be refugees were killed by border guards while trying to flee the GDR.\(^{48}\) Homicide—defined as either murder (§ 112 StGB-DDR) or manslaughter (§ 113 StGB-DDR) depending on the circumstances—was *prima facie* illegal under East German criminal law.\(^{49}\) Border guards who shot would-be refugees would therefore have been (at least nominally) liable for their actions had there not been a legal justification provided elsewhere in East German law. But, such a justification did in fact exist. According to the East German border law (§ 27 GrenzG), border guards were permitted to shoot individuals attempting to flee the GDR.\(^{50}\) Natural law proponents maintain that the systematic killing of unarmed refugees constituted a gross violation of basic human rights and that § 27 GrenzG ought therefore be considered null and void.\(^{51}\) "It would be a horrendous legal positivism," Wassermann writes, "if one were to recognize the legal validity of the unjust GDR norms upon which the accused rely."\(^{52}\)

\(^{47}\) The term 'natural law advocate' might be somewhat misleading. It could erroneously suggest that an individual who supports the use of natural law under some circumstances supports its use under all circumstances. An individual who advocates the use of natural law in extreme cases may well oppose its use in anything but extreme cases. For example, one might support the application of natural law to border guards who killed refugees but oppose its application to Stasi informants who compromised colleagues. Neither Alexy nor Wassermann advocates an expansive use of natural law, although Wassermann does entertain the possibility of using it in some cases other than those related to the border. He contemplates applying natural law when individuals were deprived of their liberty, prisoners were maltreated, or property was extorted from those wishing to emigrate. Nonetheless, Wassermann favors a reinterpretivist approach to most forms of communist malfeasance. Thus, after acknowledging the systematic divergence between written law and actual practice, he says, "It would be absurd for the courts of the Federal Republic to base their decisions on the assumption that such illegal praxis constituted valid law at the time." (Wassermann, "Regierungskriminalität und justizielle Aufarbeitung," p. 141.)

\(^{48}\) According to the latest figures, 612 people were killed at the Berlin Wall and along the inner-German border, 35 were killed trying to escape via other communist states, and 121 drowned trying to escape across the Baltic. It is unclear from published reports how many of the 612 who died at the Wall or along the inner-German border were shot by border guards and how many were killed by mines or other automatic devices. See: "An DDR-Grenze mehr Tote als angenommen," *Süddeutsche Zeitung* (August 12, 1994): 5.

\(^{49}\) §§ 112, 113 *Strafgesetzbuch der Deutschen Demokratischen Republik* ('StGB-DDR').

\(^{50}\) Gesetz über die Staatsgrenze der Deutschen Demokratischen Republik, *Gesetzblatt der Deutschen Demokratischen Republik* I (1982): 197-203. Reinterpretivists contend that most if not all of the border shootings were illegal even given the validity of § 27 GrenzG.


\(^{52}\) Wassermann, "Regierungskriminalität und justizielle Aufarbeitung," p. 139.
Despite their frank advocacy of extra-positive standards, natural law proponents remain trapped by their own timidity and the positivist presumption of postwar jurisprudence.\textsuperscript{53} In deference to \textit{nulla poena}, they carefully avoid making natural law the immediate basis for punishment. But, having accepted the \textit{nulla poena} principle, they are unable to offer a coherent rationale for permitting the (partial) invalidation of GDR law. Wassermann remains essentially mute on the issue, and is therefore immune to detailed criticism. Robert Alexy, by contrast, at least attempts to reconcile limited extra-positivism with Art. 103 II GG. In the end, however, his effort is predictably unsuccessful. Indeed, it is riven by contradiction. Alexy rejects empirical legal positivism as a conflation of the factual and the normative that erroneously disregards statutory language.\textsuperscript{54} Yet, he also dismisses the reinterpretivist strategy of narrowly construing § 27 GrenzG, which had been interpreted expansively by the GDR, as a "covert" violation of \textit{nulla poena}. "Law comprises not only the text," says Alexy, "but the prevailing interpretive praxis as well."\textsuperscript{55} He acknowledges that on this premise the border shootings were in fact legal under GDR law as it existed at the time. But, Alexy argues, the decisive issue is whether "extra-positive law invalidates the justification provided by positive law" and, if so, whether such invalidation is compatible with \textit{nulla poena}.\textsuperscript{56} It does and it is, he claims.

Alexy's argument rests largely on the spurious distinction between basic criminal statutes (\textit{'Tatbestände}) and extraordinary legal justifications (\textit{'Rechtfertigungsgründe}). A basic criminal statute defines behavior that is subject to penalty; an extraordinary legal justification specifies circumstances under which behavior that would otherwise be subject to penalty is excused. For example, § 112 StGB-DDR (which defined murder) is a basic criminal statute while § 27 GrenzG (which specified circumstances under which border guards were permitted to shoot refugees) is an extraordinary legal justification. Alexy contends that \textit{nulla poena} applies only to basic statutes and not to extraordinary justifications. Thus, according to Alexy, although one may not penalize

\textsuperscript{53}To his credit, Alexy candidly admits (p. 33) that "no positivist could accept the premises that are presupposed here."

\textsuperscript{54}Alexy, \textit{Mauerschützen}, p. 13.

\textsuperscript{55}Alexy, \textit{Mauerschützen}, p. 11.

\textsuperscript{56}Alexy, \textit{Mauerschützen}, p. 22.
behavior that was generally permitted at the time, one may penalize behavior that would have been subject to criminal sanction at the time had there not been an exception to a general rule. Alexy acknowledges that basic statutes and extraordinary justifications are “from a logical standpoint” formally equivalent.\textsuperscript{57} Rather than enact § 27 GrenzG, the GDR could have amended § 112 StGB-DDR to read: ‘Whoever intentionally kills another person, other than a person who could be prevented from fleeing the GDR only by gunshots, shall be punished by imprisonment for a period of not less than ten years.’ The end result would have been the same. But, had the communist regime amended the East German penal code in such a forthright manner, Alexy suggests, “it would have had to endure an enormous loss of legitimacy.”\textsuperscript{58} It is, he argues, precisely because extraordinary legal justifications are routinely used by totalitarian regimes to conceal inhumane policies that they deserve less \textit{nulla poena} protection than do basic criminal statutes.\textsuperscript{59}

Yet, even if one accepts the distinction between basic criminal statutes and extraordinary legal justifications, Alexy fails to provide a convincing argument for the proposition that the extra-positivist invalidation of extraordinary legal justifications is compatible with \textit{nulla poena}. Ultimately, Alexy does little more than beg the central question. In Alexy’s view, the seemingly retroactive vitiation of § 27 GrenzG does not violate Art. 103 II GG because § 27 GrenzG was in fact invalid all along.

According to the theory of law articulated here, § 27 GrenzG was, to the extent it permitted extreme injustice, not law even at the time of the act. Thus, the use of the Radbruch formula does not retroactively change the legal situation; rather, it merely confirms what the legal situation had been at the time of the act.\textsuperscript{60}

If, however, the exculpatory force of § 27 GrenzG can be ignored despite Art. 103 II GG, then the \textit{nulla poena} protection nominally afforded by Art. 103 II GG is entirely illusory. Moreover, if extremely unjust laws are, as Alexy maintains, \textit{ipso facto} invalid, then there is no principled

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\textsuperscript{57}Alexy, \textit{Mauerschützen}, p. 31.
\textsuperscript{58}Alexy, \textit{Mauerschützen}, p. 32.
\textsuperscript{60}Alexy, \textit{Mauerschützen}, pp. 32-3. Alexy never resolves the contradiction between his claim that § 27 GrenzG never enjoyed legal validity and his earlier acknowledgment that the border shootings were “justified under the positive law valid at the time” (p. 22).
reason why basic criminal statutes—unlike extraordinary legal justifications—should be exempt from extra-positivist invalidation.

Those who advocate a reinterpretivist approach to post-transitional justice in reunified Germany reject any distinction between basic criminal statutes and extraordinary legal justifications. According to reinterpretivists, *nulla poena* applies to all laws equally, be they basic statutes or extraordinary justifications.61 The willingness to nullify one but not the other is, on the reinterpretivist view, “an arbitrary division between things that belong together.”62 A thoroughgoing natural law proponent would certainly agree, seeing both basic statutes and extraordinary justifications as similarly subject to extra-positivist nullification. Within the reinterpretivist paradigm, however, the axiomatic equivalence of basic statutes and extraordinary justifications entails the diametric conclusion. Reinterpretivists maintain that the validity of neither basic statutes nor extraordinary justifications may be retroactively denied, and that the exculpatory force of extraordinary justifications provided by GDR law must therefore be accepted. “The ban on retroactive legislation,” say Arnold and Kühl, “prohibits not only the ex post facto establishment of penal laws, but ... also the ex post facto nullification of legal justifications.”63 It is, of course, precisely this stance that marks reinterpretivism as a variant of legal positivism.

At the same time, it is the reinterpretivist refusal to automatically equate social reality with legal validity that distinguishes reinterpretivism from empirical legal positivism. On the reinterpretivist view, *nulla poena* requires that post-transitional criminal courts respect all duly enacted laws of the deposed regime, but only duly enacted laws. As far as reinterpretivists are concerned, the fact that a former regime pursued policies that persistently and systematically

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63 Arnold and Kühl, “Probleme der Strafbarkeit von 'Mauerschützen',” p. 995. Similar statements can be found in, among other places, all the works cited in footnote 61.
conflicted with procedurally sanctified norms is irrelevant for *nulla poena* considerations. In the words of one reinterpretivist:

> The ban on retroactive legislation ... refers to the normative aspect, not the reality of the legal order. A legal praxis that contravenes statute does not establish an expectation worthy of protection that such a praxis will continue. The ban on retroactive legislation forbids the application of legal norms that were created after the fact in a way that is detrimental to the perpetrator; it does not prevent the application of legal norms that were 'valid' at the time of the act yet not enforced by the prosecutorial authorities.  

In contradistinction to empirical legal positivism, reinterpretive legal positivism requires nothing more than respect for the nominally valid statutory texts of the deposed regime.

Two distinct types of reinterpretivism have emerged since reunification. Though each takes the entirety of procedurally valid GDR law as its starting point, the two differ substantially in their treatment of that corpus. One version, the 'restrictive' variant, respects the text of the deposed regime's law, but insists that the text be interpreted narrowly.  

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64Rittstieg, "Strafrechtliche Verantwortlichkeit von Grenzsoldaten der DDR," p. 412. Equivalent statements can, for example, be found in: Lüderssen, *Der Staat geht unter—das Unrecht bleibt?*, pp. 33-5, 147; Renzikowski, "Zur Strafbarkeit des Schußwaffengebrauchs an der innerdeutschen Grenze," p. 154; and, Friedrich-Christian Schroeder, "Strafrechtliche Verantwortlichkeit für die Ausübung politischer Strafjustiz in der ehemaligen DDR," in Ernst-Joachim Lampe, ed., *Die Verfolgung von Regierungskriminalität in der ehemaligen DDR nach der Wiedervereinigung* (Cologne: Carl Heymanns Verlag, 1993): 113. Elsewhere Schroeder writes: "Too much is demanded of the *nulla poena sine lege* principle if the courts are obligated to search out secret, merely *de facto* justifications and to supply the perpetrators with these, which they themselves would never have dared publicly claim." (Schroeder, "Zur Strafbarkeit von Tötungen im staatlichen Auftrag," p. 991.)


66Lüderssen, *Der Staat geht unter—das Unrecht bleibt?*, p. 142.

67Lüderssen, *Der Staat geht unter—das Unrecht bleibt?*, p. 52.

68Lüderssen, *Der Staat geht unter—das Unrecht bleibt?*, pp. 34-5, 53-5, 147. See: Articles 19 and 96-104 of the 1974 East German constitution [*Gesetzblatt der Deutschen Demokratischen Republik* 1 (1974): 432]. The 1974 constitution is largely identical with that from 1968, except that references to the (unitary) German nation have been stricken. The various East German constitutions and all other German constitutions are usefully reprinted in: Rudolf Schuster, ed., *Deutsche Verfassungen* (Munich: Goldmann Verlag, 1992).
abide by the laws which it itself had ordained.69 Under ‘restrictive’ reinterpretivism, black letter law is everything. This means, for example, that although post-reunification courts must accept the fundamental validity of § 27 GrenzG, they are free to demand that a border guard have strictly observed the—in actual praxis broadly interpreted and routinely ignored—restrictions contained within § 27 GrenzG.70 The other version of reinterpretivism, the ‘received’ variant, not only respects the text of the deposed regime’s law, but furthermore insists upon adhering to the former regime’s actual interpretive practice whenever (but only whenever) that practice can be reconciled with the text.71 From a ‘received’ reinterpretivist perspective, official exegeses enjoy interpretive priority even if their binding force was not anchored in positive law. Thus, on this view, the proper understanding of the law that banned unauthorized border crossings (§ 213 StGB-DDR) is the expansive rendering set out in the “Gemeinsamer Standpunkt des Obersten Gerichtes der DDR und des Generalstaatsanwaltes”, an internal document distributed to East German judges and prosecutors.72 “The legal order of the GDR,” says Helmut Rittstieg, “may


71Works that arguably advocate ‘received’ reinterpretivism include: Arnold and Kühl, “Probleme der Strafbarkeit von ‘Mauerschützen’”; and, Rittstieg, “Strafrechtliche Verantwortlichkeit von Grenzsoldaten der DDR.” I say “arguably” advocate ‘received’ reinterpretivism because the actual extent to which they refer to East German interpretive praxis remains somewhat unclear. Yet, whatever the ambiguities in his article with Kühl, Jörg Arnold agreed with my characterization of his position in a private conversation (Frankfurt, May 16, 1994). For an unambiguous endorsement of ‘received’ reinterpretivism, albeit one that predate reunification, see: Gerald Grünwald, “Ist der Schußwaffengebrauch an der Zonengrenze strafbar?,” Juristenzeitung (1966): 633-8.

72Jörg Arnold, “Strafgesetzbegründung und -rechtsprechung als Mittel der Politik in der ehemaligen DDR,” in Lampe, Die Verfolgung von Regierungskriminalität, p. 94. Border shootings were, subject to certain limitations, justified under § 27 GrenzG whenever the attempted escape constituted a felonious act. It was § 213 StGB-DDR that specified the conditions under which an attempted escape was felonious. Thus, the legality of border shootings under codified GDR law depends in large part upon the interpretation of § 213 StGB-DDR. Similarly, deciding whether GDR judges are criminally liable for having improperly would-be refugees under § 213 StGB-DDR also depends on the way in which the statute is interpreted.
not be filled with the legal thought of the Federal Republic and thereby sharpened to the
detriment of the perpetrators."73 'Received' reinterpretivism affords perpetrators maximal *nulla poena* protection without automatically equating the *de facto* with the *de jure*. 'Restrictive' reinterpretivism, by contrast, affords perpetrators minimal *nulla poena* prosecution while still accepting the validity of all positivized extraordinary justifications. Thus, although each variant remains within the boundaries of reinterpretivism, 'restrictive' reinterpretivism clearly allows greater scope for post-transitional prosecution than does 'received' reinterpretivism.

Champions of empirical legal positivism reject both natural law and reinterpretivism (in
each of its variants).74 The limited form of natural law advocated by Alexy and Wassermann is,
from an empirical legal positivist perspective, doubly misguided: it wrongly permits the
invalidation of extraordinary legal justifications; and, it wrongly assumes that that which remains
after the invalidation of extraordinary legal justifications constitutes positive law properly defined.
Like reinterpretivists, proponents of empirical legal positivism consider the distinction between
basic statutes and extraordinary justifications to be illegitimate. "One falsifies the laws of a
state," says Günther Jakobs, "if one removes some and then interprets the rest as if those that
were removed did not belong."75 Furthermore, Jakobs argues, even if one does invalidate a
particular element of positive law on extra-positive grounds, then that which results is not positive
law properly defined, but a legal vacuum. Thus, according to Jakobs (and contra Alexy),
punishment that results from the *ex post facto* invalidation of an extraordinary legal justification
is—notwithstanding any remaining positivized statutes that might nominally be applied—

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74Empirical legal positivism is advocated in: Josef Isensee, "Nachwort: Der deutsche Fehstaat vor
seinem unrechtsstaatlichen Erbe," in Josef Isensee, ed., Vergangenheitsbewältigung durch Recht. Drei
Abhandlungen zu einem deutschen Problem (Berlin: Duncker & Humblot, 1992): 91-111; Günther
Günther Jakobs, "Vergangenheitsbewältigung durch Strafrecht? Zur Leistungsfähigkeit des Strafrechts
nach einem politischen Umbruch," in Isensee, Vergangenheitsbewältigung durch Recht, pp. 37-64;
Michael Pawlik, "Strafrecht und Staatsunrecht. Zur Strafbarkeit der 'Mauerschützen'," Goldammers Archiv
für Strafrecht (1994): 472-83; and, Bodo Pieroth, "Der Rechtsstaat und die Aufarbeitung der vor-
rechtsstaatlichen Vergangenheit," Veröffentlichungen der Vereinigung der deutschen Staatsrechtswler,
Vol. 51 (1992): 91-115. Jakobs' stance has been accurately characterized as "especially radical and
uncompromising". (See: Schroeder, "Zur Strafbarkeit von Tötungen im staatlichen Auftrag," p. 990.)
75Jakobs, "Vergangenheitsbewältigung durch Strafrecht?" p. 46.
tantamount to the direct application of natural law. This, Jakobs maintains, is "utterly incompatible" with Art. 103 II GG.76

The cardinal principle of empirical legal positivism is the proposition that positive law is always a function of politics and never an autonomous system of abstract rules. This dictum limits the range of permissible statutory interpretations. A potential interpretation qualifies as an acceptable interpretation of positive law, says Michael Pawlik, if and only if "it leaves the basic political structures of the society intact."77 An interpretation that would criminalize the institutional foundation of a political regime is, on the empirical legal positivist view, *ipso facto* false. There is no doubt, as the events of 1989 proved, that the SED and the GDR itself were dependent upon the continued existence of the Berlin Wall. Thus, Pawlik asserts, an interpretation of § 27 GrenzG that effectively criminalizes the border regime—such as the 'restrictive' reinterpretivist reading advanced by Lüderssen—is not an acceptable interpretation of positive GDR law.78

If empirical legal positivism did nothing more than place certain limits on statutory interpretation, then it would simply be an intermediate form of reinterpretivism that fell somewhere between the 'restrictive' and 'received' variants. On the one hand, it would disqualify some 'restrictive' interpretations; on the other hand, it would permit interpretations that had not actually prevailed under the former regime so long as they did not delegitimize what had been the foundations of that regime's existence. In fact, however, empirical legal positivism does considerably more than merely restrict statutory reinterpretation, and is, as a result, considerably stronger than 'received' reinterpretivism. Contrary to 'received' reinterpretivism, which insists upon respect for nominal statutory language, empirical legal positivism accepts whichever statutory interpretation had prevailed under the former regime even if that interpretation was not strictly compatible with the literal meaning of the statutory text.

Indeed, it is the disregard for codified language that distinguishes empirical legal positivism from all forms of reinterpretivism. Under reinterpretivism, valid criminal law comprises

all statutes and only those statutes that were formally enacted in accordance with the legislative procedures and substantive standards established by the written constitution. Under empirical legal positivism, valid criminal law comprises all norms and only those norms that are actually enforced by the regime in power, regardless of whether those norms were formally enacted in accordance with the legislative procedures and substantive standards established by the written constitution. Thus, under empirical legal positivism, written law—be it constitutional or statutory—is essentially irrelevant when trying to identify what constituted positive law under the former regime. According to advocates of empirical legal positivism, legal validity is defined exclusively by actual social praxis. The effective constitution is, on this view, not necessarily identical with the written constitution. "The real constitution," Jakobs insists, "is to be inferred inductively from legal reality." The East German reality was, Jakobs notes, an inhumane dictatorship in which "a system of special unwritten and unpublishned rules" existed "alongside and above the system of general written and publicized norms." According to Isensee (with whom Jakobs concurs), it was this normative aggregate, in which formal enactments were "subordinate to the principle of socialist partisanship", that defined positive law in the GDR. Under these circumstances, Jakobs concludes, "it is completely irrelevant" whether the border shootings were nominally justified under § 27 GrenzG or not: those who were shot "had been denied all legal protection by the state" and were "deprived of life according to law" as it existed at the time. As a result, say Jakobs and other empirical positivists, prosecuting East German border guards now would violate Art. 103 II GG.

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79 Lüderssen, Der Staat geht unter—das Unrecht bleibt?, p. 147.
82 Isensee, "Der deutsche Rechtsstaat vor seinem unrechtsstaatlichen Erbe," p. 106.
84 The mere fact that punishing communist perpetrators would violate the nulla poena principle does not settle the question as to whether such punishment should nonetheless occur. Jakobs is strongly opposed. He thinks that it is inappropriate to hold individuals personally responsible for having failed to resist the social order of the day. Conformity is not a crime, on his view. Moreover, Jakobs argues, because the GDR has been thoroughly discredited and it is inconceivable that those who once served it will ever repeat their misdeeds, there is no deterrent-based justification for prosecutions in reunified Germany. (He acknowledges that the situation in the immediate postwar period was in this regard somewhat different.) Pieroth, by contrast, supports the prosecution of communist perpetrators, albeit with the proviso that Art. 103 II GG first be amended. "It does not follow from the earlier legality," Pieroth writes (on p. 99), "that the current legal order must also deem such behavior legal." According to
Natural Law Redux?

Although the Bundesgerichtshof has since reaffirmed reinterpretable legal positivism's doctrinal hegemony, there were at the outset reasons to imagine that an extra-positivist approach might dominate post-reunification justice. In the forty-five years between the end of World War II and the reunification of Germany, there was significant growth in international human rights law. Beginning with the 1948 United Nations Universal Declaration of Human Rights, several officially sanctioned international instruments proclaimed the existence of certain inalienable rights which no state may lawfully deny its citizens.\textsuperscript{85} The enumerated rights routinely included the right to life and the right to emigrate as well as the right to free expression and the right to freedom from arbitrary arrest. Moreover, the 1966 International Covenant on Civil and Political Rights, to which both the Federal Republic and the GDR were signatories, explicitly limited the scope of \textit{nulla poena} protection.\textsuperscript{86} According to Article 15 Paragraph 2 of the Covenant, the fact that human rights violations were legal under the positive law of a state does not preclude the prosecution of individuals who committed such acts within the borders of that state.\textsuperscript{87} Even though the Federal Republic was under no obligation to apply international law to East German maleficence, it was not unreasonable to have thought that the BGH might be influenced by the extra-positivist trend in postwar international law.


\textsuperscript{86}Although the GDR signed the International Covenant on Civil and Political Rights, the treaty was never ratified by the East German parliament. Thus, it was never transformed into binding municipal law according to the provisions of Art. 51 of the East German constitution. See: Gerd Roellecke, “Schwierigkeiten mit der Rechtsinheit nach der deutschen Wiedervereinigung,” \textit{Neue Juristische Wochenschrift} (1991): 661; and, Rittstieg, “Strafrechtliche Verantwortlichkeit von Grenzsoldaten der DDR,” p. 414.

\textsuperscript{87}The 1950 European Human Rights Convention, to which the FRG (but not the GDR) was a signatory, contained a virtually identical provision. See: Article 15, Paragraph 2, International Covenant on Civil and Political Rights; and, Article 7, Paragraph 2, European Convention for the Protection of Human Rights and Fundamentel Freedoms, in: Lillich, \textit{International Human Rights Instruments}, pp. 170.7 and 500.4 respectively. When it signed the European Human Rights Convention, the Federal Republic stated that it would not recognize any limit to \textit{nulla poena} protection.
Indeed, had the BGH applied natural law to East German perpetrators, it would not have been the first time that a court of the Federal Republic—or even the BGH—had done so. Prior to reunification, several dozen cases concerning acts committed in the GDR found their way into the West German criminal justice system after alleged GDR malefactors had made their way to the Federal Republic. The verdicts in those cases—which typically involved Stasi informants and/or the East German border regime in one way or another—display a clear extra-positivist streak. Thus, throughout the Cold War, as reinterpretive legal positivism steadily tightened its grip on Nazi-related jurisprudence, natural law continued to dominate GDR-related jurisprudence.

In 1964, in what was perhaps the most prominent of the pre-reunification cases, the Landgericht Stuttgart convicted a border guard who had shot a would-be refugee.\(^{88}\) The court acknowledged that the guard’s actions were legal under positive GDR law, but it convicted him all the same on natural law grounds.\(^{89}\) According to the court, the East German border regime served no defensible purpose: its sole rationale was the maintenance of communist tyranny. Therefore, the court said, although “procedurally valid”, the GDR border regulations “are so repugnant to the idea of law and justice that they must be considered absolutely null and void.”\(^{90}\) Thus denied recourse to the extraordinary justification provided him by GDR law, the border guard was found guilty of manslaughter under § 212 StGB.\(^{91}\) Though the Landgericht did not address the matter in detail, its ruling implied that persons trying to flee the GDR may have been legally entitled—as an act of self-defense against unlawful restrictions on their freedom of

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88. LG Stuttgart, Ks 14/63, Juristenzeitung (1964): 101-5. As explained immediately below, the court applied natural law in the sense of invalidating an extraordinary legal justification on extra-positive grounds. The immediate basis for punishment was nominally § 212 StGB.

89. For East German criticism of this decision (commonly referred to as ‘Fall Hanke’), see: Friedrich Karl Kaul and Bernhard Graefrath, ‘Völkrechtswidrige Intervention in Form der Rechtsprechung,’ Neue Justiz (1964): 272-7. For seminal West German criticism from a ‘received’ reinterpretivist perspective, see: Grünwald, “Ist der Schußwaffengebrauch an der Zonengrenze strafbar?” pp. 633-8. Grünwald’s position was for years an isolated one. At the time, the vast majority of West German jurists opposed recognizing an extraordinary legal justification provided under GDR law if it violated the FRG’s ordre public. For a representative view, see: “Vorbemerkungen zu den §§ 3-7,” in Adolf Schöneke and Horst Schröder, Strafgesetzbuch: Kommentar, 12th ed. (Munich: C. H. Beck’sche Verlagsbuchhandlung, 1965): 81-2. For a defense of Grünwald’s position (and many citations to the contrary consensus that still reigned), see: Herwig Roggemann, “Grenzübertritt und Strafrechtsanwendung zwischen beiden deutschen Staaten,” Zeitschrift für Rechtspolitik (1976): 243-8.


91. Since the GDR did not introduce its own until 1968, the GDR and the FRG still shared a common penal code at the time of the court’s decision.
movement—to shoot any border guard who attempted to forcibly prevent their escape. In 1976, the Oberlandesgericht Hamm was forced to directly confront the issue when presented a case in which an individual had killed two East German border guards while escaping the GDR. The defendant, himself an East German soldier, was charged with manslaughter. A lower court, citing the Landgericht Stuttgart’s 1964 decision, had ordered the man released on the grounds that “self-defense against the actions of the GDR border authorities is justified in every case.” For its part, the Oberlandesgericht Hamm rejected such a categorical view. Immediately prior to his escape from the GDR, the defendant had gone AWOL, stolen a gun, stolen several cars, and threatened two police officers who tried to arrest him. The illegality of such acts, said the court, was not peculiar to the GDR; they would be recognized as crimes in a democratic society as well. The court concluded that under these circumstances the GDR border guards were legally justified in trying to apprehend the defendant, and that the defendant had therefore no right to resist capture. At the same time, however, the Oberlandesgericht emphasized that its decision was context specific. The court made it clear that an individual who had not committed an act that would be considered criminal in a democratic society and “who wanted nothing more than to exercise his right of free movement” could in fact, if necessary, attack GDR border guards during the course of an escape and then successfully claim self-defense. This conclusion was of course predicated on the extra-positivist assumption that the GDR border regulations were inherently


93 The case is known as ‘Fall Weinhold’. See: OLG Hamm, 2 Ws 144/76, Juristenzeitung (1976): 610-12.

94 Quoted in: OLG Hamm, 2 Ws 144/76, Juristenzeitung (1976): 611. The trial court seems to have been determined to acquit the defendant. After the case had been sent back for retrial, the lower court (the Schwurgericht Essen) acquitted the defendant once again, this time on evidentiary grounds. The second acquittal was reversed on procedural grounds by the BGH. See: Bundesgerichtshof, 4 StR 230/77, Neue Juristische Wochenschrift (1978): 113-5.

95 The BGH, too, seems to have rejected the absolutist stance. See the ruling (stemming from a different case): BGH 5 StR 96/82.

96 OLG Hamm, 2 Ws 144/76, Juristenzeitung (1976): 611.
invalid: had the regulations been lawful, would-be refugees would have had no legal right to resist their enforcement.

The most frequent application of extra-positive standards to East German perpetrators in the pre-reunification period affected Stasi informants.\(^{97}\) In 1951, the Bundestag enacted legislation (§ 241 a StGB) that made "political insinuation" a crime. Under § 241 a StGB, anyone who denounced an individual to totalitarian authorities and thereby exposed that individual to political persecution in the form of death, imprisonment or bodily harm was punishable by up to 5 years in prison. The Bundestag made no secret of the fact that § 241 a StGB was aimed at the communist regime in the GDR, and the West German courts did not hesitate to apply the law to acts that were committed in the GDR.\(^{98}\) Thus, though duly codified and not retroactive, § 241 a StGB was effectively extra-positive in nature. Stasi informants were held criminally liable despite the fact that their conduct was not punishable under the municipal law that governed the locale in which they had acted. In 1954, the BGH ruled that an act of denunciation committed in the GDR could be illegal under § 241 a StGB even when the behavior that was reported to the East German authorities—in this case: espionage—was also deemed criminal in a democratic state.\(^{99}\) Criminal prosecution constitutes political persecution, the court held, if the prosecution is either entirely or predominantly politically motivated. Informants whose actions result in such prosecutions are, said the court, subject to punishment under § 241 a StGB. In a 1960 decision, the BGH declared that any effort on the part of the GDR to enforce its general ban on emigration constitutes political persecution because the ban serves no purpose but to maintain "the unbearable communist tyranny in the Soviet occupation zone."\(^{100}\) As a consequence, the

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99BGHSt 6, 166.

100BGHSt 14, 104 (107-8). Referring to the territory of the GDR as the 'Soviet occupation zone' was standard Cold War fare.
court ruled, any informant who notifies the Stasi of an impending escape attempt is criminally liable under § 241 a StGB. The BGH did not recoil from the law’s extra-positive consequences.

“The fact that a prosecution takes place within the bounds of the positive law of an authoritarian tyranny,” the court stated, neither “excludes the possibility that the prosecution was politically motivated” nor eliminates the criminal liability of an informant who had brought about such a prosecution.\(^{101}\) The BGH maintained this stance throughout the pre-reunification period, even after the FRG had acknowledged the GDR’s \textit{de facto} sovereignty by signing the \textit{Grundlagenvertrag} in 1972. In 1980 and again in 1984, the court upheld the convictions of informants who had betrayed planned escape attempts.\(^{102}\) The \textit{Grundlagenvertrag}, said the court, “had done nothing to change the legal situation” according to which denunciation was a crime “independent of local law.”\(^{103}\)

\(^{101}\) BGHSt 14, 104 (106).

\(^{102}\) BGHSt 30, 1; and, BGHSt 32, 293. In BGHSt, 32, 293, the court went so far as to also find the informant guilty of aggravated deprivation of liberty. Also see: OLG Düsseldorf, 5 Ws 76/78, \textit{Neue Juristische Wochenschrift} (1979): 59-63; and, OLG Düsseldorf, V 15/82 (3), \textit{Neue Juristische Wochenschrift} (1983): 1277-8. The OLG Düsseldorf explicitly recognized that informing the Stasi of an impending escape plan “is not merely not punishable [in the GDR], but in fact represents a particularly desirable and positively valued act, the omission of which actually constitutes a crime under § 225 I Nr. 2 and 4 StGB-DDR.” Holding Stasi informants criminally liable under § 241 a StGB would therefore, the OLG acknowledged, have the unfortunate consequence of “simultaneously subjecting [an individual] to two contradictory legal commands.” Nonetheless, the court held, it was appropriate to apply § 241 a StGB to Stasi informants who revealed escape plans because the GDR laws barring unauthorized emigration constituted a “crass violation of universally recognized legal principles.” [See: OLG Düsseldorf, 5 Ws 76/78, \textit{Neue Juristische Wochenschrift} (1979): 63]

\(^{103}\) BGHSt 30, 1 (2-3). This view was sharply attacked by many commentators. The application of § 241 a StGB to acts committed in the GDR by GDR citizens against other GDR citizens was from the very beginning highly problematic. As the court itself admitted [BGHSt 30, 1 (2)], the jurisprudence allowing such application arose “without any reference to the regulations concerning the territorial purview” of the \textit{Staatsgesetzbu}ch. The extra-territorial application of § 241 a StGB became all the more dubious after the revisions to the \textit{Staatsgesetzbu}ch which took effect in 1975. According to § 5 StGB (as amended), FRG law applies “independent of local law” to certain acts that are “committed abroad”. “Political insinuation” is one of those acts, as enumerated in § 5 Nr. 6 StGB. But, according to § 5 Nr. 6 StGB, § 241 a StGB is applicable to an act of denunciation committed abroad only if “the act is directed against a German whose primary residence or permanent domicile is at home”, where “at home” (“im Inland”) is the antithesis of “abroad” (“im Ausland”). This clause presents two distinct—and, in the view of most commentators, insuperable—barriers to the application of § 241 a StGB to acts committed in the GDR by GDR citizens against other GDR citizens. If one is to apply § 241 a StGB to such acts via § 5 Nr. 6 StGB, one must assume both: i. that citizens of the GDR qualify as ‘Germans’ within the meaning of the StGB; and, ii. that the permanent domicile of someone living in the GDR is ‘at home’ within the meaning of the StGB. Neither assumption is tenable. Were citizens of the GDR ‘Germans’ within the meaning of the StGB, then they would be subject (under § 7 II StGB) to all West German laws. That would not only subject them as individuals to potentially conflicting legal commands, but would be tantamount to the imposition of the StGB upon the GDR. That, however, would violate Article 6 of the \textit{Grundlagenvertrag} in which the FRG pledged to “respect the independence and autonomy” of the GDR “in its internal and external affairs.” And even if one does assume that citizens of the GDR are in fact ‘Germans’, there is still the matter of characterizing their domicile. Remember, according to § 5 StGB, FRG law applies “independent of local law” to certain specified acts that are “committed abroad”. That is to say, the extra-territorial application of § 241 a StGB is possible only if the act of denunciation in question was committed abroad. Thus, for an act of denunciation committed in the GDR to be punishable, one must assume that the GDR is in fact ‘abroad’. Making such an assumption was easy after the signing of the \textit{Grundlagenvertrag}. The difficulty arises when one couples the general.
On at least two separate occasions prior to reunification East German judges were tried by West German courts on perversion of justice charges. In the first case, in 1954, the Kammergericht invoked both reinterpretivist and extra-positivist arguments to convict a GDR judge who had participated in the notorious Waldheim trials.104 According to the Kammergericht, the Waldheim trials—politically orchestrated proceedings in which thousands of alleged Nazi perpetrators were summarily convicted—had contravened various provisions of positive procedural law and had been “afflicted by an abundance of violations against the most elementary legal principles.”105 The trials were, said the court, for each of these reasons “completely and irredeemably void.”106 In 1960, the Bundesgerichtshof confirmed that an East German judge could be held accountable for the perversion of justice under § 336 StGB.107 It is, the BGH said, immaterial whether judges in the GDR actually enjoy the judicial independence nominally accorded them under GDR law. All officials entrusted to decide matters of law, including those who are formally bound by superior directives, are obligated “to proceed according to law and statute alone, irrespective of any directives to the contrary.”108 A judge who requires of § 5 StGB with the specific requirements of § 5 Nr. 6 StGB. Under § 5 Nr. 6 StGB, § 241 a StGB can be applied only if the primary residence or permanent domicile of the informant’s victim is ‘at home’. Thus, to apply § 241 a StGB to an act of denunciation that was committed against an individual living in the GDR, one must assume that the permanent domicile of someone living in the GDR qualifies as ‘at home’. Yet, that assumption diametrically contradicts the equally necessary assumption that the act of denunciation was committed ‘abroad’. For characteristic opposition to the application of § 241 a StGB to acts committed in the GDR by GDR citizens against GDR citizens, see (among others): Krey and Arenz, "Schutz von DDR-Bürgern durch das Strafrecht der Bundesrepublik Deutschland?," pp. 404-8; Wolfgang Abendroth, "Anmerkung," Strafverteidiger (1981): 176-7; and, Grünwald, "Die strafrechtliche Bewertung in der DDR begangener Handlungen," p. 34. For the dissenting view in support of the BGH’s jurisprudence, see: Matthias Bath, "Interdeutsches Strafrecht und politische Verdächtigung," Jura (1985): 197-203; Dietrich Oehler, "Anmerkung," Juristenzeitung (1984): 948-50; and, Friedrich-Christian Schroeder, "Anmerkung," Neue Zeitschrift für Strafrecht (1981): 173-81.


Kammergericht, 1 a Ws 26/54, Neue Juristische Wochenschrift (1954): 1901. For more information on the Waldheim trials, see Chapter 3, fn. 50.

Kammergericht, 1 a Ws 26/54, Neue Juristische Wochenschrift (1954): 1901. Scholderer describes the Kammergericht’s stance vis-à-vis the Waldheim trials as “substantially more resolute” than the Bundesgerichtshof’s stance vis-à-vis Nazi summary trials (as expressed in BGHSt 10, 294). Scholderer suggests—with considerable plausibility—that the difference is attributable to the fact that West German judges were not implicated in the Waldheim trials whereas they were (at least potentially) implicated in Nazi trials. See: Frank Scholderer, Rechtsbewug im demokratischen Rechtsstaat: Zur Rekonstruktion des § 336 StGB für die Gegenwart (Frankfurt/M: Nomos, 1993): 384. For a concise overview of the BGH’s Rechtsbewug jurisprudence vis-à-vis Nazi judges, see: Günter Griebhoft, "Nationalsozialismus und Strafrecht—Versuch einer Bilanz," Neue Juristische Wochenschrift (1988): 2842-9.

BGHSt 14, 147. The case involved a judge who had sentenced Jehovah’s Witnesses to jail.

BGHSt 14, 147 (148).
consciously disregards statute is therefore guilty of Rechtsbeugung, said the court, even if such behavior "is expected of him by the political rulers." 109

Jurisprudence after Reunification

Had the courts of the Federal Republic continued to treat acts that were committed in the GDR as they had prior to 1990, the post-reunification period would be marked by the frequent and widespread application of extra-positive standards. Natural law has, however, been invoked very sparingly. Its only application has come in the trials of those responsible for the deaths of would-be refugees, and even in those cases its use has been limited. Natural law never forms the immediate basis for punishment; punishment always rests on nominal statute. Moreover, extra-positivist argumentation never appears alone: it is always accompanied by an independent interpretivist logic. The dominant jurisprudential posture, as reflected in the decisions of the Bundesgerichtshof, has been that of reinterpretable legal positivism. In some areas the BGH has tended toward 'restrictive' reinterpretivism, in others toward 'received' reinterpretivism. In any event, the court's post-reunification attitude toward communist malefaction in the GDR has been uniformly more positivist—and, thus, in general substantially more lenient—than that which the court had evinced previously.

The BGH's post-reunification border jurisprudence closely resembles the dualist reasoning that governed the second wave of Nazi trials. 110 On the one hand, the court holds

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109 BGHSt 14, 147 (148). In an earlier ruling (in the same case?), the BGH emphasized that to be guilty of Rechtsbeugung the judge must have 'willfully' disregarded valid law. This requirement, which was settled case law already under the prewar Reichsgericht, sets a high evidentiary hurdle for conviction under § 336 StGB. The rationale behind establishing such an exacting standard is the protection of judicial independence: if judges were subject to criminal prosecution for each 'erroneous' decision, they would have every incentive to avoid rulings that would anger the government of the day. This rationale is moot, however, if the judiciary lacks independence to begin with—as it did in both the Third Reich and the GDR. See: Bundesgerichtshof, 5 StR 519/57, Recht in Ost und West (1958): 204-5; and, Reinhart Maurach, "Zur Problematik der Rechtsbeugung durch Anwendung sowjetzonalen Rechts," Recht Ost und West (1958): 177-81. The court's Rechtsbeugung jurisprudence is discussed at greater length on pages 162-8 below.

110 The second wave of Nazi trials is discussed in Chapter 3 (pages 102-9). The most important rulings concerning criminal responsibility for the East German border regime returned thus far are: BGHSt 39, 1; BGHSt 40, 218; BGHSt 40, 241; and, BGHSt 41, 101. BGHSt 39, 1 is the seminal decision upon which all the others are based. BGHSt 40, 218 addresses the criminal liability of the East German leadership. BGHSt 40, 241 concerns the legal situation in the period prior to GDR having signed the International Covenant on Civil and Political Rights. BGHSt 41, 101 is the court's response to the various criticisms of its border jurisprudence. The court's border jurisprudence is discussed in (among other places) the following critical analyses: Alexy, Mauerzüchtigen, passim; Knut Amelung, "Anmerkung," Neue Zeitschrift für Strafrecht (1995): 29-30; Gerhard Dannecker, "Die Schüsse an der innerdeutschen Grenze in der höchstrichterlichen Rechtsprechung," Jura (1994): 585-95; Eduard Dreher and Herbert Tröndle, Strafgesetzbuch, 47th ed., Vor § 3, Rn. 52 (Munich: C. H. Beck'sche Verlagsbuchhandlung, 1995): 38-
that East German law was, to the extent that it permitted the killing of unarmed individuals seeking to leave the GDR, invalid on extra-positive grounds. On the other hand, the court holds that the killing of unarmed individuals seeking to leave the GDR was, as a matter of positive law, illegal all along under East German law "properly interpreted."111 The BGH is indecisive: although each line of argument—extra-positivist and reinterpreivist—could carry the adjudicative weight alone and although there is a degree of tension between the two, neither is ever presented without the other.112

There is no doubt that the GDR considered the border shootings legal. Leaving the GDR without official authorization was a crime.113 Border guards were ordered to use deadly force if an individual opened fire.114

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111 The quoted phrase is to be found in BGHSt 39, 1 (26).

112 Hartmut Horstkotte, the BGH Justice who authored BGHSt 39, 1, has characterized the reinterpreivist logic as "a supplementary consideration" that was intended by the court "to tone down the ex-post-facto law issue." [See: Hartmut Horstkotte, "The Role of Criminal Law in Dealing with East Germany's Past: The Mauerschützen Cases," in Werner F. Ebke and Detlev F. Varga, eds., Democracy, Market Economy, and the Law (Heidelberg: Verlag Recht und Wirtschaft, 1995): 226.] Describing reinterpreivism as 'supplementary' suggests that it is of secondary importance. Yet, when considered in their entirety, neither of the court's most fully developed border decisions (i.e. BGHSt 39, 1 and BGHSt 41, 101) support such a claim. Indeed, if anything, they suggest that it is reinterpreivism rather than natural law that enjoys forensic primacy. In a conversation with the author, Justice Horstkotte confirmed this interpretation. Describing reinterpreivism and extra-positivism as "parallel" (i.e. independent) lines of argument, Horstkotte said that extra-positivism was an option the court held in reserve should reinterpreivism ever prove inadequate (interview, July 29, 1994).

113 From the earliest days of the GDR, even prior to the 1961 construction of the Berlin Wall, the communist authorities tried to prevent East Germans from emigrating to the West. The inner-German border was fortified in 1952. Thousands of individuals who attempted to flee were prosecuted under a succession of laws that criminalized leaving the GDR without official authorization. Article 10 of the 1949 East German constitution guaranteed GDR citizens the right to emigrate, but subject to statutory restrictions. Between 1952 and 1957, those caught trying to leave the GDR were prosecuted under (the
force, if necessary, in order to prevent escapes.¹¹⁴ The injunction issued border guards at the beginning of each shift was categorical:

Border breakthroughs are not to be allowed under any circumstances. Border violators are to be intercepted or destroyed.¹¹⁵

Though border guards were supposed to use deadly force only as a last resort, the prevailing principle was “better dead than fled”. Any criminal investigation that was conducted by the GDR as the result of an attempted escape was an investigation of the escape attempt itself. The use of deadly force by border guards was never the object of criminal inquiry in the GDR.¹¹⁶ On the contrary. Border guards who thwarted an escape—even those who had done so by fatally shooting a refugee—were decorated and rewarded for their accomplishment.¹¹⁷ In light of these facts, the BGH recognizes that the intentional killing of a would-be refugee “would not have been considered illegal” under GDR law as practiced in the GDR.¹¹⁸ Moreover, the BGH acknowledges that the way in which the GDR implemented its border regulations was in fact compatible with GDR law as written.¹¹⁹

extraordinarily vague) Art. 6 of the constitution which made it a crime to “agitate against democratic institutions and organizations.” In 1957, unauthorized exit from the GDR was for the first time specifically outlawed by § 8 PaßG (the law governing the use of passports). Permission to leave the GDR, if requested, was routinely denied. It is doubtful that the way in which the restrictions established by § 8 PaßG were implemented was compatible with Art. 49 of the 1949 constitution. Art. 49 stipulated that whenever a fundamental right is circumscribed by statutory restrictions “the fundamental right as such must remain unfringed.” But, the dubious constitutionality of § 8 PaßG as implemented did not diminish the legality of the restrictions on emigration. According to Art. 66 of the 1949 constitution, doubts as to constitutionality of laws could be raised only by a two-thirds majority of parliament, the president of the parliament, the president of the republic, or the government itself. Neither judges nor individual citizens had standing to challenge a law’s constitutionality. Needless to say, no one with the authority to do so ever questioned the way in which § 8 PaßG was implemented. In any case, the point became moot in 1968, when the GDR adopted a new, explicitly “socialist” constitution. The new constitution no longer guaranteed the right to emigrate. In the same year, § 8 PaßG was replaced by a more detailed but essentially comparable § 213 StGB-DDR. See: Matthias Bath, “Notwehr und Notstand bei der Flucht aus der DDR.” (doctoral dissertation, Freie Universität Berlin, 1988): 36-50; and, Grünwald, “Ist der Schußwaffengebrauch an der Zonengrenze strafbar?,” pp. 635-6.

¹¹⁴On the successive orders governing the use of weapons at the border, see: Matthias Bath, “Es wird weiter geschossen. Zur Normgenese des ‘Schießbefehls,’” Deutschland Archiv (1985): 959-71; and, Bath, “Notwehr und Notstand bei der Flucht aus der DDR,” pp. 56-63. Prior to 1982, the authority to use deadly force was based on a series of internal regulations with only indirect statutory sanction. After 1982, the authority to use deadly force was derived directly from § 27 GrenzG.

¹¹⁵Quoted in: BGHSt 39, 1 (11).

¹¹⁶Established at trial in: LG Berlin, (523) 2 Js 48/90 (9/91), pp. 61-3, 114-5; and, LG Berlin, (527) 2 Js 26/90 Ks (10/92), p. 63. Reiterated in: BGHSt 39, 168 (173); and, BGHSt 40, 218 (223).

¹¹⁷BGHSt 39, 1 (11); BGHSt 40, 218 (223); and, BGHSt 41, 101 (102).

¹¹⁸BGHSt 39, 1 (13). The BGH has concluded that the border shootings were justified under GDR law as practiced at all times, irrespective of which particular set of constitutional, statutory and regulatory rules happened to be in force at the time a given shooting occurred. See: BGHSt 39, 1; BGHSt 40, 241; and, BGHSt 41, 101.

¹¹⁹BGHSt 39, 1 (10); BGHSt 40, 241 (243); and, BGHSt 41, 101 (103). This holding contradicts that of the lower courts. In each instance a chamber of the Landgericht Berlin had found that the actual border praxis could not be reconciled with the relevant GDR norms.
Nevertheless, the BGH has decided that those responsible for the deaths of individuals trying to flee the GDR—both the border guards themselves and their superiors—are criminally liable for their actions. The court has repeatedly invoked natural law, and in particular the Radbruch formula, in reaching this conclusion. The court acknowledges that the Radbruch formula was conceived with Nazi atrocities in mind and that “the killing of people on the inner-German border cannot be equated with the Nazi genocide.” Yet, says the court, whatever the differences between the Third Reich and the GDR, “the insight remains valid that when judging acts that were committed at the state’s behest, one must consider whether the state transgressed the outer limit that is, according to universal conviction, imposed upon it in each country.” In the court’s opinion, the GDR had indeed transgressed that limit insofar as it permitted the intentional killing of unarmed refugees. Allowing unarmed refugees to be shot, says the court, constituted “an obvious and unbearable contravention of basic dictates of justice and of human rights that are protected under international law.” As such, the court continues, the legal justification that was provided the border guards and their superiors under GDR law as interpreted by the GDR is “null and void”. The violation of human rights manifest in the East German border praxis was so extreme, says the BGH, that “positive law must yield to justice.”

Despite the BGH’s seemingly unequivocal endorsement of extra-positivist standards, the court’s commitment to natural law is highly circumscribed. Natural law has been applied only in border cases, and then only in a narrowly defined subset of border cases. The court has ruled that a border guard is criminally liable if and only if it is proven that when shooting he either

\[120\text{BGHS}t\ 39,\ 1\ (16).\]
\[121\text{BGHS}t\ 39,\ 1\ (16).\]
\[122\text{BGHS}t\ 41,\ 101\ (105).\] Despite the reference to international law, the court carefully avoids claiming that the border shootings were illegal under international law per se. Although the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights each proclaimed a right to life free from arbitrary killing and a right to leave one’s own country, neither instrument was legally binding in the GDR. The Declaration was by its very nature not a binding treaty, and the Covenant was never transformed into binding law within the GDR. [See footnotes 85 and 86 above.] The BGH employs the two documents as “standards” by which to guide its application of the Radbruch formula. Though not legally binding, the documents are, says the court, “a concretization of the legal convictions concerning human value and human dignity that are shared by all peoples.” See: BGHS\(t\) 39, 1 (16-22); and, BGHS\(t\) 40, 241 (246-8). For a contrary evaluation of the right to emigrate, according to which the right to leave one’s own country is not universally recognized, see: LG Berlin, (518) 2 Js 63/90 Kls (57/91), Neue Justiz (1992): 419-20.
\[123\text{BGHS}t\ 41,\ 101\ (105).\]
intended to kill or willingly accepted the possibility that he might kill the would-be refugee.\textsuperscript{124} According to the court, a guard who intentionally wounded a refugee without having either intended to kill or willingly accepted the possibility that he might kill the refugee may not be punished.\textsuperscript{125} It is, says the BGH, “dubious” whether intentionally wounding a would-be refugee can be considered to have been illegal.\textsuperscript{126} But, even if it were in fact illegal, says the court, the illegality of the act was certainly not obvious. Under East and West German law, however, a soldier is criminally liable for an act committed pursuant to superior orders only if the illegality of the act was self-evident.\textsuperscript{127} Thus, the court holds, a border guard who was acting under orders (as all border guards were) and who neither intended to kill nor willingly accepted the possibility that he might kill the refugee may not be held criminally responsible for having intentionally wounded a refugee.\textsuperscript{128} This marks a significant retreat from the court’s earlier stance. Throughout the pre-reunification period, the West German courts, including the BGH, consistently held that any effort by East German authorities to enforce the GDR’s border restrictions—whether by firearms or criminal prosecution—was a violation of fundamental human rights and therefore illegal on extra-positive grounds.\textsuperscript{129} Under the previous jurisprudence, a border guard who had done nothing more than physically block a would-be refugee’s path would be guilty of coercion, and a

\textsuperscript{124}Having actually killed a would-be refugee is taken as \textit{prima facie} evidence of either the intent or willingness to kill. If a border guard shot single fire and killed, he is presumed to have intended to kill given the accuracy of single fire shots. If a border guard shot a long rapid fire burst and killed, he is presumed to have been willing to kill given the inaccuracy inherent in shooting long rapid fire bursts. If a border guard wounded but did not kill a would-be refugee and had shot either single fire or a short (as opposed to long) rapid fire burst, he is presumed neither to have intended to kill nor to been willing to kill.

\textsuperscript{125}Various factual permutations in which border guards are not held criminally liable can be found in: BGHSt 39, 168 (177-9); BGHSt 41, 10 (15); Bundesgerichtshof, 5 StR 88/93, \textit{Neue Zeitschrift für Strafrecht} (1993): 488-9; and, Bundesgerichtshof, 5 StR 139/95, \textit{Neue Zeitschrift für Strafrecht} (1995): 497-8.

\textsuperscript{126}BGHSt 41, 10 (15).

\textsuperscript{127}§ 5 I Wehrstrafgesetz; and, § 258 I StGB-DDR. This standard is significantly more lenient than that set out in Kontrollratsgesetz Nr. 10. According to Art. 4 (b) KRG 10, “the fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.” See: \textit{Official Gazette of the Control Council for Germany}, No. 3 (January 31, 1946): 52.

\textsuperscript{128}Bundesgerichtshof, 5 StR 88/93, \textit{Neue Zeitschrift für Strafrecht} (1993): 489; and, BGHSt 41, 10 (15). Intentionally or willingly killing an unarmed refugee was by contrast self-evidently illegal, the court maintains [BGHSt 39, 1 (33-5)].

\textsuperscript{129}See: BGH 6 StR 1/56; BGHSt 14, 104; BGHSt 30, 1; BGHSt 32, 293; LG Stuttgart, Ks 14/63, Juristenzeitung (1964): 101-5; OLG Düsseldorf, 5 Ws 767/78, Neue Juristische Wochenschrift (1979): 59-63; and, OLG Düsseldorf, V 15/82 (3), \textit{Neue Juristische Wochenschrift} (1983): 1277-8. The LG Stuttgart (p. 101) stated, for example, that it “is impossible ... to recognize the legality and binding force of the formally valid laws upon which the measures and actions concerned with the criminal prosecution and actual prevention of \textit{Republikflucht} are based.” \textit{Republikflucht} (‘flight from the republic’) is the term the GDR used to describe unauthorized emigration.
border guard who had arrested a would-be refugee would be guilty of unlawful deprivation of liberty.\footnote{These examples were provided by Justice Horstkotte, who readily acknowledges that the BGH’s post-reunification decisions represent a change of course (interview, July 29, 1994).} Under the new jurisprudence, by contrast, a border guard can have intentionally shot an unarmed refugee yet not bear any criminal liability.

Natural law, even in the narrow range of cases to which it is still applied by the BGH, is not the immediate basis for the punishment of East German border guards. To the extent that it is used at all, natural law serves only to invalidate the extraordinary legal justification provided the border guards under GDR law.\footnote{The exact form that the extraordinary justification took changed over time. See footnotes 114 and 118 above.} Punishment rests on what remains of “positive” law rather than on explicitly retroactive law. Referring to the court’s recent border guard decisions, Justice Horstkotte writes, “The offense that was prosecuted was homicide; and the relevance of the Radbruch formula was restricted to the elimination of a ground of justification.”\footnote{Horstkotte, “The Role of Criminal Law in Dealing with East Germany’s Past,” p. 222.} The BGH, Horstkotte emphasizes, “was not required to develop new offenses such as crimes against humanity.”\footnote{Horstkotte, “The Role of Criminal Law in Dealing with East Germany’s Past,” p. 222.} The court refuses to avail itself of either Article 15, Paragraph 2 of the International Covenant on Civil and Political Rights or Article 7, Paragraph 2 of the European Human Rights Convention, each of which expressly permits the suspension of nulla poena when prosecuting violations of internationally recognized human rights.\footnote{BGHSt 39, 1 (27). On the provisions of the Covenant and the Convention, see page 142 and footnote 87 above.} The punishment of the border guards and their superiors is, the BGH insists, fully compatible with Art. 103 II GG, even if that punishment ultimately depends on the extra-positivist invalidation of a legal justification. Homicide was, unless specifically justified, illegal under East German statute. In the court’s view, the shooting of would-be refugees was without valid legal justification and is therefore punishable under that section of the penal code which outlawed manslaughter.\footnote{Manslaughter was outlawed by § 212 StGB-DDR prior to 1968 and by § 113 StGB-DDR thereafter.} According to the BGH, the extraordinary legal justification provided border guards under GDR law (as interpreted by the GDR) was invalid “from the very beginning” because a legal justification that permits an
extreme violation of human rights "never attains validity. Given that the legal justification was invalid all along, the court argues, disregarding it now does not constitute retroactive legislation. The court explicitly rejects the notion that the nullification of an extraordinary legal justification results in a legal vacuum. "The penal statute against manslaughter remains applicable," says the court.

For all its prominence, extra-positivism actually occupies a subsidiary role in the BGH's recent border jurisprudence. Natural law is relegated to a fall-back position upon which the court need not rely. True, the BGH declares its willingness to nullify an extraordinary legal justification if such a justification would inevitably sanction the violation of fundamental human rights. Yet, the BGH's declaration is more obiter dictum than an integral element of its border jurisprudence. The court makes clear that what it is invalidating when it applies extra-positive standards to the cases at hand is GDR law as it was interpreted by the GDR. It is, the court states, impossible to recognize § 27 GrenzG and § 213 StGB-DDR "in the expansive manner in which they were understood in the official praxis of the GDR." At no point, however, does the court deem either § 27 GrenzG or § 213 StGB-DDR intrinsically invalid. Thus, the BGH is using extra-positive standards to disqualify a particular interpretation of statute rather than to invalidate statute per se. Whenever it considers the validity of statute per se, the BGH employs the subjunctive: had GDR law as written been impervious to humane interpretation,

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136 BGHSt 39, 1 (22); and, BGHSt 41, 101 (105).
137 BGHSt 41, 101 (112). Also see: Walter Odersky, Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts (Heidelberg: C. F. Müller, 1992): 16. Odersky is the chief justice of the Bundesgerichtshof, not sits on a different panel than that which has issued the border rulings.
138 BGHSt 41, 101 (113). One could make the argument that the court applies natural law directly, for the court states that "the fundamental criminality of deliberate homicide belongs to the basic assets of all civilized legal cultures." For his part, Justice Horstkte states that "the punishability of homicide goes without saying." [See: BGHSt 41, 101 (112-3); and, Horstkte, "The Role of Criminal Law in East Germany's Past," p. 226.] That punishment (to the extent that it relies on extra-positivism at all) does in fact rest upon the application of rump positive law rather than upon the immediate application of natural law is demonstrated by the fact that: 1. the court explicitly cites those sections of the East German penal code that classified certain forms of homicide as unlawful; 2. the court discusses how the border guards' actions fulfilled the definitional criteria stipulated under those sections of the East German penal code; and, 3. the court repeatedly emphasizes that the criminality was 'statutorily determined' at the time that the border shootings occurred. [See: BGHSt 39, 1 (3-5, 26, 29-30); BGHSt 39, 168 (177-80); and, BGHSt 41, 101 (103, 112).]
139 In a discussion with the author, Justice Horstkte described the court's extra-positivist tack as a line of reasoning "held in reserve" for "extreme cases". Horstkte reported that the prospect of resorting to extra-positivism, even in extreme cases in which positive law was not susceptible to tolerable interpretation, was "somewhat controversial" among the members of the BGH's 5th panel (interview, July 29, 1994).
140 BGHSt 39, 1 (30); and, BGHSt 41, 101 (105).
141 BGHSt 39, 1 (22).
then it would have been irredeemably void. But, according to the court, there is no need to invalidate GDR statute outright because "GDR law as written could also have been interpreted in a human rights friendly manner."  

Indeed, it is a reinterpreted rendering of GDR law that lies at the heart of the BGH's border jurisprudence. Art. 103 II GG, says the court, requires that "the written law of the GDR not be ignored." But, the court hastens to add, that is all that Art. 103 II GG requires. It neither compels recognition of empirical reality, says the court, nor guarantees interpretive continuity.

What is decisive is ... whether the criminality 'was statutorily determined' before the act was committed. When evaluating whether it was, the judge is not bound ... by the interpretation that was reflected in official praxis at the time the act was committed.  

Rather, says the BGH, it is necessary for the contemporary judge to investigate whether it had been theoretically possible, within the framework of the East German constitution, to interpret GDR statute in a way that was both faithful to the statutory text and consistent with international human rights standards. If such an interpretation was possible, the court states, then it constitutes the proper interpretation of GDR law and it is GDR law so understood which determines whether the criminality of a given act was—as required by Art. 103 II GG—'statutorily determined' at the time of the act. Such an interpretation, which the BGH labels a 'human rights friendly' interpretation, was in fact possible, says the court.

The BGH develops its 'human rights friendly' interpretation of GDR statute using concepts that it claims were endogenous to GDR constitutional law. The court observes that "unlike in the Nazi Führer state, there was no doctrine in the GDR whereby the mere will of the de facto ruler was sufficient to establish law." Under the (1974) GDR constitution, the court notes, only parliament was empowered to enact statutes, and all statutes enacted by parliament

142 BGHSt 39, 1 (30); and, BGHSt 41, 101 (112).
143 BGHSt 41, 101 (111).
144 BGHSt 41, 101 (110). The court never explains how this assertion and the extra-positivist approach could be reconciled.
146 BGHSt 39, 1 (29).
147 BGHSt 39, 1 (24).
were binding. From this, and from the fact that the GDR constitution guaranteed judicial independence, the BGH concludes that "statutes laid claim to a validity that was not defined by internal directives or actual state praxis." In other words, according to the BGH, the GDR constitution endowed statutes with an autonomous existence free from political control. Under the GDR constitution, statutes were, says the BGH, subordinate only to the constitution itself. It is therefore legitimate, the BGH argues, for a post-reunification court to respecify the meaning of GDR statutes in light of East German constitutional norms. When evaluating the legality of border shootings under GDR law, the crucial constitutional clause is, the court asserts, Article 30 of the 1974 constitution. Article 30, Paragraph I declared that "the individuality and freedom of each citizen of the German Democratic Republic are inviolable." Article 30, Paragraph II stipulated that the rights of a GDR citizen could be limited only if the citizen were engaged in illegal activity, and then only by law and to the least extent necessary. From these two provisions the BGH derives both a right to life, which it says is undoubtedly included in the inviolability of one's personality, and a proportionality requirement, according to which the severity of the state's actions must be commensurate with the degree of criminality it is countering. The BGH insists that the statute governing the use of weapons at the border (§ 27 GrenzG) must be interpreted in light of these derived principles. When § 27 GrenzG is so interpreted, the extent of the extraordinary legal justification provided border guards under GDR law is—in comparison to that which was provided under the official interpretation that had prevailed prior to reunification—greatly diminished. Consequently, says the BGH, a border guard who shot someone and either intended to kill or willingly accepted the possibility that he might kill the person is criminally liable "because the act was punishable at the time under valid GDR law properly understood."

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148 The court details its argument only once, in BGHSt 39, 1 (23-6). That case involved an incident from 1984, by which point the 1974 constitution was in force, § 213 StGB-DDR was on the books, and § 27 GrenzG had been enacted. But, the court has declared that a 'human rights friendly' interpretation of East Germany's border regulations using concepts endogenous to GDR law was also possible both under the 1968 constitution prior to the enactment of § 27 GrenzG and under the 1949 constitution prior to the enactment of § 213 StGB-DDR. [See: BGHSt 40, 241 (249-50); and, BGHSt 41, 101 (110).] NB: all otherwise unattributed paraphrasing in this paragraph comes from BGHSt 39, 1 (23-6).

149 BGHSt 39, 1 (24).

150 BGHSt 39, 1 (26).
The restrictive reinterpretation of GDR statute is, in the court's view, entirely consistent with Art. 103 II GG's underlying rationale.

The ban on retroactive legislation is supposed to protect the defendant against caprice and to restrict the penal authority to the enforcement of general laws. It protects the trust that the defendant placed at the time of the act in the continued existence of the law that was then valid. These constitutional purposes are not lost here: the expectation that the law will also be applied in the future, as it was at the time of the act, in such a way that recognizes a legal justification contrary to human rights is not worthy of protection. It is not capricious if the illegality of the defendant's behavior is judged as it would have to have been judged had GDR law been properly interpreted already at the time of the act.\footnote{BGHSt 39, 1 (29-30). Similarly: BGHSt 41, 101 (111-2).}

The BGH freely acknowledges that “neither the various constitutions of the GDR nor its other laws... were actually interpreted in a human rights friendly manner.”\footnote{BGHSt 41, 101 (110).} Nonetheless, the court emphatically denies “having constructed a legal system that has nothing whatsoever to do with GDR law.”\footnote{BGHSt 41, 101 (110). The BGH, says Justice Horstkotte, did nothing more than “take the GDR at its word.” (Interview, July 29, 1994.)} The decisive point, says the court, is that GDR statute could have been interpreted in a 'human rights friendly' manner using principles found within GDR law itself. According to the court, that is all that matters when considering the constraints imposed by nulla poena.

The BGH's reinterpretivist approach to the border shootings suffers from the weaknesses that are endemic to reinterpretivism generally: it fails to provide an adequate defense of fundamental human rights while simultaneously failing to provide robust protection against retroactive legislation. To the extent that it is positivist, the court's approach fails to affirm the existence of inalienable human rights. Insofar as it recognizes the basic validity of § 213 StGB-DDR, the BGH accepts that the GDR was entitled to imprison its own populace; insofar as it recognizes the basic validity of § 27 GrenzG, the BGH accepts that the GDR was entitled to inflict grievous bodily harm upon those who tried to flee.\footnote{It is true that the BGH arrived at the exact same result via reinterpretivism as it did via extra-positivism, viz. the rule that a border could shoot a would-be refugee so long as he neither intended to kill or willingly accepted the possibility that he might kill the would-be refugee. But, the derived rule is probably at the limit of what can be accomplished under a reinterpretivist approach. As the court's pre-reunification jurisprudence demonstrates, a thoroughgoing extra-positivist approach can accomplish much more.} By the BGH's own admission, its adoption of the reinterpretivist approach is motivated by a desire to satisfy the demands of Art.
103 II GG. According to the court, a statutory reinterpretation is permissible under Art. 103 II GG if and only if it is based on the positive constitutional law that existed at the time. Applying this criterion, the BGH rejected a line of reinterpretivist reasoning that had been offered by one of the trial courts. The trial court's restrictive interpretation of § 27 GrenzG could not be accepted, said the BGH, because it relied on principles derived from the Grundgesetz and the European Human Rights Convention, neither of which were valid in the GDR. Yet, the interpretive principles that the BGH employs are hardly less alien, even if nominally gleaned from the GDR's own constitution. The BGH's use of GDR constitutional law is highly selective. For example, the court conveniently ignores Article 1 of the 1974 GDR constitution which declared the GDR a socialist state "under the leadership of the working class and its Marxist-Leninist party." In a hierarchically organized state which knew no separation of powers, this provision (together with several others) guaranteed that statutes did not enjoy an autonomous existence free from political control. Thus, it is an ex post facto imposition of exogenous standards when the BGH insists that § 27 GrenzG must be interpreted in a manner that would have been systematically contrary to the existential interests of the GDR's communist regime. Holding border guards criminally liable under a 'human rights friendly' interpretation of § 27 GrenzG is, therefore, tantamount to an application of (highly circumscribed) natural law in positivist guise.

Nulla poena is not the only principle of intertemporal law that affects the boundaries of post-transitional justice. Nulla poena, which prohibits legislation that would retroactively disadvantage a potential defendant, has as its sole object increases in the severity of penal law. The severity of penal law, however, can just as easily be decreased as increased. Nulla poena has no bearing on situations in which the severity of penal law has been reduced after the commission of an act. In particular, it does not preclude the prosecution of an act under a law that was in force at the time of the act even if the law has subsequently been revoked without replacement. But, according to another principle of intertemporal law (as codified in § 2 StGB

155 BGHSt 39, 1 (14).
156 Brunner, Einführung in das Recht der DDR, pp. 1-9
and as stipulated in the Unification Treaty), an act that is not punishable under current law may not be prosecuted, even if the act was punishable under the law that had been in force at the time the act was committed.\textsuperscript{158} This principle, which might be called the 'leniency principle', is meant to insure that individuals are not subjected to antiquated (and therefore perhaps inhumane) standards of conduct which are no longer endorsed by the polity. The logic of the principle is especially apparent in post-transitional settings. For example, under the 'Blutschutzgesetz', enacted by the Nazis in 1935 and abrogated by the Allies in 1945, it was illegal for Jews to have sex with 'Aryans'. Although enforcement of the 'Blutschutzgesetz' was reprehensible already during the Third Reich, it would have been particularly outrageous were an individual still prosecuted in 1946 for having violated the law two years before. The leniency principle is in some sense the inverse of \textit{nulla poena}. Each is a special case of a general intertemporal rule: if the law at the time that an act was committed differs from current law, then the applicable law is whichever of the two is more beneficial to the potential defendant.\textsuperscript{159} In other words, for an act to be punishable, it must both be punishable under current law and have been punishable under the law that was in force at the time it was committed. At the moment of reunification, the East German penal code lost all force and the West German penal code became effective throughout what until then had been the GDR. Thus, under the principles of intertemporal law, an act committed in the GDR prior to reunification is now punishable if and only if it had been punishable under GDR law and remains punishable under FRG law.

The leniency principle has important implications for justice in the post-reunification period. In many cases, the ramifications are clear. It is obvious that certain acts which constituted crimes when committed in the GDR—such as attempting to emigrate without authorization—may not be prosecuted because the FRG penal code contains no equivalent crimes. It is equally obvious that other acts committed in the GDR—such as rape—are still subject to prosecution

because they remain illegal under FRG law. In some cases, however, the ramifications of the leniency principle are not clear.\textsuperscript{160} This is especially true of cases involving electoral fraud and the perversion of justice. Electoral fraud and the perversion of justice were both (nominally) illegal under GDR law.\textsuperscript{161} Needless to say, both are also illegal under FRG law.\textsuperscript{162} The difficulty arises when one considers whether, despite the apparent statutory congruence, current FRG law actually criminalizes the same behavior that had been (nominally) criminalized under GDR law. The question turns on whether current (FRG) law protects the same legal good as had been protected under prior (GDR) law.\textsuperscript{163} There is, for example, no doubt that the West German statute criminalizing rape protects the same good, namely the security of one's person, as had the analogous East German statute. Thus, rape committed in the GDR remains punishable even after reunification. It is highly questionable, however, whether the West German statutes that criminalize electoral fraud and the perversion of justice protect the same goods as had been protected by the comparable East German statutes. Though elections and courts do display certain generic similarities across states, their exact function in any given state is in many ways peculiar to that state. Thus, the goods that are protected by the laws criminalizing electoral fraud and the perversion of justice are, at least in part, state specific. The critical issue is the degree to which they are state specific.\textsuperscript{164} In order to conclude that electoral fraud and the perversion of justice committed in the GDR are punishable in the post-reunification period, one must assume that East German elections and East German courts were—in some fundamental sense—equivalent to West German elections and West German courts. The Bundesgerichtshof makes the necessary assumption and reaches the corresponding conclusion: according to the

\textsuperscript{160}See the examples given in: Klaus Lüderssen, "Zu den Folgen des 'Beitritts' für die Strafjustiz der Bundesrepublik Deutschland," Strafverteidiger (1991): 484.

\textsuperscript{161}The relevant statutes were § 211 StGB-DDR and § 244 StGB-DDR respectively.

\textsuperscript{162}The corresponding statutes are § 107 a StGB and § 336 StGB respectively.


\textsuperscript{164}One commentator describes the issue as "one of the most difficult problems" associated with post-reunification justice. See: Peter König, "Anmerkung," Juristische Rundschau (1993): 209.
BGH, electoral fraud and perversions of justice committed in the GDR are indeed punishable in the post-reunification period.

According to the BGH, neither *nulla poena* nor the leniency principle precludes the prosecution of electoral fraud committed in the GDR prior to reunification. Reinterpretivist disregard for empirical reality figures prominently in the BGH's reasoning. As far as the court is concerned, there is no doubt that the electoral fraud routinely orchestrated by the communist regime was in fact punishable under GDR law. In keeping with its exclusive emphasis on nominal statute, the BGH does not even consider the possibility that the ban on retroactive legislation might prevent the punishment of formally prohibited but officially sanctioned and widely practiced behavior. The only question in the court's mind is whether the communist electoral manipulations can be subsumed under FRG law. The BGH recognizes that elections in the GDR served a very different purpose than do elections in the FRG. Whereas West German elections are a democratic method of selecting among competing political parties, elections in the GDR were, in the court's words, intended "to promote the perpetuation of socialist tyranny through an ostensible plebiscitarian confirmation of the existing rulers." The BGH acknowledges that as a result of this disparity the goods protected, on the one hand, by the West German statute against electoral fraud (§ 107 a StGB) and, on the other hand, by the East German statute against electoral fraud (§ 211 StGB-DDR) "do not correspond to one another when viewed in their entirety." Nonetheless, the court argues, electoral fraud committed in the GDR is still punishable under § 107 a StGB. It is punishable, the court asserts, because § 211 StGB-DDR,

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166BGHSt 39, 54 (69).

167BGHSt 39, 54 (69).
in addition to protecting the continued existence of the communist regime, also protected those
"rudimentary elements of free parliamentary democratic elections" that remained in the GDR.\textsuperscript{168}

In particular, the court claims, § 211 StGB-DDR protected the right of GDR citizens to reject the
 slate of official candidates. This (supposed) facet of § 211 StGB-DDR, says the court,
corresponds to the good that is protected by § 107 a StGB, viz. the democratic construction of
political will. Yet, to claim, as the BGH does, that § 211 StGB-DDR protected the right of GDR
citizens to resist the communist regime is a fanciful interpretation that is not only contrary to
empirical reality, but difficult to reconcile with various provisions of positive GDR law.\textsuperscript{169} Not
surprisingly, the BGH fails to adduce a single citation from the East German legal literature to
support its democratizing reinterpretation of § 211 StGB-DDR.

The BGH has ruled that East German judges and East German prosecutors are, under
certain circumstances, criminally liable for juridical malefaction committed in the GDR.\textsuperscript{170} According
to the court, the legal good that had been protected by the GDR \textit{Rechtsbeugung} statute (§ 244
StGB-DDR) was, at least in part, the same legal good as is currently protected by the FFRG

\textsuperscript{168}BGHSt 39, 54 (70).
\textsuperscript{169}For example: the preamble to the East German electoral law stated that the elections held under its
aegis were intended to help realize the goals set by the communist party while Article 1 of the
1968/1974 East German constitution guaranteed the communist party's leading role. See: Arnold and
\textsuperscript{170}The most important of the post-reunification \textit{Rechtsbeugung} rulings are: BGHSt 40, 30; BGHSt 40,
272; BGH 5 St 713/94; and, BGH 5 St 747/94. A general discussion of the issues involved can be
found in: Michael Bohlander, "Hexenjagd—oder: Rechtsbeugung durch Verletzung überpositiver
die Ausübung politischer Strafjustiz in der ehemaligen DDR," in Lampe, \textit{Die Verfolgung von
Wochenschrift} (1993): 1881-9; Erardo Cristoforo Rautenberg and Gerd Burges, "Anfangsverdacht wegen
Rechtsbeugung gegen Staatsanwälte und Richter der früheren DDR—ein Beitrag zum Meinungsstand in
demokratischen Rechtsstaat}, pp. 503-5; and, Friedrich-Christian Schroeder, "Strafrechtliche
Verantwortlichkeit für die Ausübung politischer Strafjustiz in der ehemaligen DDR," in Lampe, \textit{Die
Verfolgung von Regierungskriminalität}, pp. 109-121. A specific discussion of the court's jurisprudence
can be found in: Knut Amelung, "Die strafrechtliche Bewältigung des DDR-Unrechts durch die deutsche
der Rechtsbeugung," \textit{Juristische Zeitung} (1995): 123-7; Olaf Hohmann, "Zur Rechtsbeugung durch DDR-
Armin Schorel, "Anmerkung," \textit{Strafrechtliche Fragestellungen in der DDR} (1994): 195-7; Manfred Seebode,
"Rechtsbeugung und Rechtsbruch. Bemerkungen zum Urteil des BGH v. 29.10.92—4 St 353/92 (BGHSt 38, 381),
6; Günter Spendel, "Der Bundesgerichtshof zur Rechtsbeugung unter dem SED-Regime," \textit{Juristische
Rundschau} (1994): 221-4; Günter Spendel, "Rechtsbeugung und Justiz insbesondere unter dem SED-
overview of the administration of political justice in the GDR, see: Karl Wilhelm Fricke, "Politische
Rechtsbeugung statute (§ 336 StGB), manifold differences between the East German and West German judicial systems notwithstanding.\textsuperscript{171} The court frankly acknowledges that the East German judiciary was—both as a practical matter and as a matter of constitutional law—subject to tight political control. The court also acknowledges that the notion of individual rights counterpoised to state interests was alien to East German legal theory.\textsuperscript{172} Had § 244 StGB-DDR protected nothing more than the integrity of the GDR legal system as such, the BGH says, Rechtsbeugung committed in the GDR would no longer be punishable because § 336 StGB does not protect the integrity of a foreign legal system, let alone the integrity of a fundamentally undemocratic foreign legal system. But, the BGH asserts, under the literal meaning of its statutory text, § 244 StGB-DDR protected not only the GDR legal system as such, but also protected individual GDR citizens against the misapplication of municipal law. This individualized protection, says the court, corresponds to "an essential component" of § 336 StGB.\textsuperscript{173} The two statutes are, in the court's view, therefore sufficiently similar to satisfy the leniency principle and thus justify the post-reunification prosecution of Rechtsbeugung committed in the GDR.\textsuperscript{174} As is the case in its electoral fraud decisions, the BGH is unable to provide even one authoritative statement from the GDR that would lend credence to its idealized interpretation of GDR statute. The BGH's disregard for empirical reality is striking: although it explicitly acknowledges that electoral and judicial affairs in the GDR were in fact and under law intended to promote the constitutionally ordained goal of solidifying communist rule, the court still manages to interpret GDR statute in such a way as to find an enduring guarantee of citizens' rights vis-à-vis the East German state.

Despite recurrent extra-positivist declarations which appear as obiter dicta in the various decisions, the court's perversion of justice jurisprudence ultimately stands on what are thoroughly reinterpreivist grounds. Indeed, the BGH does more than merely refrain from using natural law;

\textsuperscript{171}BGHSt 40, 30 (39-40); and, BGHSt 40, 272 (275).
\textsuperscript{172}BGHSt 40, 30 (34-9).
\textsuperscript{173}BGHSt 40, 272 (275).
it generally applies a ‘received’ reinterpretivist standard to judicial behavior in the GDR. When deciding whether an East German judicial official perverted GDR law, says the court, “what matters are the interpretive methods of the GDR, not those of the Federal Republic.”

This is true, the court states, even when the case revolves around the application of criminal statutes that were intentionally vague. “An extensive interpretation” of intentionally vague statutes “must be tolerated,” the court holds.

Furthermore, says the BGH, criminal liability “is limited to those cases in which the illegality of the decision was so obvious and the rights of others—in particular their human rights—were so seriously violated that the decision constitutes an arbitrary act.”

Thus, according to the BGH, for an East German judge or prosecutor to be punishable for action taken in an official capacity, the action must have violated GDR law as interpreted by the GDR and must, in addition, have violated fundamental human rights. Adherence to this cumulative standard, which the court says is necessary in order to insure that “punishment does not contravene the ban on retroactive legislation,” establishes a very high threshold for conviction.

The severe limitations of the court’s Rechtsbeugung jurisprudence are perhaps most evident in BGHSt 40, 272. The defendants in the case were a former judge and a former prosecutor. The judge, acting on an indictment brought by the prosecutor, had sentenced an individual to jail under § 214 StGB-DDR (which outlawed “interference in state activities”) for unfurling a banner that criticized the GDR border regime. Though the BGH accepts the theoretical possibility of applying natural law to instances of judicial depravity, it denies its applicability to the case at hand.

Freedom of expression and the right to emigrate are, the court acknowledges, internationally recognized human rights. But, according to the court, the imprisonment of a peaceable demonstrator protesting the GDR’s draconian emigration restrictions did not violate binding extra-positive norms. The court refuses to hold the

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175 BGHSt 40, 30 (41).
177 BGHSt 40, 30 (41).
178 BGHSt 40, 30 (42). Insofar as neither judges nor prosecutors are required to have applied a ‘human rights friendly’ interpretation of GDR law, they are held to a lesser standard than are border guards. The stringency of the BGH's Rechtsbeugung standard has been criticized by (among others): Bandel, “Anmerkung,” p. 439; Bemmann, “Zu aktuellen Problemen der Rechtsbeugung,” pp. 123-7; and, Spendel, “Der Bundesgerichtshof zur Rechtsbeugung unter dem SED-Regime,” pp. 221-4.
179 BGHSt 40, 272 (276-7).
defendants liable at all, not even on 'restrictive' reinterpretivist grounds, despite the fact that their behavior was—on the court's own account—both undemocratic and unnecessary. The court recognizes that the defendants had put themselves at the service of the communist regime voluntarily.\textsuperscript{180} The court also recognizes that the defendants had not been compelled to apply GDR statute in the manner that they did. The subsumption of the victim's protest under § 214 StGB-DDR was, the BGH notes, "by no means imperative."\textsuperscript{181} Nonetheless, the BGH acquits the two defendants because the application of § 214 StGB-DDR was "not indefensible" within the context of GDR interpretive practice.\textsuperscript{182}

Insofar as the BGH adopts a 'received' reinterpretivist stance, it makes it very difficult to prosecute East German judicial maleficence. But, the court does not eliminate the possibility of prosecution altogether. Even on 'received' reinterpretivist grounds, prosecution is possible if an East German judicial official utterly ignored statutory language.\textsuperscript{183} After all, what distinguishes 'received' reinterpretivism from empirical legal positivism is the reinterpretivist attention to written law. "The boundaries of possible word meaning," says the court, "may not be exceeded."\textsuperscript{184} More important, however, are the exceptions to 'received' reinterpretivism that the court makes for particularly egregious cases.

The written law of the GDR in the form given to it by the prevailing interpretive methodology is ... not the sole and final standard by which to judge whether a judicial decision was contrary to law within the meaning of § 244 StGB-DDR. The judicial action was also then contrary to law if the application of law constituted an obvious and unbearable violation of basic principles of justice and internationally protected human rights.\textsuperscript{185}

The court holds out the possibility of prosecuting judicial officials on natural law grounds. A judge who applied positive law in a way that flagrantly violated fundamental human rights can be guilty of \textit{Rechtsbeugung}, says the court, even if the relevant statutory text did not permit a humane interpretation.\textsuperscript{186} Thus far, however, the BGH has, in explicit deference to legal certainty,

\textsuperscript{180}\textit{BGHSt} 40, 272 (285). In the court's words: "They allowed themselves to be integrated into this system."
\textsuperscript{181}\textit{BGHSt} 40, 272 (281).
\textsuperscript{182}\textit{BGHSt} 40, 272 (281). Complete acquittals were also returned in \textit{BGHSt} 40, 30 and \textit{BGH} 3 \textit{StR} 605/94.
\textsuperscript{183}\textit{BGHSt} 40, 30 (42-3).
\textsuperscript{184}\textit{BGHSt} 40, 272 (279).
\textsuperscript{185}\textit{BGH} 3 \textit{StR} 605/94, p. 12.
\textsuperscript{186}\textit{BGHSt} 40, 272 (276).
consistently declined to invalidate even the most repugnant of GDR statutes. 187 According to the court, "The incompatibility of ... GDR penal law with human rights—an in particular the incompatibility associated with the undemocratic restrictions on the freedom to emigrate, the freedom of thought, the freedom of assembly and the freedom of association—does not ... reach such a degree of intolerability that one can conclude that positive law was invalid under the Radbruch formula." 188 As a result, the theoretical possibility of extra-positivist prosecutions has remained just that: purely theoretical. 189

The Rechtsbeugung convictions that the BGH has upheld have been upheld on reinterpretivist grounds. According to the BGH, judicial or prosecutorial conduct resulting in a blatant human rights violation constituted an arbitrary and therefore punishable act if: relevant statutory language was completely disregarded; a sentence was imposed that was grossly disproportionate to the crime being punished; or, positive procedural rules were wantonly violated. 190 Under any of these circumstances, says the court, GDR interpretive praxis need not be respected. Using these criteria, the BGH has upheld the conviction of several East German legal officials. Thus, for example, the court has affirmed without comment the conviction of a

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187 The court has recognized the validity of: § 27 GrenzG (which permitted the use of weapons against would-be refugees); § 213 StGB-DDR (which outlawed unauthorized emigration); § 214 StGB-DDR (which outlawed 'interference in state activities'); § 220 StGB-DDR (which outlawed 'public degradation' of the state); and, Article 6 of the 1949 constitution (which outlawed—among other things—'incitement to boycott democratic institutions'). [See: BGHSt 39, 1; BGHSt 40, 125; BGHSt 40, 272; BGH 5 StR 713/94; and, BGH 5 StR 747/94 respectively.] Prior to 1968, Art. 6 was the primary tool of judicial repression; thereafter, §§ 214, 220 were the weapons of choice against domestic dissent.

188BGH 5 StR 713/94, p. 22.

189 One could try to argue that the decision in BGH 5 StR 747/94 rests on extra-positive norms. The case involves a judge on the Oberster Gericht (the GDR's highest court) who had imposed three death sentences in the 1950s under Art. 6 of the 1949 East German constitution. The BGH, which speaks [p. 45] of "homicide in the guise of a judicial decision", says that the judge is guilty of Rechtsbeugung because the death sentences were grossly disproportionate to the crimes that had been committed by his victims. According to the court: "The principle that an imposed sentence may not be unbearably disproportionate to the act being punished is a universal belief of all civilized nations of modernity and was valid in the GDR even without its (partial) codification." [p. 14] To the extent that the BGH sees the rule of proportionate sentencing as universally valid irrespective of municipal law, one could say that the Rechtsbeugung conviction does in fact rely on natural law. But, several things mitigate against such a claim. First, even though the BGH declares the death sentences imposed under Art. 6 to have been illegal, it does not nullify Art. 6 outright. Instead, what the court invalidates is "the legal praxis that prevailed at the time." [p. 22] That is to say, the court simply disqualifies a particular (albeit previously authoritative) interpretation of fundamentally valid law. Thus, here, as in BGHSt 39, 1 (vis-à-vis § 27 GrenzG), extra-positive standards do nothing more than justify the substitution of an alternative statutory interpretation. Second, the BGH makes a point of arguing that the GDR itself recognized the rule of proportionate sentencing as an element of municipal law. The court does this in two ways: On the one hand [pp. 14, 19], it provides citations to contemporary, quasi-official GDR sources in which the principle was acknowledged. On the other hand [p. 14], it asserts that the rule of proportionate sentencing was an intrinsic feature of Art. 6 insofar as Art. 6 allowed a range of penalties.

190BGHSt 40, 30 (42-3); BGH 5 StR 713/94, p. 15.
judge who had presided at the procedurally deficient 1950 Waldheim trials. \(^{191}\) The court has also sustained the conviction of an East Berlin prosecutor who had been responsible for the prosecution of 'crimes against the state'. \(^{192}\) According to the BGH, the prosecutor had committed Rechtsbeugung in three instances, once by wrongly subsuming a citizen's dissident behavior under a penal statute, once by requesting (and receiving) an unduly harsh sentence, and once by flagrantly contravening procedural requirements. Such convictions, however, are the exception rather than the rule. \(^{193}\) "The obligatory reliance on the perspective of GDR law," the BGH notes, "will rarely lead to the assumption that Rechtsbeugung occurred." \(^{194}\)

The extent of the already considerable protection granted GDR judicial officials under 'received' reinterpretivism is magnified by the fact that the BGH extends to them the immunity of 'judicial privilege'. \(^{195}\) Under this doctrine, a judicial official must first be found guilty of Rechtsbeugung before being held criminally liable for the consequences of a judicial act. This means, for example, that an East German judge who imprisoned a dissident for peaceably

\(^{191}\) BGH 3 StR 252/94. The lower court conviction, in which a litany of procedural flaws are cited, can be found at: LG Leipzig, 1 Ks 04 Js 1807/91, Neue Justiz (1994): 111-5. For more information on the Waldheim trials and earlier jurisprudential responses to them, see page 147 above and Chapter 3, footnote 50.

\(^{192}\) BGH 5 StR 713/94.

\(^{193}\) The fact that Rechtsbeugung convictions are being returned at all, however, marks a dramatic change from the previous treatment of Nazi judges. The BGH openly acknowledges that "the standards by which Nazi judicial injustice was judged in the Federal Republic were significantly less stringent" than those that are currently being applied to judicial malefactor committed in the GDR. [BGH 5 StR 747/94, p. 29] No professional judge was ever convicted on perversion of justice charges for actions taken during the Third Reich. Those Nazi judges who were held criminally liable after 1945 were typically military officers or party officials who had served as ex officio members of a summary court. Moreover, they were typically found guilty of unlawful homicide rather than the perversion of justice. Under BGH jurisprudence (as articulated in the seminal decision BGHSt 10, 294), for a judge to be convicted of Rechtsbeugung, it had to be proven that the judge had intentionally violated the law. The court established such high evidentiary standards that it was virtually impossible to bring the necessary pr. "In an act of contrition, the BGH admits that its jurisprudence played 'a central role' in 'the failure to prosecute Nazi judges.' [BGH 5 StR 747/94, p. 44] The recent shift in jurisprudence does not turn on positivism, extra-positivism or reinterpretivism, but on the burden of proof. The court is now more willing to accept that (GDR) judges had knowingly violated the law. The BGH cautions that the FRG's failure to punish Nazi judges should not lead to an overreaction now. In particular, says the court, it should not result in "GDR judicial officials being held responsible for their official actions without regard to their individual guilt and in disregard for the rule of law." [BGH 5 StR 713/94, p. 12] On the postwar treatment of judicial malefactor under the Nazis, see: Günter Spedel, Rechtsbeugung durch Rechtsprechung (Berlin: de Gruyter, 1984); Gribbohm, "Nationalsozialismus und Strafpraxis," pp. 2842-9; Friedrich Dencker, "Die strafrechtliche Beurteilung von NS-Rechtsprechungsakten," in Peter Salje, ed., Recht und Unrecht im Nationalsozialismus (Münster: Wissenschaftliche Verlagsgesellschaft Regensburg & Bie mann, 1985): 294-310; Günter Frankenberg and Franz J. Müller, "Juristische Vergangenheitsbewältigung: der Volksgerichtshof vorm BGH," in Redaktion Kritische Justiz, ed., Der Unrechts-Staat. Recht und Justiz im Nationalsozialismus (Baden-Baden: Nomos Verlag, 1984): 225-43; Schol derer, Rechtsbeugung im demokratischen Rechtsstaat, passim; and, Jörg Friedrich, Freispruch für die Nazi-Justiz: Die Urteile gegen NS-Richter seit 1948: Eine Dokumentation (Reinbek bei Hamburg: Rowohlt Taschenbuch Verlag, 1983).

\(^{194}\) BGH 5 StR 713/94, p. 36.

\(^{195}\) BGH 5 StR 747/94, p. 10.
criticizing the communist regime cannot be punished for the deprivation of liberty unless it is also proven that the judge had in some manner capriciously violated GDR law. By making collateral criminal liability dependent on having first fulfilled the (stringent 'received' reinterpreivist) standards of Rechtsbeugung, the BGH advantages judges and prosecutors over other officials, who are—at least potentially—liable as soon as they violated any (restrictively reinterpreted) law. The putative rationale behind ‘judicial privilege’ is the protection of judicial independence. Were they potentially liable for every 'mistake', judges might be tempted to reach politically safe rather than legally correct decisions in controversial cases. But, the East German judiciary was, as the BGH recognizes, anything but independent. East German judges routinely did the regime's bidding. Granting 'judicial privilege' to GDR judges immunizes them against responsibility for their servility. Thus, by treating the GDR judiciary according to the same rule that it treats the Federal Republic's democratic judiciary, the BGH undermines the substantive value which the doctrine of 'judicial privilege' is intended to promote.

Since reunification, the BGH has extended the same leniency to Stasi informants that it has shown GDR judges.\(^{196}\) Though the BGH, in keeping with its pre-reunification jurisprudence, continues to hold that § 241 a StGB (which outlaws 'political insinuation') is in theory applicable to acts committed in the GDR, the court has sharply limited the range of cases in which denunciation is actually punishable.\(^{197}\) According to the BGH's new position, denunciation, like the perversion of justice, is only punishable in exceptional cases. To be criminally liable, a Stasi informant must have exposed his or her victim to "an act of violence or caprice" so extreme that it constituted a "severe and obvious violation of human rights".\(^{198}\) The court says this threshold is necessary in order to insure that informants are not exposed to greater criminal liability than are the state

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\(^{197}\) On the applicability of § 241 a StGB to acts committed in the GDR via § 5 Nr. 6 StGB, see, in addition to the literature cited in the immediately preceding footnote, footnote 103 above.

\(^{198}\) BGHSt 40, 125 (136).
officials (i.e. judges) who acted on the information that was provided by the informant.\(^{199}\) In a marked departure from its earlier stance, the court now finds that the East German statute banning unauthorized emigration (§ 213 StGB-DDR) did not constitute an *ipso facto* violation of basic human rights and that the denunciation of would-be refugees is therefore generally not punishable under § 241 a StGB.\(^{200}\) Moreover, in an explicit reversal of an earlier decision, the court refuses to hold Stasi informants who revealed would-be refugees' escape plans liable for any deprivation of liberty that may have befallen their victims.\(^{201}\) The court now acknowledges that East German citizens were required by statute to inform the authorities of an impending escape attempt of which they had knowledge and that any deprivation of liberty that may have resulted from a corresponding act of denunciation was therefore legally justified under positive GDR law.\(^{202}\) The court's recent denunciation decisions signal a clear repositivization of the BGH's jurisprudence vis-à-vis communist malfeasance in the GDR.

The treatment of domestic Stasi officers is a clear indication of the more positivist approach taken since reunification by the BGH toward official East German maleficence and of the limits inherent in that approach. The Stasi was an efficient repressive apparatus that successfully silenced domestic dissent for forty years. Despite the myriad human rights abuses for which they were responsible, Stasi officers have escaped criminal liability for those abuses in the post-reunification period. The Landgericht Magdeburg had convicted several high ranking regional Stasi officers for their role in the Stasi's systematic wiretapping and mail interception

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\(^{199}\) Of course, an alternative means of achieving the same end would be to increase judges' exposure to criminal liability. The court says that the uniform liability of informants and judges was a principle of its post-1945 jurisprudence arising from Nazi malefaction. Indeed, this principle was enunciated in BGHSt 3, 110. In practice, however, Nazi informants were (at least until the mid-1950s) convicted with some regularity while professional Nazi judges escaped punishment entirely. On the dissimilar treatment of informants and judges in the 1950s, see: Michael Kim, *Verfassungsumsturz oder Rechtskontinuität? Die Stellung der Jurisprudenz nach 1945 zum Dritten Reich, insbesondere die Konflikte um die Kontinuität der Beamtenrechte nach Art. 131 GG* (Berlin: Duncker & Humblot, 1972): 71.

\(^{200}\) BGHSt 40, 125 (136). This holding contradicts: BGH 6 Str 1/56; BGHSt 14, 104; BGHSt 30, 1; and, BGHSt 32, 293. It also contradicts the lower court decisions cited in footnote 129.

\(^{201}\) BGHSt 40, 125 (125, 130). This overturns the holding in BGHSt, 32, 293. Under § 241 a StGB, which the court says is still theoretically applicable, it is a crime to denounce an individual to totalitarian authorities and thereby expose that individual to the danger of political persecution. Holding informants liable—at least in theory, if not in practice—for having exposed their victims to the danger of persecution but not for any harm which actually befell their victims is paradoxical. The result rests on the differences between § 5 StGB and § 7 StGB. See footnote 103.

\(^{202}\) BGHSt 40, 125 (134).
activities. The Landgericht's verdict was prototypical 'restrictive' reinterpretivism: The Stasi officers were not convicted of wiretapping itself, because wiretapping per se was not illegal under GDR law. Instead, the trial court—avowedly ignoring the GDR's own interpretation of the Stasi's legal authority—convicted the officers of usurping official powers, specifically prosecutorial powers, because the power to authorize wiretaps was, under the letter of the East German code of criminal procedure, reserved exclusively to prosecutors. Similarly, the trial court convicted the Stasi officers of embezzlement because only customs officials were, again under the nominal letter of East German law, authorized to seize goods mailed from abroad. The BGH, invoking the 'leniency principle', reversed the convictions. The BGH concluded that regardless of whether their behavior had been illegal under GDR law properly understood, the defendants' actions could not be subsumed under the West German Strafgesetzbuch and thus could not be punished now. Moreover, the BGH strongly suggested that it would have overturned the convictions in any case because the Landgericht had lent excessive weight to nominal statute and had not paid due attention to prevailing East German interpretive praxis. The BGH says that it "is fully aware that it appears unsatisfactory when a behavior ... that constitutes a grave injustice cannot be criminally punished because it is not a crime." But, remarks the court, "such a penal lacuna must be accepted."

Explanation: Political Context and Judicial Proclivities

Under the BGH's jurisprudence, some but only some communist maleficence can prosecuted. This intermediate outcome corresponds both to the court's own inclinations and to

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203 LG Magdeburg, 23 KfS 27/91.
204 LG Magdeburg, 23 KfS 27/91, pp. 89-92. The Stasi charter, upon which the wiretaps and mail interception were based, did not provide legal justification under GDR law, said the court, because the charter had not been formally enacted by the East German parliament and therefore did not meet the procedural requirements stipulated in Art. 31 (2) of the East German constitution. The Kammergericht returned a similar verdict. GDR law, says the Kammergericht, "must be taken at its word." See: Kammergericht, (5) 2 Z 116/91 Ss (34/92), Jüristische Rundschau (1993): 398-92 (390).
205 BGHSt 40, 8. A panel different than the one which decided BGHSt 40, 8 wanted to uphold an embezzlement conviction that had been returned in a similar case originating in Berlin. A special panel that was convened to resolve the dispute subsequently reaffirmed BGHSt 40, 8. See: BGH 5 StR 386/94; and, BGH, GSt 1/95. The court's jurisprudence is discussed in: Amelung, "Die strafrechtliche Bewältigung des DDR-Unrechts," pp. 67-9; and, Friedrich-Christian Schroeder, "§§ 246, 133 StGB auf dem Prüfstand der MfS-Postplünderungen. Zum Vorlageschluß des 5. Strafsenats des BGH," Jüristische Rundschau (1995): 95-7; and, Axel Weiβ, "Anmerkung," Jüristische Rundschau (1995): 29-32.
206 BGHSt 40, 8 (16).
207 BGHSt 40, 8 (24).
the post-reunification Zeitgeist. A few Germans are passionately in favor of prosecuting communist malefactors, and a few Germans are passionately opposed. Most Germans, however, are not terribly interested one way or the other. Under these circumstances, limited prosecutions are the politically expedient course. Not entirely by chance, but not inevitably either, political expediency and judicial proclivities coincide. The Bundesgerichtshof, which is not immune to the political atmosphere that surrounds it, is committed to a particular conception of nulla poena. As the court sees it, an act may be punished, even though it had been condoned by the former regime, if but only if there was a statute nominally in force at the time the act was committed under which the act could be construed as criminal. Conveniently, this conception of nulla poena permits the prosecution of certain misdeeds and precludes the prosecution of others. Though contingencies and institutions have had an effect too, it is above all the interplay of political interest and jurisprudential belief that explains the pattern of post-transitional justice in reunified Germany.

One might be tempted to argue that political interest alone can adequately explain the course of post-reunification justice. One might, for example, argue that the government—or, alternatively, that each of the state governments—had an interest in there being some minimal number of trials greater than zero. Greater than zero in order to appease anti-communist constituents, minimal in order to facilitate national reconciliation. And indeed, as will be made clear below, there is something to this notion. But, the mere existence of such an interest does not provide a sufficient explanation of the observed outcome. Even if one were to concede that the quantity of prosecutorial activity is in the aggregate completely determined by the government's interest in there being some minimal number of trials greater than zero, it still would not explain who is punished and who is not. After all, the same aggregate outcome could have been achieved through a law which, on the one hand amnestied all but a handful of the top leadership, and on the other hand, specified that members of the top leadership would be charged with violating basic human rights. Political interest alone cannot explain why those who misappropriated funds are imprisoned but those imprisoned dissidents are not. Political interest
alone cannot explain why junior electoral officials who falsified returns are convicted while senior police officers who squelched dissent are acquitted. The inability to account for the precise pattern of post-transitional justice is a major lacuna, both because the pattern represents an important aspect of modern German history and because the pattern has significant normative repercussions. In order to explain the precise pattern of punishment, which is imperative if one is to provide an adequate explanation of post-reunification justice as a whole, one must recognize the constraining force of jurisprudential ideas. Needless to say, however, such ideas, though semi-autonomous, do not exist in a vacuum. Once again, it is the interaction of politics and ideas—as well as, to a lesser degree, contingencies and institutions—that has produced post-reunification justice.

Aside from a few ex-dissidents, former East Germans generally oppose the trials. Despite overwhelming popular support in the East in 1990 for rapid absorption of the GDR by the FRG, Easterners have become bitter at many of the consequences of reunification. Unemployment has risen, property has been lost, and state employees have been subjected to political vetting. Much as the postwar opposition to the prosecution of so-called ‘war criminals’ was in part a reflection of popular anger at occupation and denazification, post-reunification opposition to the trials of communist malefactors is in part a reflection of broader resentment vis-à-vis the West and how it has treated the East. The trials of former communist officials are perceived by many Easterners as a form of victors’ justice, as yet another aspect of western ‘colonization’ of the East. This perception is of course fueled by the fact that virtually all of the prosecutors and judges involved in the trials are from the West. Even though the vast majority of Easterners are in no danger of being prosecuted, almost all Easterners feel, in their identity if not in their person, threatened by the trials. There was some support in the East for the trial of Erich Honecker, the longtime communist ruler. That support, however, was exceptional and rife

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208 For a sense of this, see: “Kultur der Verbitterung,” Der Spiegel (December 12, 1994): 18-22.  
209 East Germans, like their postwar counterparts, typically ignore the fact that they themselves are largely to blame for the circumstances in which they find themselves.  
210 Honecker was charged with five others in the deaths of would-be refugees at the Berlin Wall and the inner-German border. He, like two of his co-defendants, was ultimately deemed unfit for trial. Honecker went into Chilean exile where he subsequently died. Those who did stand trial were convicted. The
with denial. "It wasn't me," went the postwar refrain, "it was Adolf Hitler." The same refrain can now be heard *mutatis mutandis* among Easterners in reunified Germany. Needless to say, the notion that either Honecker individually or Honecker and a small cabal were alone responsible for decades of tyranny is patently untrue. Whether it was by waving a flag on May Day or by voting in fixed elections, virtually every East German collaborated to some degree or other in the pervasive mechanisms of political repression.\(^\text{211}\) Thus, the average Easterner, like the average postwar German, has the sense of being an unindicted co-conspirator. What little popular support there is among Easterners for the trials is generally reserved for those trials that focus on economic rather than political malefaction.\(^\text{212}\) There are two reasons for this. First, since the communist leadership had preached equality, its use of the system for personal enrichment is rightly seen as a particularly galling form of hypocrisy. Second, and more importantly, whatever the political compromises the average Easterner may have made, the average Easterner did not have access to economic privileges. Thus, trials that focus on economic—rather than political—malefaction do not implicitly implicate the average Easterner. By contrast, trials in which a defendant (such as a former judge) is accused of having persecuted an erstwhile dissident are especially problematic from the perspective of the average Easterner because such trials are a reminder that—contrary to the totalitarian myth—dissent was in fact possible. Since the administration of justice is a state affair under German federalism, Eastern voters have somewhat greater influence over the course of post-reunification prosecutions than they do over policies that are determined solely at the federal level. It is, therefore, given the attitude that Easterners have toward the trials, not surprising that the respective Eastern states have not put more resources into the prosecution of communist malefaction.\(^\text{213}\)

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\(^{212}\) This fact was noted by Franz Brüner, the deputy chief of the criminal division of the Saxon ministry of justice and before that one of the prosecutors responsible for bringing Honecker to trial (interview, January 27, 1994). For a similar observation, see: Odersky, *Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts*, p. 5.

\(^{213}\) See pages 125-6 above.
Notwithstanding the accusations of ‘victors’ justice’ that emanate from the East, most Westerners are not very keen on extensive prosecutions either. Though the federal government, under prodding from some of its Eastern constituents, did ultimately secure Honecker’s extradition from Moscow (where he had fled after a warrant for his arrest had been issued), the lethargy with which it pursued his apprehension strongly suggested that the Bonn government would have been quite happy had Honecker never returned. And, if their persistent failure to provide the promised number of prosecutors and criminal investigators to the Berlin authorities is any indication, the governments of the respective Western states are not terribly interested in the vigorous pursuit of communist malefactors either.\textsuperscript{214} The lack of Western support for the trials is also evidenced by the increasingly frequent calls from prominent Western quarters for the issuance of an amnesty for GDR perpetrators.\textsuperscript{215} Even the president of the Bundesgerichtshof has advocated a partial amnesty. It is, he said, desirable “that the number of trials not get out of hand.”\textsuperscript{216}

Despite the political pressures against the prosecution of GDR perpetrators, the trials continue. An immediate halt to the trials is neither politically feasible nor institutionally possible. Though a majority of Germans is either opposed to or uninterested in the punishment of communist malefactors, an important minority is very much in favor of such punishment. Supporters include both right-wing Westerners (such as Friedrich Karl Fromme, the chief FAZ editorialist) and former East German dissidents (such as Joachim Gauck, who currently administers the Stasi archives).\textsuperscript{217} The political influence and moral authority of such figures precludes the issuance of an outright amnesty. Absent such an amnesty, the trials will continue, both because

\textsuperscript{214} The inference is the author’s own. The fact that the Western states have failed to fulfill their promises to the Berlin authorities was reported to the author by: Christoph Schaefer, now head of Staatsanwaltschaft II and at the time head of the Arbeitsgruppe-Regierungskriminalität (interview, June 15, 1994); and, Manfred Kittlaus, director of the Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität beim Polizeipräsidium Berlin [= the detective bureau established by the Berlin state government to investigate state-sanctioned malefaction in the GDR] (interview, July 18, 1994).


there is a degree of institutional momentum within the criminal justice system and because the rule of mandatory prosecution requires prosecutors to bring charges whenever they have reason to believe that a crime has been committed. Thus, prosecutions continue even in those Eastern states (i.e. Brandenburg and Sachsen-Anhalt) in which the responsible ministers have spoken out in favor of an amnesty.\footnote{See: "Höppner für Amnestie-Initiative," \textit{Süddeutsche Zeitung} (January 30, 1995): 5; "Lieb wie Stolpe," \textit{Der Spiegel} (January 2, 1995): 28-30; and, "Die Täter schweigen," \textit{Der Spiegel} (April 17, 1995): 92-4.}

Needless to say, even though they are career jurists rather than political appointees, justices of the BGH do not live in hermetic isolation from their political surroundings. It is therefore not surprising that as members of the German political elite they would tend to pursue a course of action that is at least broadly consistent with that favored by other members of the political elite. But, as jurists, the justices are motivated by purely legal as well as overtly political considerations. The intermediate course charted by the BGH is more than a jurisprudential rationalization of the politically desired. The BGH’s post-reunification jurisprudence is also a reflection of the court’s pre-existing commitment to a specific interpretation of Art. 103 II GG.

The court’s post-reunification approach to communist malefaction in the GDR is simultaneously a policy decision and an affirmation of certain juridical values. There is no doubt that the BGH wanted to see GDR human rights abusers punished. Confirming the legal culpability of East German border guards was, says Justice Horstkotte, “an opportunity to underscore the significance of human rights.”\footnote{Interview, July 29, 1994.} That, however, was by no means the court’s only consideration in rejecting empirical legal positivism. The court was, Horstkotte reports, also driven by a strong desire for jurisprudential continuity:

We deemed the state-sanctioned acts of the Nazi period to be illegal. We cannot now suddenly apply the diametric method.... We cannot now declare actions to be justified simply because they were treated as legal in the actual praxis of the GDR. The court perceived the methodological necessity of a certain consistency in [the treatment of] the two systems.\footnote{Interview, July 29, 1994. This particular conception of jurisprudential continuity presupposes that it is the court’s Nazi-related decisions that provide the proper referent for post-reunification justice. An alternative base line could have been the predominantly extra-positivist decisions that the court had returned in cases relating to the GDR prior to reunification. That juridical corpus, however, was not only less developed than the more extensive Nazi-related case law, but was also perceived by the court to be out-of-date. The earlier decisions, Justice Horstkotte notes, were written “deep in the Cold War.” Now, Horstkotte says, “one sees things in a more differentiated manner.”}
The rejection of empirical legal positivism is, of course, only one facet of the jurisprudential continuity that the court strives to maintain. As it did throughout the postwar period, the BGH adheres to a conception of *nulla poena* according to which an act is punishable if, but only if, one can identify a formally valid statute under which the act was illegal at the time it was committed. Thus, at the same time that the court refuses to recognize the exculpatory force of empirical reality it also refuses to recognize the criminalizing force of natural law.

Making the existence of positive law a precondition for punishment sharply restricts the range of possible prosecutions. As the president of the BGH observes, “The terrible horror and the frightfulness of the totalitarian system are ... in large measure not subsumable under penal statutes.”

The constraining effects of the BGH’s jurisprudence are tangible. Prosecutors, well aware of the court’s general attitude even before the first post-reunification decisions were rendered, did not bother—for lack of a statutory basis—to file charges against many whom they considered to be serious human rights abusers. And, of course, even in instances in which indictments were brought, appellate acquittals have frequently followed, forcing prosecutors to shut entire lines of investigation. The effect of post-transitional positivism is often perverse, even when human rights abusers are punished. Erich Mielke, the former secret police chief, was punished for having committed two murders in the waning days of the Weimar Republic but not for having organized the decades-long repression of millions of East Germans.

Why? Because murder was a crime under Weimar law while running a repressive apparatus was not a crime under GDR law. Similarly, Harry Tisch, the former Politburo member, was jailed for misappropriating funds rather than for complicity in oppression because misappropriation of funds was a crime under GDR law while establishing a totalitarian trade union organization was

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221 Odersky, *Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts*, p. 28.
222 Asker whether there were categories of people he would like to indict but couldn’t, Jan van Rossun, the head of the special prosecutorial office in Brandenburg replied: “Yes, there are of course the leading officials of the Ministry for State Security, who for years in a despicable manner spied on people, probed into their professional and personal lives, assembled the findings in files, and then orchestrated surreptitious reprisals. I consider these people primary perpetrators. And the party and state leadership ... But we are for doctrinal reasons often prevented from prosecuting them. That is very disappointing.” [interview, June 14, 1994]
223 For example, Franz Trost, the head of the special prosecutorial office in Thüringen, reported that his office had prepared a massive indictment (charging the usurpation of official powers) against the Stasi officers responsible for wiretapping in Erfurt only to abandon it after the court handed down its decision in BGHSt 40, 8. He also reported having to close all investigations into judges accused of jailing would-be emigrants under § 213 StGB-DDR. [interview, July 12, 1994]
not. On several occasions the BGH expresses regret at the limits imposed by positivism. For example, the fact that high-ranking Stasi agents cannot be punished for years of pervasive domestic surveillance is, says the court, "clearly contrary to the sense of justice." Similarly, the court bemoans the fact that in most instances former judges cannot be held accountable for having persecuted East German citizens. These results, says the court, are an "unsatisfactory" but necessary consequence of *nulla poena.*

\(^{224}\) BGHSt 40, 8 (11).

\(^{225}\) BGH 5 Str 713/94, p. 36.
Chapter 5: Ahistoric Legal Positivism: The Worst of Both Worlds

Overview

The West German criminal justice system has twice faced the dilemma of what to do with the former officials of a deposed dictatorial regime. At the very beginning of the postwar period, overt and affirmatively conceived natural law played a prominent role in post-transitional justice. Within a few years, however, reinterpretable legal positivism became the dominant jurisprudential mode. Natural law never disappeared entirely, but the extra-positivism that persisted assumed a highly circumscribed and ultimately redundant form. By the time of reunification, a distinctive two-track jurisprudence had been firmly established: the reinterpretation of formally valid statute was occasionally augmented by the nullification of an extraordinary legal justification. According to the Bundesgerichtshof, this dualist approach constitutes the application of positive law “properly understood”.

The BGH’s stance, which rests upon an ahistoric conception of positive law, is highly problematic but born of necessity. Article 103 II of the Grundgesetz stipulates that an act is punishable only if it was punishable under positive law at the time it was committed. Since human rights abuses were as a matter of state policy rewarded rather than punished in both the Third Reich and the GDR, Art. 103 II GG would apparently preclude the prosecution of Nazi and communist perpetrators. Constitutional integrity would seem to require that the Federal Republic either forego prosecution or amend the Grundgesetz. But neither of these things has happened. Political circumstances have demanded that at least some perpetrators be prosecuted, yet Article 103 remains unaltered. The burden of reconciling the irreconcilable has fallen to the Bundesgerichtshof.

The BGH’s ahistoric conception of positive law allows the prosecution of (some) state-sponsored malefaction, but only at a considerable price. The BGH’s jurisprudence is rife with contradiction. Moreover, it insidiously falsifies the nature of the deposed regimes. Above all, however, the BGH’s approach to post-transitional justice is bad policy. Put succinctly, the court’s jurisprudence provides the worst of both worlds: it neither affirms the existence of inalienable
human rights nor provides a meaningful guarantee of legal certainty. The court’s jurisprudence is excessively positivist. According to the BGH, human rights abuse is punishable only if the act in question was criminal at the time it was committed under procedurally valid municipal law. As a result, only a small fraction of the heinous acts perpetrated at the behest of the deposed regimes have been brought to trial. By extending *nulla poena* protection to tyrannical state officials, the BGH undermines individual liberty and thus jeopardizes the very value which *nulla poena* is intended to promote. Paradoxically, among those (distressingly few) cases which have gone to trial, the court’s jurisprudence is—despite the positivist foundation upon which it rests—effectively extra-positivist. Whenever the BGH reinterprets a statute or invalidates an extraordinary illegal justification, the court is blatantly disregarding municipal law as it had been defined by the deposed regime. As a result, in those instances in which they are actually punished, former officials are subjected to criminal liability that they did not face at the time of their act. But, because the Bundesgerichtshof is loathe to admit any conflict with Art. 103 II GG, the retroactivity is disingenuously denied.

Since the attempt to finesse the choice means incurring the costs of each and the benefits of neither, it would be better if the BGH had chosen one or the other of the two coherent post-transitional alternatives available—that is to say, had chosen either empirical legal positivism coupled with *nulla poena* or an avowedly retroactive, affirmatively conceived natural law. Of these two alternatives, natural law would have been the ethically preferable route.

*Post-Transitional Justice in the Postwar Period*

The early postwar period was characterized by a strong natural law renaissance. At the heart of the renaissance lay two legal instruments: Kontrollratgesetz Nr. 10 and the Radbruch formula.\(^1\) Enacted by the Allies and virtually identical to the London Charter of the International Military Tribunal at Nuremberg, KRG 10 was a concretization of affirmatively conceived natural law. KRG 10 was unabashedly retroactive. Vaguely defined “crimes against humanity” were punishable under KRG 10 “whether or not in violation of the domestic laws of the country where

\(^1\) See: Chapter 2, pp. 42-55.
perpetrated."^2 Used extensively in the British and French occupations zones, KRG 10 was the basis for many prosecutions between 1945 and 1951. In the American occupation zone, where German prosecutors lacked permission to use KRG 10, and throughout the Federal Republic after 1951, when the British and French authorities effectively rescinded KRG 10, it was the Radbruch formula that played the leading role in the natural law renaissance. According to the Radbruch formula, duly enacted positive law is invalid whenever "the contradiction between positive law and justice reaches an intolerable proportion."^3 In the eyes of many judges, including on occasion the justices of the BGH, some Nazi law was indeed invalid on this criterion. Unlike KRG 10, however, the Radbruch formula did not itself criminalize behavior. The Radbruch formula was simply a device for nullifying extraordinary legal justifications; the immediate basis for punishment was always the Strafgesetzbuch. Nonetheless, the fact remains that extra-positive norms—both affirmatively and negatively conceived—were frequently invoked during the first decade following the collapse of the Third Reich.

Even in the immediate postwar period, at the height of the natural law renaissance, extra-positivism did not go unchallenged. From the very beginning, reinterpretable legal positivism had its ardent champions.^4 They argued that the use of natural law, however conceived, was a profoundly misguided and ultimately unnecessary violation of nulla poena. According to the reinterpretableists, the bulk of Nazi maleficence could be prosecuted under the Strafgesetzbuch without having to invalidate positive law. Depending on the malefactio in question, one had only to deny the legal validity of Hitler’s secret orders, insist upon fastidious attention to the nominal limits of Nazi legislation, or interpret abstract statutory terms as if the Third Reich had been a liberal democracy. By the mid-1950s, the application of natural law had ebbed and reinterpretivism had come to dominate post-transitional jurisprudence.^5 Reinterpretivism has

^2Art. II 1(c) Control Council Law No. 10, Official Gazette of the Control Council for Germany, No. 3 (January 31, 1946): 51.
^4See: Chapter 2, pp. 55-67.
retained its hegemonic position to the present day, governing the current treatment of former communist officials as it had once governed the treatment of former Nazi officials.

Though unquestionably eclipsed by reinterpretable legal positivism, natural law did not vanish altogether. During the second wave of Nazi trials, which focused primarily on the genocide in eastern Europe, extra-positivistic norms were often cited by courts when asserting the criminal liability of Nazi perpetrators. Similarly, notions of natural law have regularly appeared in post-reunification border decisions. Nonetheless, the extra-positivism that survives is of a very limited sort, far narrower in scope than that which had flourished in the earliest postwar period. In the years immediately following the collapse of the Nazi regime, natural law as embodied by KRG 10 was used in a wide range of cases, some of which involved comparatively minor malefactions such as the denunciation of an individual by a Gestapo informant. Since the mid-1950s, by contrast, the use of natural law has been confined to only the most extreme forms of totalitarian maleficence (such as the killing of unarmed refugees at the Berlin Wall). Moreover, like the Radbruch formula but unlike KRG 10, the natural law that it is still invoked is conceived of in exclusively negative terms. That is to say, it nullifies certain statutes but does not itself establish criminal liability. Thus, though extraordinary legal justifications may be deemed invalid on extra-positive grounds, punishment always rests on some provision of the Strafgesetzbuch. The clearest indication of reinterpretable positivism's ascendancy and extra-positivism's corresponding decline is the fact that as of the mid-1950s natural law argumentation ceased to stand alone. Theretofore, postwar courts were often content to base their decisions entirely on natural law reasoning; since then, extra-positivistic claims have almost always been accompanied by an independent line of reinterpretable positivist logic. Given that the reinterpretable argumentation is, in the courts' view, by itself sufficient grounds for conviction, the vestigial extra-positivism is ultimately superfluous, amounting to little more than a rhetorical embellishment.

The Bundesgerichtshof claims that the jurisprudential tack taken since the mid-1950s is fully compatible with Art. 103 II GG. The court maintains that nulla poena precludes neither the

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6 See: Chapter 3, pp. 103-4.
7 See: Chapter 4, pp. 151-4.
reinterpretation of statute nor the invalidation of extraordinary legal justifications. According to the BGH, interpreting statute as if it were the product of a liberal democracy and ignoring invalid extraordinary legal justifications is nothing other than the application of positive law "properly understood". The BGH's conception of 'positive' law is utterly ahistoric: it assumes that positive law enjoys an autonomous existence that is independent of the regime in power. An ahistoric conception of 'positive' law is, however, a contradiction in terms. 'Positive' law divorced from empirical reality is no longer positive law. It is this underlying contradiction that gives rise to much of what is wrong with the Bundesgerichtshof's post-transitional jurisprudence.

The Incoherence of Postwar Jurisprudence

The Bundesgerichtshof's post-transitional jurisprudence is profoundly incoherent. For example, although the BGH categorically rejects empirical legal positivism when judging the criminality of an act, the court does consider the mere will of the deposed regime to have constituted law when it is the statute of limitations that is at issue. Other discrepancies, though perhaps less stark, are no less fundamental. The BGH makes incompatible pronouncements as to what is required by *nulla poena*, sometimes asserting that one must respect written law as interpreted by the former regime, sometimes asserting that one may ignore the previously authoritative interpretation, and at yet other times insisting that one may disregard certain formally valid enactments altogether. Such contradictions are not an artifact created by juxtaposing different decisions from different periods; they can often be found within a single decision. The inconsistencies are the inevitable result of the Bundesgerichtshof's failure to adopt a principled jurisprudential stance. As Dencker remarks, "Internally contradictory legal constructs allow one to do a lot, just not apply law in a consistent manner."9

Extra-constitutional norms are, according to the BGH, simultaneously law and not law. This contradiction emerges when the court concludes that the statute of limitations had been in abeyance (insofar as state-sponsored malefaction was concerned) throughout the existence of

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8 The fullest articulation of this view is found in: BGHSt 39, 1; and, BGHSt 41, 101.
both the Third Reich and the GDR. The conclusion is a necessary precondition for the
punishment of most acts that were committed in all but the final years of either regime. Given the
longevity of each regime, had the statute of limitations not been suspended, it would in many
instances have already expired before the fall of the regime in question. Under German law, for
the statute of limitations to have been in abeyance, there must have been a legal (as opposed
to practical) impediment to prosecution.\textsuperscript{10} Hence, for the BGH to conclude that the statute of
limitations had in fact been suspended, the court has to assume that the barriers to prosecution
that existed in the Third Reich and the GDR were of a legal nature. The BGH makes the
necessary assumption in each case "There is no doubt," the court states, that during the Third
Reich the prosecution of those who killed Jews had been thwarted by Hitler's will and that his will
had been "regarded as law."\textsuperscript{11} Similarly, the court declares that the GDR's failure to prosecute border guards was attributable "to the will of the state and party leadership" and that this will
"had the effect of a statutory obstacle to prosecution."\textsuperscript{12} This rare recognition of empirical reality
has allowed the prosecution of perpetrators whose misdeeds lie in the comparatively distant
past to occur despite the statute of limitations. But, the very assumption which establishes the
procedural precondition for the prosecution of such perpetrators eliminates the substantive
precondition that must be met if they—and, for that matter, all other perpetrators—are to be
prosecuted within the bounds of \textit{nulla poena}. That is to say, the grounds for concluding that the statute of limitations had been in abeyance are simultaneously grounds for concluding that the acts

\textsuperscript{10}Prior to 1975, the statute of limitations was governed by § 69 StGB; since then, it has been governed by § 78 StGB.
\textsuperscript{11}Bundesgerichtshof, 1 StR 299/62, \textit{Neue Juristische Wochenschrift} (1962): 2309. Also see: BGHSt 18, 367 (368-9); and, BGHSt 23, 137 (141).
\textsuperscript{12}BGHSt 40, 113 (115-6). Also see: BGHSt 40, 48. The court reaches an identical conclusion regarding the perversion of justice and the maltreatment of prisoners. See: Bundesgerichtshof, 5 StR 747/94, p. 9; and, Bundesgerichtshof, 3 StR 93/95, \textit{Neue Juristische Wochenschrift} (1995): 2861-2. In 1993, in response to several contrary lower court decisions (which were issued prior to the BGH's subsequent authoritative ruling), the Bundestag passed a law stipulating that the statute of limitations had been in abeyance until the day of reunification for all 'crimes' committed in the GDR that were for political reasons not prosecuted by East Germany's communist regime. [Gesetz über das Ruhen der Verjährung bei SED-Unrechtsaten, Bundesgesetzblatt I (1993): 392.] Had the BGH relied on the 1993 law rather than the provisions of § 78 StGB, it could have avoided the contradiction being criticized here. But, the BGH proceeds under § 78 StGB, characterizing the 1993 law as a purely "declaratory" pronouncement which "simply confirmed the pre-existing legal situation" [BGHSt 40, 113 (115)].
in question were not illegal at the time they were committed.\textsuperscript{13} If the procedurally deficient but systematically enforced and routinely obeyed will of a state's political leadership constitutes positive law (as the BGH in the statute of limitations context correctly assumes), then anyone who acted pursuant to that will acted lawfully and cannot be prosecuted so long as \textit{nulla poena} remains in effect. It is inconsistent for the BGH to claim that the statute of limitations had been suspended yet not accept the exculpatory force of extra-constitutional norms. Hitler's will (and that of the East German communist party) either was or was not legally valid. The BGH cannot have it both ways.

The incoherence of the BGH's post-transitional jurisprudence is not confined to cases in which the statute of limitations is at issue. Across decisions and even within decisions the BGH makes contradictory assertions as to the requirements of Art. 103 II GG. The contradictions are clearly visible in the court's recent jurisprudence. When considering East German judicial malefaction, the BGH court vacillates between 'received' reinterpretivism and 'restrictive' reinterpretivism. According to the BGH, Art. 103 II GG requires that in all but the most extreme cases one must, when evaluating alleged instances of \textit{Rechtsbeugung}, accept GDR interpretive praxis as the standard by which to judge whether a judicial official perverted GDR law.\textsuperscript{14} In extreme cases, says the court, one may ignore GDR interpretive praxis without violating Art. 103 II GG. When considering the East German border regime, the BGH vacillates between 'restrictive' reinterpretivism and a negatively conceived natural law. On the one hand, the court


\textsuperscript{14}See: Chapter 4, pp. 164-7.
states that Art. 103 II GG demands consideration of the relevant statutory text; on the other hand, the court states that the statutory text can be ignored if it does not allow a 'human rights friendly' interpretation.\textsuperscript{15} What is the underlying principle? Punishing the former officials of a deposed regime either is or is not a violation of \textit{nulla poena}. There is no severity test for retroactivity. Art. 103 II GG does not contain an 'except-in-extreme-cases' clause. As the court itself recognizes, the Federal Republic explicitly rejected such a qualification of \textit{nulla poena} when it signed the European Human Rights Convention.\textsuperscript{16} If an act, no matter how minor, was illegal at the time it was committed, then \textit{nulla poena} does not preclude its prosecution now.\textsuperscript{17} Conversely, if an act was not illegal at the time, then, no matter how odious, it cannot be prosecuted now without violating \textit{nulla poena}. If the BGH chooses to punish an act because it constituted a particularly grave violation of basic human rights, then the court should forthrightly acknowledge that the punishment contravenes \textit{nulla poena}. As it is, the court evades the ban on retroactive legislation but without admitting to it.

Bounded by empirical legal positivism on the one side and natural law on the other, reinterpreting legal positivism, the dominant form of post-transitional justice in the Federal Republic, is an unprincipled and therefore analytically unstable middle.\textsuperscript{18} The very argument advanced by its proponents to counter critics of one extreme is precisely the argument with which it is attacked by critics of the other extreme. And vice versa.\textsuperscript{19} The reinterpreting argument against natural law rests on the importance of legal certainty as guaranteed by \textit{nulla poena}. In defending itself against empirical legal positivism, however, reinterpretingism must abandon any sort of robust \textit{nulla poena} position. The logical difficulties reflect a fundamental contradiction that

\textsuperscript{15}See: Chapter 4, pp. 148-58.
\textsuperscript{17}The theft of 50 DM is no less illegal than the theft of 500 DM. For a similar criticism, see: Günter Spedel, "Der Bundesgerichtshof zur Rechtsbeugung unter dem SED-Regime. Zum Urteil des BGH v. 13.12.1993—5 StR 76/93," Juristische Rundschau (1994): 223.
\textsuperscript{18}For similar criticism that is directed specifically at the BGH's treatment of Nazi judges, see: Friedrich Dencker, "Die strafrechtliche Beurteilung von NS-Rechtsprechungsakten," in Peter Salje, ed., \textit{Recht und Unrecht im Nationalsozialismus} (Münster: Wissenschaftliche Verlagsgesellschaft Regensberg & Biermann, 1985): 299-304.
\textsuperscript{19}This forensic dilemma is recognized by Lüerssen, a leading proponent of 'restrictive' reinterpretingism who acknowledges that reinterpretingism "cannot be defended with ultimate clarity." See: Klaus Lüerssen, \textit{Der Staat geht unter—das Unrecht bleibt? Regierungskriminalität in der ehemaligen DDR} (Frankfurt/M: Suhrkamp Verlag, 1992): 52, 69-70, and 142.
lurks deep within reinterpretivism. As a species of legal positivism, reinterpretivism must by definition deny the existence of legally binding extra-positive norms. But, in order to avoid the consequences of empirical legal positivism, reinterpretivism is forced to presuppose the existence of one particular extra-positive norm that no state may violate. Specifically, reinterpretivism must insist that the nominal laws of a state also be the real laws of that state. That is to say, reinterpretivism imposes upon each regime the meta-constitutional requirement that the laws on the books actually be the laws that structure public life. The imposition of this (singular) extra-positivist requirement is problematic from both the positivist and natural law perspectives. From a positivist perspective, of course, the imposition of any a priori validity condition is highly suspect. Although congruence between nominal laws and real laws is—for reasons of public scrutiny and popular control—generally desirable, assuming that the nominal laws of a state are ipso facto the real laws of that state betrays positivism’s historic project of defining law as that which is rather than as that which one wishes it to be. From a natural law perspective, making the congruence between nominal laws and real laws the sole extra-positive norm within one’s theory of law is grossly inadequate for it implies that a state may permit or require anything so long as it does so in writing.\(^{20}\) Reinterpretivism founders on an inescapable dilemma: If one has already abandoned a pure positivist position by postulating the existence of one extra-positive norm, why not assume the existence of other such norms? Why not assume that there are various things which no state may lawfully do?

Postwar Jurisprudence Affirms neither Human Rights nor Legal Certainty

The Bundesgerichtshof has based its post-transitional jurisprudence on an ahistoric conception of positive law. This oxymoronic premise underlies both reinterpretivism, which has dominated postwar jurisprudence, and the negatively conceived natural law that sometimes supplements reinterpretivism. To the limited extent that it has occurred, the punishment of Nazi and communist perpetrators has rested on positive statute, be it reinterpreted statute or statute

that remains after an extraordinary legal justification has been invalidated. In taking this tack, which the court describes as the application of positive law “properly understood”, the Bundesgerichtshof has accomplished a dubious feat: on the one hand, the court has in general granted undue *nulla poena* protection to totalitarian malefactors; on the other hand, the court has—in those exceptional instances in which malefactors are punished—surreptitiously violated the *nulla poena* principle. As a result, the court’s jurisprudence affirms neither human rights nor legal certainty.

Extra-positivist though its effect may at times be, the BGH’s ahistoric legal positivism is indeed a form of legal positivism. As such, it shares an undesirable feature common to all forms of legal positivism: it subverts *nulla poena’s* purpose by extending *nulla poena* protection to state-sponsored human rights abusers. One must remember that *nulla poena* is an instrument rather than an absolute good in and of itself. There are two distinct yet compatible intermediate justifications of *nulla poena*. *Nulla poena* can be justified as a mechanism that reinforces the separation of powers and it can be justified as a guarantor of legal certainty. But regardless of which defense one offers, the underlying teleological rationale is the same, namely the protection of individual liberty against a tyrannical state. Thus, insofar as it extends *nulla poena* protection to state-sponsored human rights abusers, the EGH undermines the ultimate purpose of *nulla poena*.

Consider first *nulla poena* as an instrument that maintains the separation of governmental powers. Since Montesquieu, the concentration of powers has been widely understood to be a threat to individual liberty. On this view, a strict delineation between the powers of the legislature and the powers of the judiciary diminishes the threat of tyranny. By making the existence of statutory law a condition for criminal punishment, *nulla poena* helps define the boundary between judicial and legislative powers and thus promotes liberty by inhibiting judicial usurpation of legislative prerogative. Though compelling on its own terms, the separation of powers rationale for *nulla poena* does not hold in the case at hand. Retroactive punishment of East German human rights abusers by the German judiciary neither usurps the power of the
current Bundestag nor increases the danger of tyranny in the former GDR.\textsuperscript{21} Retroactive punishment of East German perpetrators does not usurp the Bundestag's powers. The Bundestag could have issued either an amnesty or a retroactive statute. And, indeed, it would have been better if it had acted one way or the other. An explicit enactment would have been more transparent than arcane judicial argumentation, and the legislature is, \textit{ceteris paribus}, a more democratic policy making forum than the judiciary. But, the fact is, the Bundestag chose to remain silent.\textsuperscript{22} That silence was a tacit referral of the policy issue to the judiciary. Thus, in making whatever decision it does, the judiciary is—far from usurping legislative powers—acting at the implicit behest of the legislature. If retroactive punishment of East German perpetrators constitutes an usurpation of any legislative powers, then it is an usurpation of the powers of the former GDR Volkskammer. After all, the acts now being judged are acts that were committed in the GDR, and establishing legal norms of behavior in the GDR was, at least nominally, the prerogative of the Volkskammer. But even if one concedes that retroactive punishment of East German perpetrators constitutes an usurpation of the Volkskammer's legislative powers, the separation of powers argument still fails to hold. The rationale behind the separation of powers is the prevention of tyranny. The Volkskammer, however, was hardly a bastion of democracy: its elections were rigged and its legislative enactments were little more than a rubber stamp of decisions made by the SED Central Committee. Since tyranny had (with the connivance of the Volkskammer) already been realized in the GDR, barring retroactive usurpation of the Volkskammer's powers cannot possibly prevent tyranny and therefore cannot fulfill the separation of powers purpose behind \textit{nulla poena}. If anything, judicial usurpation of legislative powers is in this case a blow for liberty and against tyranny.

The other intermediate justification for \textit{nulla poena}, that in which \textit{nulla poena} is championed as the guarantor of legal certainty, is similarly unable to defeat retroactive punishment of East German human rights abusers once individual liberty—the goal behind legal certainty—rather than legal certainty itself is made paramount. Legal certainty is the ability to

\textsuperscript{21}The same can be said \textit{mutatis mutandis} for the retroactive punishment of Nazi malefactors.

\textsuperscript{22}See: Chapter 4, pp. 121-2.
know what the law is. Legal certainty fosters individual liberty by enabling rational action. An individual who knows the consequences of each potential action can select the one that he or she deems most preferable. In the absence of legal certainty, by contrast, an individual cannot know what penalty is attached to a given action and therefore cannot calculate which action is subjectively best. Nevertheless, despite the fact that it is generally conducive to individual liberty, legal certainty provides no assurance that individual liberty will actually exist. The possibility of rational calculation can exist under conditions of tyranny. If a totalitarian regime consistently enforces clearly defined and previously promulgated draconian law, calculation is possible but liberty is absent. Predictable brutality may be preferable to random brutality, but the true value of legal certainty as a precondition for rational calculation surely lies in its promotion of individual autonomy, not fearful obedience. If legal certainty is meant to promote meaningful individual autonomy rather than mere predictability, then it cannot be the grounds for extending *nulla poena* protection to tyrannical state servants. Extending *nulla poena* protection to tyrannical state servants makes political repression costless from the perspective of those state officials. Secure in the knowledge that they can never be held accountable for their actions, they are more likely to perpetrate human rights abuses. Granting *nulla poena* protection to members of a dictatorial regime therefore undermines rather than enhances individual liberty and thereby subverts precisely that goal which it ultimately seeks to ensure.

The foregoing criticism of granting *nulla poena* protection to dictators and their henchmen applies to all versions of legal positivism. But, even if one rejects the (admittedly controversial) contention that granting *nulla poena* protection to tyrannical officials is wrong, one should at least accept the proposition that tying *nulla poena* to an ahistoric conception of positive law is particularly problematic in that it vitiates legal certainty without affirming the inviolability of human rights.²³

Reinterpretivism, which is by far the most common manifestation of ahistorically conceived ‘positive’ law, can make post-transitional justice look vindictive. Under reinterpretivism’s tenets,
members of the former regime, no matter how despicable their misdeeds, can be prosecuted only if it can be shown that—on some interpretation—they violated some criminal statute. Under this constraint, the grounds for post-transitional punishment are often either trivial (when, for example, a politburo member is sentenced for having misappropriated a few thousand marks) or tangential (when, for example, the head of the secret police is jailed for an act committed nearly two decades prior to the establishment of the dictatorship in question). Since everyone rightly suspects that there is an ulterior motive at work and no one thinks that the stated grounds for punishment are the true grounds for punishment, prosecuting ex-officials for trivial or tangential acts casts the legal system in an unnecessarily vengeful light.

Punishing former high-ranking officials for petty infractions not only calls the successor regime’s motives into question, it also trivializes the former regime’s misdeeds. Was having his private dascha furnished at public expense really the worst thing that Harry Tisch did? Punishment of high officials for trifling offenses is just half of reinterpretivism’s trivializing tendency. At least as important is the fact that reinterpretivism is blind to the many reprehensible practices of the former regime that were not illegal under statutory law. Thus, at the same time Tisch is punished for financial impropriety, Stasi agents who smothered political opposition—and in the process destroyed the lives of numerous dissidents—emerge unscathed by post-transitional justice. Put simply, the charges brought under reinterpretivism do not reflect the true nature of the deposed regime.

Reinterpretivism carries with it the perverse implication that there is, at least legally speaking, nothing to rebuke so long as Nazi and communist officials applied the odious law of their respective regimes ‘correctly’. This insidious suggestion is, for example, manifest in the reinterpretivist response to the deportation of Jews during the Third Reich.

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24 The allusions are to Harry Tisch and Erich Mielke respectively. See: Chapter 4, pp. 118-20.
25 Resort to petty or tenuously related charges might be justified when trying to stop an otherwise elusive and dangerous quarry. For example, prosecuting Al Capone for tax evasion was a useful maneuver when it proved impossible to lay any other crime directly at his feet. But, Tisch, Mielke and their ilk have already been stopped.
27 See: Chapter 2, pp. 65-7.
reinterpretivism, a Gestapo officer was criminally liable for having sent a Jew to an extermination camp only if the deportation violated the 'Nazis' own regulations. The mass deportations, which affected all but a tiny minority of 'privileged' Jews, were unambiguously permissible under Nazi regulations and therefore not subject to reinterpretivist prosecution. The deportation of a 'privileged' Jew was also allowed—and therefore similarly immune from prosecution—if he or she had broken any of the myriad laws designed to stigmatize and isolate Jews. Thus, the only deportations punishable under reinterpretivism were those of 'privileged' Jews who were deported despite having scrupulously obeyed the various discriminatory laws that had been imposed by the Nazis. The perversity of the reinterpretivist approach can be seen in the 1950 trial of Georg Albert Dengler, a Gestapo officer charged in the deportation of twelve 'privileged' Jews. Though convicted on seven counts, Dengler was acquitted in each of the five cases in which his victim had arguably violated one or another of the Nazis' anti-Semitic laws. In other words, on the reinterpretivist view, sending Jews to their deaths was acceptable so long as regulatory niceties were strictly observed. Reinterpretivism's pernicious implication is also evident in the recent treatment of East German judges. According to the Bundesgerichtshof, former East German judges are criminally liable if but only if they misapplied GDR law.²⁸ That is to say, according to the court, the improper application of repressive law is punishable while the proper application of repressive law is not. Given the fact that law in the GDR was by design an instrument of communist domination, it is at the very least debatable whether the so-called 'misapplication' of law to the detriment of regime opponents was in fact any such thing. Yet even if one agrees with the BGH that it was, punishing only those judges who misapplied the GDR's repressive laws undermines the sanctity of human rights.²⁹ It suggests that all would have been

²⁸See: Chapter 4, pp. 162-8.
²⁹Moreover, if one punishes judges who misapplied GDR law precisely because they misapplied GDR law, there is no logical basis for exempting from punishment those judges who misapplied GDR law to the benefit of defendants. Imagine, for example, a judge who, despite compelling evidence to the contrary, acquitted a dissident accused of "interference in state activity" (§ 214 StGB-DDR). Under both § 244 StGB-DDR and § 336 StGB, any intentional misapplication of the law—whether to the advantage or disadvantage of an involved party—constitutes Rechtszuschlagung. Thus, the only grounds for distinguishing between misapplication to the benefit and misapplication to the detriment of a defendant are substantive. That is to say, any distinction between misapplication to the benefit and misapplication to the detriment of a defendant necessarily rests on a moral judgement concerning the
well had judges simply applied GDR law properly. Of course, to the extent that judges applied repressive statute more broadly than was warranted by the statutory text, their failure to apply such statute 'properly' made matters worse. But, the fundamental problem was not that East German judges on occasion 'misapplied' GDR law. The real problem was that East German judges routinely applied GDR law correctly. If human rights are to be legally protected, state officials must be criminally liable for the (correct) application of inherently repressive law. They should not be liable because they applied a repressive law improperly, but because they applied one at all.

Since reinterpretivism rests on a positivist premise, it is utterly powerless in the face of an overtly and unabashedly inhumane regime. Had the Third Reich or the GDR explicitly and unambiguously permitted certain forms of homicide, there is nothing in the reinterpretivist logic which would allow the prosecution of such homicides now. Brought to a point, reinterpretivism maintains that each state may permit rape, torture and genocide so long as it does so in writing.

Paradoxically, despite the excessive nulla poena protection that reinterpretivism extends to state-sponsored human rights abusers, reinterpretivism fails to insure true legal certainty. Based as it is on an ahistoric conception of positive law, reinterpretivism effectively deprives (certain) perpetrators of nulla poena protection. The ex post facto denial of legal validity to exculpatory directives that were generally considered law despite their procedural deficiency under the former regime's nominal constitution eviscerates the notion of legal certainty. What is left of the Nazi legal system if Hitler's secret orders lack legal force? What is left of the GDR legal system if its laws are no longer applied according to the principles of "socialist partisanship"? The reinterpretivist conception of positive law willfully disregards the contextual dependence of statutory meaning. 'Public order' in the Third Reich was not the same thing as 'public order' in the Federal Republic and an 'election' in the GDR was not the same thing as an 'election' in the FRG. Political context is all important. As Carl Schmitt noted in 1934, a revolution
“transforms the entire law without a single ‘positive’ statute having to be changed.”

Interpreting the law of a totalitarian regime as if it were the law of a liberal democracy constitutes jurisprudential subterfuge. As Pawlik remarks:

A democratic theory of law is one possibility but by no means the only possibility. Which theory of law actually governs a society is determined by the political system. Whoever ignores this fact does not identify the positive law of a real society but instead constructs the fictional law of a fictional society.

Positive law reinterpreted is no longer positive law, and any assertion of nulla poena protection based upon it is hollow. Individuals prosecuted under positive law reinterpreted are retroactively subjected to penal norms that were not in force at the time they acted.

Reinterpretivism perpetrates historiographic fraud by sanitizing the former regime’s legal history. Contrary to the reinterpretivist depiction (which is forced upon its practitioners by their commitment to nulla poena), human rights abuses were in fact legal under Nazi and GDR law. Killing Jews and would-be refugees wasn’t merely tolerated, it was officially sanctioned. That is the ugly fact which epitomizes the essence of each regime. A chilling verdict from 1943 illustrates the state of positive law under the Nazis. The case involved an SS officer who had killed hundreds of Jews on his own initiative in a particularly bestial fashion. In its verdict, the court states:

The defendant is not to be punished for his actions against the Jews as such. The Jews must be annihilated and no tears need be shed over any of the Jews whom the defendant has killed.

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The officer was charged with and found guilty not of murder but of the dereliction of duty for having undermined discipline among his subordinates. The implication is clear: killing Jews did not constitute murder in the Third Reich.\textsuperscript{34} The same is true mutatis mutandis of killing refugees in the GDR. A border guard who shot a would-be refugee was rewarded by the state for having done so, and any criminal investigation that ensued was not into the shooting per se but into the would-be refugee’s attempt at an unauthorized and therefore illicit border crossing.\textsuperscript{35} Assuming that state-sponsored human rights abuses were in fact punishable under positive law in the Third Reich and the GDR obscures the depravity of each regime.\textsuperscript{36}

Contrary to the reinterpretivist view, there was no “true law” that somehow survived the Nazi revolution or communist domination. Under both the Nazis and the communists, law was a means of achieving substantive, ideological goals.\textsuperscript{37} Every law, Carl Schmitt emphasized in 1934, “must be applied in the spirit of National Socialism.”\textsuperscript{38} Just what that meant was made clear by Joseph Goebbels, the Nazi propaganda minister, when he addressed the members of the Volksgerichtshof. According to the notes of someone present, Goebbels told the assembled justices:

\textsuperscript{34} Of course, it was not only Jews who could be lawfully killed during the Third Reich. When informed of Hitler’s secret ‘euthanasia’ decree in 1941, regional court officials immediately and without protest closed all prosecutorial investigations into the sanatorium homicides. This is a clear indication that during the Third Reich Hitler’s unpublished will was an accepted source of law and that it was within his recognized powers to mandate homicide. [See: Chapter 3, pp. 104-7.] The case of Maximilian Grabner, the first head of the political unit at the Auschwitz concentration camp, is also instructive. Grabner was indicted in 1944 on 2,000 counts of murder. Several points are worth noting: Grabner was never convicted; his trial was halted on orders from Berlin. That Grabner was charged at all was a consequence of his participation in corruption (namely the theft of gold which had been removed from the mouths of murdered prisoners). Most significantly, the homicides for which he was indicted were all unauthorized killings. According to one of those who prepared the case against Grabner, the officially sanctioned gassing of concentration camp inmates “did not interest us.” The Grabner case is further evidence that, at least with proper authorization, the killing of those deemed undesirable by the Nazi leadership did not constitute murder in the Third Reich. [See: Herrmann Langbein, Der Auschwitz-Prozeß. Eine Dokumentation, Vol. 1 (Vienna: Europa Verlag, 1965): 336-41.] Others have argued that the secrecy surrounding the Nazi genocide is \textit{prima facie} evidence that state-sponsored homicide remained illegal during the Third Reich. [See, for example: Adolf Arndt, “Das Verbrechen der Euthanasie (Probleme der Frankfurter Euthanasie-Prozesse),” in E.-W. Böckenförde and Walter Lewald, eds., Gesammelte Juristische Schriften. Ausgewählte Aufsätze und Vorträge 1946-1972 von Adolf Arndt. (Munich: C. H. Beck’sche Verlagshandlung, 1976): 276.] Secrecy, however, does not constitute an admission of illegality. The maintenance of secrecy may be nothing more than a tactical choice motivated by political expediency.

\textsuperscript{35} See: Chapter 4, pp. 149-50.

\textsuperscript{36} Identical criticism can be found in: Dencker, “Vergangenheitsbewältigung durch Strafrecht?,” p. 305; and, Jakobs, “Vergangenheitsbewältigung durch Strafrecht?,” pp. 46-53.

\textsuperscript{37} See: Chapter 3, pp. 82-3; and, Chapter 4, p. 138, footnote 69 and pages 157-8.

\textsuperscript{38} Carl Schmitt, “Nationalsozialismus und Rechtsstaat,” Juristische Wochenricht (1934): 717. Schmitt was a leading Nazi constitutional theorist in the early years of the Third Reich. He was given a chair at the Berlin university, appointed head of the academic section of the Nazi legal association and made a Prussian privy councillor by Göring. For a brief biographical sketch of Schmitt, see: Ingo Müller, Hitler’s Justice: The Courts of the Third Reich (Cambridge: Harvard University Press, 1991): 41-5.
It is not so much a question of whether a verdict is just or unjust; instead, it is only a question of whether the decision is expedient... The primary purpose of the justice system is not retribution and certainly not rehabilitation; rather, it is the maintenance of the state. One is to act not on the basis of statute but with the resolve that the offender must be eliminated.\textsuperscript{39}

An equally instrumental if somewhat less brutal conception of law underlay the legal system of the GDR. In the representative words of one quasi-official publication, “Socialist law is a tool for realizing the policies of the Marxist-Leninist party that is not distinct from, let alone superior to those policies.”\textsuperscript{40} Thus, in neither the Third Reich nor the GDR was law a neutral system of formal rules meant to be applied equally. Those deemed politically undesirable were utterly without legal protection under the respective regimes. To pretend otherwise is a tendentious distortion of empirical reality.

Proponents of reinterpretivism deny that they are imposing extra-positivist standards; they say that they are merely taking the former regime “at its word”. Though there is something appealing in this notion, it is nonetheless misguided. There is no doubt that governments should honor constitutional guarantees (of free speech, free elections, etc.) and that courts should not maliciously stretch (already vague) criminal statutes. Indeed, insisting that the government heed written law is a legitimate demand of dissident citizens living under a given regime.\textsuperscript{41} It is, however, quite another thing for a successor regime to retroactively take the deposed regime “at its word”. After all, it is not ‘the regime’ that is ultimately put on trial, but rather particular individuals (who often had nothing to do with the former regime’s statutory enactments). If it takes nulla poena seriously, the successor regime must objectively determine what was, as matter of empirical fact, law at the time. Nulla poena, if it has any meaning at all, surely precludes wishful


thinking as a basis for criminal liability. Insofar as it allows the prosecution of human rights abusers, reinterpretivism is dishonest: it claims to apply positive law, but actually applies extra-positive norms under the cloak of interpretation.  

On the rare occasions that the Bundesgerichtshof applies extra-positive standards openly, it does so via a negatively conceived natural law. According to the BGH, an extraordinary legal justification that permits an extreme violation of fundamental human rights is ipso facto invalid and therefore cannot exculpate an individual whose actions otherwise contravene positive penal law. The extra-positivism of this approach is, in contrast to that of reinterpretivism, overt. Yet, because it too ultimately rests on an ahistoric conception of positive law, it suffers from defects very similar to those of reinterpretivism.

The BGH assumes that that which remains of the national legal order after an extraordinary legal justification has been invalidated on extra-positive grounds constitutes positive law “properly understood”. On the basis of this assumption, the BGH concludes that a prosecution predicated on the nullification of an extraordinary legal justification is fully consistent with the nulla poena principle. The BGH is wrong. What remains after an extraordinary legal justification has been invalidated is not positive law “properly understood” but a legal vacuum. Positive law is a product of legislative will. In enacting an extraordinary legal justification, the sovereign legislator has intentionally limited the scope of a general penal statute and indicated that a certain behavior is not criminal. The subsequent nullification of that justification on extra-positive grounds by a successor regime cannot alter the fact that the legislator in power at the time had declared the behavior in question to be free from penal sanction. Moreover, primary penal statutes and extraordinary legal justifications are not distinct entities that exist in isolation.

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42 To claim that a democratic version of law had in fact been the positive law at the time despite uniformly contrary judicial praxis is akin to suggesting that it is jailhouse lawyers rather than the Supreme Court who are the final arbiters of law in the United States.


44 See: Chapter 3, pp. 103-4; and, Chapter 4, pp. 151-4.

45 See: Chapter 4, pp. 153-4.

46 For a forceful articulation of this view, see: Jakobs, “Untaten des Staates,” pp. 11-2.
from each other.\textsuperscript{47} Each legal system is an organic whole; removing one element transforms the entire system.\textsuperscript{48} "It is impossible," Grünwald notes, "to strike individual laws from the complex of statutes, thereby changing the content of the remaining laws, and to nonetheless claim: the altered norms are those of the given state."\textsuperscript{49} A legal system in which shooting a refugee is statutorily permissible is, at least from a border guard's perspective, completely different from a legal system in which such behavior constitutes manslaughter. Contrary to what the BGH asserts, rump 'positive' law is tantamount to retroactive legislation and any prosecution that rests upon it is incompatible with \textit{nulla poena}.\textsuperscript{50}

Like reinterpreativism, negatively conceived natural law sacrifices legal certainty without validating the existence of inalienable human rights. This is especially true of the BGH's version of negatively conceived natural law. The court has set an exceedingly high threshold for the invalidation of repugnant legal justifications. Time and again the court has upheld the validity of abhorrent totalitarian law, including both the Nazis' \textit{Kriegssonderstrafrechtsverordnung} and the GDR's ban on unauthorized emigration.\textsuperscript{51} As a result, the range of possible prosecutions is very narrowly drawn. But even if the BGH were less tolerant of inhumane law, grave problems would still persist because negatively conceived natural law is inherently flawed. While providing grounds for nullifying certain extraordinary legal justifications, negatively conceived natural law

\textsuperscript{47}See: Chapter 4, pp. 134-5.

\textsuperscript{48}This claim is somewhat overstated. Imagine two legal systems identical in all respects but one: legal system X bans smoking in public spaces; legal system Y does not. Prosecuting someone on charges of murder under system Y for an act that was committed at a time and place where system X and only system X was valid does not violate \textit{nulla poena}. Nonetheless, certain elements (such as legal justifications and general clauses) are essential to the meaning of other elements of a given legal system and their removal does indeed fundamentally alter the significance of what remains.

\textsuperscript{49}Gerald Grünwald, \textit{Zur Kritik der Lehre vom überpositiven Recht} (Bonn: Hanstein, 1971): 11. Grünwald is slightly off the mark. It is not so much impossible as it is illegitimate to ignore certain formally valid enactments and to nonetheless claim that one is applying positive law. The basic point is also made in: Jakobs, "Vergangenheitsbewältigung durch Strafrecht?", p. 46.

\textsuperscript{50}The issue existed even prior to the BGH's formation. In the immediate postwar period, when Radbruch's formula was at the height of its influence, there was talk of charging Nazi judges with murder for having sentenced individuals to death under statutes that were said to have violated natural law. Arguing that such a course would violate \textit{nulla poena}, Coing wrote: "One cannot say that natural law simply invalidates an extraordinary legal justification for an act that is in and of itself murder under positive law. The distinction between 'in and of itself' criminal behavior and an extraordinary legal justification is simply a mental construct. The judge's act is not a murder that is exceptionally justified; it is something else altogether. In truth, under positive law there is a death sentence issued in accordance with statute while under natural law there is a murder committed through application of an unjust statute. Natural law alone forms the basis for punishment." See: Helmut Coing, "Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze," \textit{Süddeutsche Juristenzeitung} (1947): 63.

\textsuperscript{51}See: Chapter 3, pp. 79-80; and, Chapter 4, p. 166, footnote 187.
does not provide an immediate basis for punishment. Punishment rests instead on what remains of positive law after the offensive exculpatory justification has been removed. This means that the punishment of totalitarian malefactors is, despite the overt extra-positivism which negatively conceived natural law entails, thoroughly dependent upon the existence of a primary penal statute under which their actions can be subsumed. The reliance on positive statute for the punishment of human rights abusers risks a penal lacuna. If, rather than relying on extraordinary legal justifications, a nefarious state were either to cast its primary penal statutes in an inhumane form or to refrain from enacting primary penal statutes in the first place, human rights abusers would be beyond the reach of negatively conceived natural law.

In sum, the Bundesgerichtshof's post-transitional jurisprudence yields the worst possible combination. On the one hand, the court's jurisprudence fails to provide true legal security. Though in perfunctory compliance with nulla poena's strictures, it effectively exposes individuals to retroactive legislation. On the other hand, the court's jurisprudence fails to provide a principled defense of human rights. Given its insistence on a statutory basis for punishment, it ultimately allows tyrannical regimes to abuse their citizens at will. This dismal result is an inevitable consequence of the BGH's dual commitment to nulla poena and an ahistoric conception of positive law.\textsuperscript{52}

\textit{Normative Prescription: Apply Affirmatively Conceived Natural Law}

The problems with the Bundesgerichtshof's post-transitional jurisprudence are not entirely of the court's own making. Nulla poena is imposed upon the BGH by Art. 103 II GG. The court would have had it much easier had the Grundgesetz not established an absolute ban

\textsuperscript{52}Some contend that basing post-transitional justice on nulla poena and ahistoric legal positivism is an appropriate compromise rather than a deplorable muddle. Though perhaps intellectually incoherent, its defenders argue, the course charted by the BGH admirably balances competing values under the constraint of practical politics. The court has, after all, managed to convict at least some human rights abusers while avoiding unbounded retroactivity. Isn't that better, they ask, than letting everyone go? In short, the answer is: no. Those who support the court's tack discount the costs of judicial hypocrisy. There is something grotesque in the BGH declaring GDR judges (at least potentially) liable for having stretched the literal meaning of statutory language while the BGH itself ignores the plain meaning of Art. 103 II GG. Given the history of judicial depravity, and in particular the history of all too extensive interpretation, in both the Third Reich and the GDR, the BGH should be especially careful to avoid duplicitous argumentation. In those (regrettably rare) instances in which an individual is actually punished, the BGH should candidly acknowledge that it has effectively scuttled nulla poena. It should do so both for the sake of forthrightness itself and to establish a clear precedent for any future rounds of post-transitional justice.
on retroactive legislation. None of the contradictions need have arisen if the Grundgesetz, like the International Covenant on Civil and Political Rights and the European Human Rights Convention, specifically exempted human rights abuses from nulla poena protection. Indeed, it would have been eminently desirable had the Grundgesetz been either written or amended accordingly.53 But, the fact is, the Grundgesetz as it stands does contain an absolute ban of retroactive legislation. There is nothing that the BGH can do about that.

Nonetheless, the Bundesgerichtshof must bear full responsibility for the consequences of its ill-conceived attempt to surreptitiously evade Art. 103’s nulla poena guarantee. On a coherent conception of positive law (i.e. one that is rooted in empirical reality), nulla poena flatly precludes the prosecution of state-sponsored human rights abusers. To its credit, the BGH has recoiled at the logically necessary but morally unpalatable conclusion that Nazi and communist malefactors are immune from prosecution. In order to escape the seemingly inescapable, the court has adopted an ahistoric conception of positive law in which positive law “properly understood” comprises reinterpreted statute and whatever remains after extraordinary legal justifications have been invalidated on extra-positive grounds. This definitional artifice enables the court to circumvent nulla poena (in a small number of cases) without openly violating Art. 103 II GG. The BGH’s stratagem suffers, however, from its timidity and disingenuity. The fact: that the court relies on positive law at all, even if ahistorically conceived, unduly limits the scope of possible prosecutions. And yet, notwithstanding the BGH’s protestations to the contrary, the court subjects individuals to retroactive legislation. Because the retroactivity is—in deference to Art. 103 II GG—hidden in the court’s ahistoric conception of ‘positive’ law, the contravention of nulla poena is obscured. But the fact is, the court has exposed individuals to criminal liability that did not exist at the time they acted. It is entirely appropriate that the BGH deprive state-

sponsored human rights abusers of *nulla poena* protection. The court should, however, for the sake of candor frankly acknowledge that this is what it has done. Moreover, having already dispensed with *nulla poena*, the court should—in the interest of confirming the inviolability of human rights—go all the way and apply an avowedly retroactive, affirmatively conceived natural law.

The International Military Tribunal at Nuremberg was a watershed. For the first time, national sovereignty was subordinated to human rights and tyrannical officials were held criminally liable under retroactive extra-national law for the maltreatment of their own citizens.\(^{54}\) In the earliest postwar period, the Nuremberg principle was reinforced by German courts applying KRG 10. Unfortunately, despite subsequent international agreements in which specific human rights are enumerated, enforcement of the Nuremberg principle remains tenuous at best. The Bundesgerichtshof should strengthen the Nuremberg precedent by allowing vigorous, retroactive prosecution of East German human rights abusers. The Bundesgerichtshof should unequivocally state that communist malefactors are subject to punishment not because they violated positive law "properly understood" but because they violated natural law as articulated in postwar human rights agreements. The forthright application of natural law would be a significant contribution toward consolidation of the Nuremberg principle and the effective protection of fundamental human rights.

It might not be "fair" to punish ex-GDR officials under retroactive natural law, but it should be done anyway. First of all, it's not all that unfair. It is generally assumed, and not without reason, that low level subordinates in a hierarchy that demands obedience typically enjoy less autonomy than do their superiors. It is frequently inferred that subordinates should therefore enjoy greater protection from prosecution than their superiors. Thus, prosecuting lowly East German border guards—who were usually teenage conscripts—is often viewed as particularly problematic. The prosecution of border guards therefore presents a critical test. If it is shown that border guards should not be punished despite the magnitude of their malefaction, it follows

\(^{54}\text{See: Chapter 2, pp. 38-42.}\)
that lesser perpetrators should not be punished either. Demonstrating that border
guards should in fact be held liable for their actions is therefore a necessary (though insufficient)
condition for establishing that other perpetrators beneath the top echelon of the GDR
leadership ought to be held accountable for what they did. Those opposed to the prosecution
of border guards object that the border guards were merely following orders, orders that were
not only lawful but backed by propagandistic and coercive structures that defied resistance.
Decomposed, this objection contains three distinct claims: first, that ‘superior orders’ constitute a
legitimate defense; second, that communist indoctrination in the GDR was so strong as to thwart
moral reasoning; and third, that anyone who dared disobey—the SED’s supposedly hegemonic
ideology notwithstanding—was liable to draconian punishment. Neither the objection as a whole
nor any of its constituent claims can be sustained.

The ‘superior orders’ defense has been rightly rejected ever since Nuremberg; to
resurrect it now would be retrogressive. If combined with another hoary legal principle, that of
‘sovereign immunity’, the ‘superior orders’ defense would place state crimes beyond legal
jurisdiction. Those who received and executed the orders would be exempt from punishment on
the grounds that they were subordinates; their superiors would be immune from prosecution on
the theory that they had the right to rule in whatever manner they saw fit. Only one who valued
state power more highly than human rights could accept such a proposition. Of course, one
might reject the principle of sovereign immunity yet continue to insist upon a subordinate’s
exemption from punishment. But to do so would be seriously misguided for both behavioral
and theoretical reasons. Relieving subordinates of responsibility for their actions would, on a
practical level, foster blind obedience. It would create a legal incentive structure in which a
subordinate had no reason to fear punishment for executing an order and every reason to fear
punishment for disobeying it. Immunizing subordinates against punishment makes sense only if
one assumes that average citizens are less capable of reasoning morally than are political
leaders. It is, however, arrogant to assume that ‘simple’ working class kids are not in a position to
distinguish right from wrong. Indeed, there is ample historical evidence to show that resistance to
tyranny is not a class-specific trait. But, by the same token, this implies that even 'simple' people (such as the East German border guards) should be held responsible for their actions. Although subordinates may be subordinates, they are not and ought not be treated as automatons.

Modern penal theory typically predicates punishment on the perpetrator’s ability to have discerned right from wrong. Punishing someone who could not have known better is considered unethical. It is for this reason that minors, the mentally deficient and the insane are generally exempt from punishment. Applying this principle in the context of totalitarian maleficence can be problematic. Ideologically motivated perpetrators, encouraged in their convictions by the regime in power, might sincerely believe that what they are doing is morally just. For example, a committed anti-Semite might well believe that killing Jews is an irreproachable act. Were the existence of mens rea a necessary precondition for punishment, fanatic Nazis and other true believers would be forever exempt from criminal prosecution. Be that as it may, one need not assume that East German border guards lacked the ability to distinguish right from wrong. On the contrary, evidence presented in the first border guard trial suggests that the SED propaganda apparatus was not so powerful as to entirely disable the border guards’ capacity to reason morally. The border guards testified that they had hoped to emerge from their tour of duty with “white gloves”, i.e. without having had to shoot anyone.55 But why would this be a concern if they were truly convinced that traitorous “border violators” had to be “destroyed”? Perhaps the desire to leave service without having fired a shot reflected nothing more than natural distaste at an unpleasant aspect of an unfortunately necessary but morally impeccable job. Perhaps. After all, few police officers enjoy shooting a suspect even when it is justified. But then again, equally few police officers deny their technical prowess or conceal their official commendations. Yet those border guards awarded the sharpshooter’s braid chose not to wear it when they left their compound.56 Why? It was not out of modesty. Rather, it was because border guards who wore the braid were regularly reproached by people they encountered on

55LG Berlin, (523) 2 Js 48/90 (9/91), p. 36.
56LG Berlin, (523) 2 Js 48/90 (9/91), p. 27.
the street. The popular censure clearly tapped a moral reservoir that SED propaganda had failed to desiccate. Border guards wanted to emerge with "white gloves" because they understood that shooting unarmed refugees was immoral.

A 'superior orders' defense is, as the International Military Tribunal at Nuremberg stated, acceptable only when the subordinate reasonably fears "imminent physical peril". No such peril existed for East German border guards, no matter how unpleasant one might imagine the military prison at Schwedt to have been. First of all, one could always have shot and intentionally missed. Indeed, some border guards reported having done precisely that. They never suffered any untoward repercussions. Lethargy in the exercise of duty, even if suspected, was never and could never be proven. More significantly, border guards never had to allow themselves to get into a position where they would have to shoot, accurately or otherwise. Someone destined to be a border guard had three opportunities to decline armed service. Though clearly not a ticket to advancement in the East German state, doing so entailed no dire consequences and certainly no "imminent physical peril." The first opportunity to refuse armed service was at the time of induction to the "National People's Army." If one announced one's unwillingness to carry a weapon at that point, either of two things happened: one was assigned to a construction brigade or one was made subject to reinduction later. The former diminished ones chances of receiving a place at university, the latter disrupted one's ability to make long-range plans. Unpleasant of course, but hardly draconian. The second opportunity to decline armed service at the border was when one was selected for border guard training. If at this point one declared oneself unwilling to shoot would-be refugees, one was simply not sent to the border troops. Again, such refusal presumably harmed one's future career prospects, but there was no threat of legal (let alone corporal) sanction. The final opportunity to refuse armed border service was when one was sent to a particular border guard regiment after completion of border guard training. It was at this point that one of four guards charged in the death of Chris Geuffroy, the

57The GDR authorities were aware that border guards were apparently missing refugees on purpose. See: "Schossen DDR-Grenzsoldaten absichtlich daneben?," Frankfurter Allegemeine Zeitung (September 5, 1994): 7.
last person to be killed at the Berlin Wall, declared his unwillingness to perform armed border duty. The guard’s punishment? Being assigned kitchen duty. That is all, just kitchen duty. Admittedly, in addition to having to peel potatoes and scrub pots, he was also subjected to the derision of his comrades. But nothing worse. No court martial. No “imminent physical peril”. Still, he could not stand the taunts and ultimately agreed—with fatal consequences for Chris Geuffroy—to carry a gun. Law ought not require heroism, but it ought not tolerate cowardice either.

Whatever is true for subordinates in this regard is all the more true for superiors. Though application of natural law to high ranking East German malefactors would undeniably constitute an instance of retroactive justice, it would not be an entirely unprecedented bolt out of the blue. East German leaders, like all postwar leaders, were aware that they might eventually be called to book. The Nuremberg trials had served clear notice that state-sponsored human rights abusers might be held criminally liable regardless of positive municipal law. Subsequent human rights instruments, such as the International Covenant on Civil and Political Rights (which the East German leadership signed), reiterated this notice.

It is true that most officials of most deposed regimes escape criminal liability for their actions. But, it is also true that most thieves escape criminal liability: we only prosecute those thieves we apprehend. Yet no one suggests that this is a reason not to prosecute the unlucky

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59 During the trial of the East German politico-military leadership (i.e. Honecker, Keßler et al.), it was reported that in 1972 a border guard was sentenced to three months in jail after refusing to shoot would-be refugees. [See: LG Berlin, (527) 2 Js 26/80 Ks (10/92), p. 57.] The punishment seems to be the rare exception rather than the rule. The SED regime had a strong interest in seeing to it that all those serving on the border would in fact shoot if the occasion arose; it was not in the regime's interest to force individuals to serve against their will. In any event, even if such reprisals had been commonplace, the threat of a three-month prison term does not constitute "imminent physical peril".

60 Nor should it tolerate amoral opportunism. No one, for example, was forced to become either a judge or prosecutor in the GDR. Those who became judges and prosecutors did so voluntarily. Once in office, an individual could always relinquish his or her post without threat of draconian sanction. There is therefore no reason why an East German judicial official who used tyrannical GDR statute to deter unauthorized emigration or suppress political dissent should be exempt from prosecution simply on the grounds that he or she applied such statute correctly. Having had the initial opportunity to choose a different career and having had the subsequent opportunity to resign at any point, the judicial official need never have applied tyrannical statute, either correctly or incorrectly. The situation of Stasi informants is slightly more complicated. Some were in fact coerced into cooperation (though perhaps not under threat of "imminent physical peril"). The majority, however, denounced friends, relatives and colleagues voluntarily. A few did so out of ideological conviction; many did so with an eye toward professional advancement. According to Joachim Gauck, a former East German dissident who now administers the Stasi archives for the federal government, most people who refused to act as Stasi informants suffered, if any penalty at all, nothing more than diminished career prospects (interview, June 13, 1994). That individuals were put into a position in which they had to choose between professional satisfaction and personal integrity is of course reprehensible. But, in those instances in which informants inflicted demonstrable harm upon other individuals, opportunism should not be accepted as a legal justification.
minority that is caught. Why, then, should the fact that most human rights abusers escape punishment be grounds for not punishing any human rights abusers?\textsuperscript{61} Many successor regimes are not in a position to pursue former officials. Many successor regimes are unable to do so because they had to cut a deal in order to initiate the transition to democracy (and frequently exist under the threat of a counter-revolutionary coup that could be sparked by prosecutorial efforts).\textsuperscript{62} Likewise, many successor regimes depend upon the expertise (and, thus, the goodwill) of former officials of the deposed regime. Germany, however, is free of such constraints. Because the GDR imploded, the transition to democracy was not negotiated and ex-communist officials have no leverage over the new regime. Moreover, West Germans have provided an alternate administrative elite. The post-reunification Federal Republic is therefore not dependent upon the expertise of former East German officials. One should take advantage of the opportunity presented by German reunification to affirm the Nuremberg precedent. It should be made abundantly clear that individuals—regardless of their position in the state hierarchy and regardless of what is allowed by positive law—are responsible for their actions even under dictatorship. If it is real, the threat of punishment might deter future human rights abuses.

The rule of law is a historical artifact that emerged from centuries of struggle. It was not voluntarily bestowed by benevolent rulers and it did not spring fully developed into existence. Rather, the establishment of effective legal protections at the national level arose from a succession of contingent opportunities that were exploited by actors willing to use the resources

\textsuperscript{61} The same point is made by Robert Kempner, one of the prosecutors in the American follow-on trials at Nuremberg. See: Peter Schneider, Peter Noll, and Robert M. W. Kempner, "Kolloquium über die Bedeutung der Nürnberger Prozesse für die NS-Verbrecherprozesse," in Peter Schneider and Hermann J. Meyer, eds., Rechtliche und politische Aspekte der NS-Verbrecherprozesse (Mainz: Hanns Kresch, 1968): 14.

\textsuperscript{62} On the conditions under which post-transitional trials are politically feasible, see: Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman, Oklahoma: University of Oklahoma Press, 1991): 211-31. Using a trichotomous taxonomy of transitions to democracy, Huntington theorizes that the nature of the transition from authoritarian rule determines how former officials are treated by a successor regime. He argues that prosecutions never occur where reformist elements within the former regime either initiated or negotiated democratization; only in those instances where authoritarian regimes collapsed are former officials ever prosecuted. Huntington explains variance among the latter cases on the basis of policy choices made by the successor regime and the relative power of different groups in the post-transitional period. To the extent that the form of transition is itself a function of the distribution of political power (between government and opposition on the one hand, and between reformer and hardliners on the other), Huntington's theory is based exclusively on transient power. He explicitly rejects (p. 215) the notion that the treatment of former officials is determined by either moral or legal considerations. Huntington's theory is useful but incomplete. It specifies the necessary condition for prosecutions to occur, but fails to provide any account of why ex-officials, if in fact prosecuted, are charged with the crimes that they are. This is a significant lacuna. Huntington fails to afford due attention to the autonomous power of legal ideas.
at their disposal. The on-going effort to secure legal protection of human rights at an extra-national level is no different. It too will require years of struggle, and its success will similarly depend upon the seizure of contingent opportunities. German reunification is one such opportunity. East German human rights abusers can be and therefore should be punished. Punishing them will strengthen the Nuremberg precedent. Regrettably, the GDR was not the last tyranny and its misdeeds are not the last human rights abuses that will cry out for punishment. Future malefactors should be punished whenever possible. Eventually, once basic human rights guarantees are sufficiently established as a principle of extra-national law, the nulìa poena objection will cease to be an issue.
Bibliography

PRIMARY SOURCES

Interviews


Eppelmann, Rainer, Mitglied des Bundestages and Vorsitzender der Enquete-Kommission "Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland", (Bonn, July 4, 1994).

Gauck, Joachim, Bundesbeauftragter für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik, (Berlin, June 13, 1994).

Geiger, Hansgeorg, Direktor beim Bundesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik (Berlin, June 13, 1994).

Grimm, Dieter, Bundesverfassungsrichter (Karlsruhe, June 21, 1994).

Horstkotte, Hartmuth, Richter beim Bundesgerichtshof (Berlin, July 29, 1994).

Kittlaus, Manfred, Leiter, Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität (Berlin, July 18, 1994).


Kuff, Alexander, Staatsanwalt, Schwerpunktabteilung zur Verfolgung der Unrechtstaten des SED-Regimes des Landes Thüringen (Erfurt, July 12, 1994).

Limbach, Jutta, Bundesverfassungsrichterin (Karlsruhe, June 21, 1994).


Meinerzhagen, Ulrich, Leitender Staatsanwalt, Schwerpunktabteilung SED-Unrecht, Staatsanwaltschaft Dresden (Dresden, January 27, 1994).


Schaefgen, Christoph, Leitender Oberstaatsanwalt, Arbeitsgruppe-Regierungskriminalität, Staatsanwaltschaft bei dem Kammergericht (Berlin, June 15, 1994).


Trost, Franz, Leitender Oberstaatsanwalt, Schwerpunktabteilung zur Verfolgung der Unrechtstaten des ehemaligen SED-Regimes (Erfurt, July 12, 1994).

van Rossun, Jan, Leitender Staatsanwalt, Schwerpunktabteilung-Regierungskriminalität, Staatsanwaltschaft Neuruppin (Potsdam, June 14, 1994).
Judicial Decisions

COLLECTIONS

Entscheidungen des Bundesgerichtshofs in Strafsachen.
(whose cases are cited: BGHSt [volume], [first page of decision].)

Entscheidungen des Bundesgerichtshofs in Zivilsachen.
(whose cases are cited: BGHZ [volume], [first page of decision].)

Entscheidungen des Bundesverfassungsgerichts.
(whose cases are cited: BVerfGE [volume], [first page of decision].)

Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen.
(whose cases are cited: OGHSt [volume], [first page of decision].)


INDIVIDUAL DECISIONS


BGHSt 2, 173.

BGHSt 2, 234.

BGHSt 2, 251.

BGHSt 2, 333.

BGHSt 3, 110.

BGHSt 3, 357.

BGHSt 4, 66.

BGHSt 6, 46.

BGHSt 6, 147.

BGHSt 6, 166.
BGHSt 9, 302.
BGHSt 10, 294.
BGHSt 14, 104.
BGHSt 14, 147.
BGHSt 18, 37.
BGHSt 18, 367.
BGHSt 23, 137.
BGHSt 30, 1.
BGHSt 32, 293.
BGHSt 33, 238.
BGHSt 37, 305.
BGHSt 39, 1.
BGHSt 39, 54.
BGHSt 39, 168.
BGHSt 39, 260.
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BGHSt 40, 48.
BGHSt 40, 113.
BGHSt 40, 125.
BGHSt 40, 169.
BGHSt 40, 218.
BGHSt 40, 241.
BGHSt 40, 272.
BGHSt 40, 307.
BGHSt 41, 10.
BGHSt 41, 101.

Bundesgerichtshof, 1 Str 50/56.


Bundesgerichtshof, 2 Str 71/64, in Rüter, Justiz und NS-Verbrechen, Vol. 21, pp. 345-56.
Bundesgerichtshof, 3 StR 252/94.
Bundesgerichtshof, 3 StR 605/94.
Bundesgerichtshof, 5 StR 96/82.
Bundesgerichtshof, 5 StR 473/93.
Bundesgerichtshof, 5 StR 378/94.
Bundesgerichtshof, 5 StR 386/94.
Bundesgerichtshof, 5 StR 713/94.
Bundesgerichtshof, 5 StR 747/94.
Bundesgerichtshof, 6 StR 1/56.
Bundesgerichtshof, GSSt 1/95.
BVerfGE 1, 14.
BVerfGE 3, 58.
BVerfGE 3, 225.
BVerfGE 6, 132.
Bundesverfassungsgericht, 2 BvL 19/91; 2 BvR 1206/91; 2 BvR 1584/91; 2 BvR 2601/93.

Landgericht Berlin, (523) 2 Js 48/90 (9/91).

Landgericht Berlin, (527) 2 Js 26/90 (10/92).

Landgericht Braunschweig, 2 Ks 1/63, in Rüter, Justiz und NS-Verbrechen, Vol. 20, pp. 23-100.

Landgericht Darmstadt, 2 a Ks 1/49, in Moritz and Noam, NS-Verbrechen vor Gericht, pp. 281-92.

Landgericht Dortmund, 10 Ks 1/61, in Rüter, Justiz und NS-Verbrechen, Vol. 17, pp. 749-88.

Landgericht Dresden, 3 (c) KLS 51 Js 4048/91, Neue Justiz (1993): 493-503.


Landgericht Düsseldorf, 8 l Ks 2/64, in Rüter, Justiz und NS-Verbrechen, Vol. 22, p. 175.


Landgericht Essen, 29 Ks 1/64, in Rüter, Justiz und NS-Verbrechen, Vol. 20, pp. 715-807.


Landgericht Frankfurt, 4 Ks 2/63, in Rüter, Justiz und NS-Verbrechen, Vol. 21, pp. 444.

Landgericht Göttingen, 3 Ks 2/50, Monatsschrift für Deutsches Recht (1951): 312.


Landgericht Hildesheim, 4 KSs 50/47, Niedersächsische Rechtspflege (1948): 118.

Landgericht Karlsruhe, VI Ks 1/60, in Rüter, Justiz und NS-Verbrechen, Vol. 19, pp. 620.


Landgericht Magdeburg, 23 KLS 27/91.


OGHSt 1, 1.

OGHSt 1, 6.

OGHSt 1, 11.

OGHSt 1, 217.

OGHSt 1, 284.

OGHSt 1, 297.

OGHSt 1, 321.

OGHSt 2, 209.

OGHSt 2, 231.

OGHSt 2, 269.

OGHSt 2, 361.

OGHSt 2, 375.


Oberlandesgericht Hamm, 2 Ws 144/76, Juristenzeitung (1976): 611.

Oberlandesgericht Hamm, Ws 81/47, Monatsschrift für Deutsches Recht (1947): 205.


Schwurgericht Frankfurt, 51 Ks 1/50, in Moritz and Noam, NS-Verbrechen vor Gericht, pp. 239-56.

Other


Parlamentarischer Rat, Allgemeiner Redaktionsausschuß, "Vorschlag des Allgemeinen Redaktionsausschusses über Neufassung des Abschnittes XII "Gerichtsbarkeit und Rechtspflege", PR.12.48—343 (December 5, 1948).


SECONDARY SOURCES

Journals

Archiv für Rechts- und Sozialphilosophie.
Aus Politik und Zeitgeschichte.
Demokratie und Recht.
Der Spiegel.
Deutsch-Deutsche Rechtszeitschrift.
Deutsche Richterzeitung.
Deutschland Archiv.
Die Zeit.
Frankfurter Allgemeine Zeitung.
Goltdammers Archiv für Strafrecht.
Juristenzeitung.
Juristische Rundschau.
Juristische Schule.
Kritische Justiz.
Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft.
Monatsschrift für Deutsches Recht.
Neue Juristische Wochenschrift.
Neue Justiz.

Neue Zeitschrift für Strafrecht.

Recht in Ost und West.

Staat und Recht.

Strafverteidiger.

Süddeutsche Juristenzeitung.

Süddeutsche Zeitung.

Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer.

Vierteljahreshefte für Zeitgeschichte.

Zeitschrift für die gesamte Strafrechtswissenschaft.

Zeitschrift für Gesetzgebung.

Zeitschrift für Rechtspolitik.

Individual Works


Bundesjustizministerium, Die Verfolgung nationalsozialistischer Straftaten im Gebiet der Bundesrepublik Deutschland seit 1945 (Bonn: n. p., 1964).


Dreier, Ralf, and Wolfgang Sellert, eds., Recht und Justiz im 'Dritten Reich' (Frankfurt/M: Suhrkamp, 1989).


Jäger, Herbert, Verbrechen unter totalitärer Herrschaft. Studien zur nationalsozialistischen Gewaltherrschaft (Frankfurt/M: Suhrkamp, 1982 [1957]).


Kim, Michael, Verfassungsumsturz oder Rechtskontinuität? Die Stellung der Jurisprudenz nach 1945 zum Dritten Reich, insbesondere die Konflikte um die Kontinuität der Beamtenrechte nach Art. 131 GG (Berlin: Duncker & Humblot, 1972).


Langner, Albrecht, Der Gedanke des Naturrechts seit Weimar und in der Rechtsprechung der Bundesrepublik (Bonn: H. Bouvier, 1959).


Lüderssen, Klaus, Der Staat geht unter—das Unrecht bleibt? Regierungskriminalität in der ehemaligen DDR (Frankfurt/M: Suhrkamp Verlag, 1992).


Maunz, Theodor, Günter Dürg, et al., Grundgesetz: Kommentar, Art. 103 II GG, Rdnrm. 98-121  

Maurach, Reinhart, "Das Gesetz zum Schutz der persönlichen Freiheit," Neue Juristische 

Maurach, Reinhart, "Zur Problematic der Rechtsbeugung durch Anwendung sowjetzonalen 
Rechts. Bemerkungen zu BGH 5 StR 519/57 v. 10.12.57.," Recht Ost und West (1958): 
177-81.

Maus, Ingeborg, "Gesetzesbindung der Justiz und die Struktur der nationalsozialistischen 
Rechtsnormen," in Ralf Dreier and Wolfgang Sellert, eds., Recht und Justiz im Dritten Reich  
(Frankfurt/M: Suhrkamp, 1989): 81-104.

Mehl, Birgit, "Die Staatsrechtslehre zwischen 1945 und 1952 in Deutschland," (dissertation, Berlin,  
1993).

Merkl, Peter H., The Origin of the West German Republic (New York: Oxford University Press, 
1963).

Merritt, Anna J. and Richard L., ed., Public Opinion in Occupied Germany: The OMGUS 


Merryman, John Henry, The Civil Law Tradition: An Introduction to the Legal Systems of Western 

Moritz, Klaus, and Ernst Noam, NS-Verbrechen vor Gericht 1945-1955. Dokumente aus 
Judenverfolgung (Wiesbaden: Kommission für die Geschichte der Juden in Hessen, 
1979).

Müller, Ingo, "Gesetzliches Recht und übergesetzliches Unrecht. Gustav Radbruch und die 

Müller, Ingo, Hitler's Justice: The Courts of the Third Reich (Cambridge: Harvard University 

Müller, Wolfgang, and Manfred Grigo, "Amnestie oder Strafverfolgung? Zum Problem der 

Naumann, Bernd, Auschwitz. Berichte über die Strafsache gegen Mulka u.a. vor dem 
Schwurgericht Frankfurt (Frankfurt/M: Fischer, 1965).

Neidhardt, H., "Die Gerichtsbarkeit der deutschen Gerichte und der Besatzungsgerichte in der 

Neumann, Ulfrid, "Strafrechtliche Verantwortlichkeit für die DDR-Spionage gegen die 
Bundesrepublik nach der Wiedervereinigung," in Ernst-Joachim Lampe, ed., Die 
Verfolgung von Regierungskriminalität in der ehemaligen DDR nach der 

Niethammer, Lutz, Entnazifizierung in Bayern: Säuberung und Rehabilitation unter 
amerikanischer Besatzung (Frankfurt/M: Fischer, 1972).

Noll, Peter, "Die NS-Verbrecherprozesse strafrechtshomogen und gesetzgebungspolitisch 
betrachtet," in Peter Schneider and Hermann J. Meyer, eds., Rechtliche und politische 


Roggemann, Herwig, Systemunrecht und Strafrecht am Beispiel der Mauerschützen in der ehemaligen DDR (Berlin: Berlin Verlag, 1993).


Rottleuthner, Hubert, ed., Recht, Rechtsphilosophie und Nationalsozialismus (Wiesbaden: F. Steiner, 1983).


Spendel, Günter, Rechtsbeugung durch Rechtsprechung (Berlin: de Gruyter, 1984).


Staff, Ilse, Justiz im Dritten Reich, 2nd ed. (Frankfurt/M: Fischer Taschenbuch Verlag, 1978).


Stolleis, Michael, Gemeinwohlformeln im nationalsozialistischen Recht (Berlin: J. Schweitzer, 1974).


Walther, Manfred, "Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht?", in Ralf Dreier and Wolfgang Sellert, eds., *Recht und Justiz im 'Dritten Reich'* (Frankfurt/M: Suhrkamp, 1989).


Wesel, Uwe, Ein Staat vor Gericht. Der Honecker Prozeß. (Frankfurt: Eichhorn, 1994).


