

Retribution and Judgment

Violence, Democratic Accountability, and the Invocation of the Rule of Law

John Borneman

Borneman, John 1998: *Retribution and Judgment: Violence, Democratic Accountability, and the Invocation of the Rule of Law*. – *Ethnologia Europaea* 28: 131–150.

During the first decade following the regime changes in 1989 in East-Central Europe, those regimes that have successfully and peacefully democratized have engaged in some sort of retributive justice punishing wrongdoers and vindicating victims. Other regimes have become even less democratic and engaged in further violence by identifying substitute victims to sacrifice in order to avoid holding actual wrongdoers accountable for their past crimes.

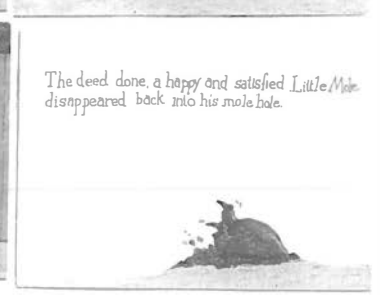
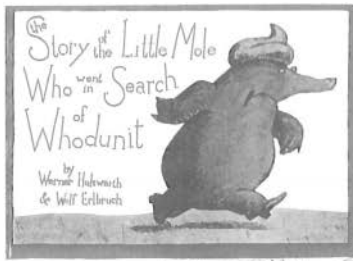
The author examines the efficacy of retributive justice through the work of the division of the German criminal justice system responsible for prosecuting “governmental and reunification crime” and of a public commission of vindication. He then compares this German effort with that in select other East-Central European regimes. In order to contribute to democratic legitimacy, he concludes, regimes must studiously avoid seeking substitute victims and instead hold those in the center of the regime accountable for wrongdoing. At the same time, they must make a good faith effort to redress the wrongs of unjustly harmed parties. Effective criminal law establishes the state as a moral agent representing the entire community by reiterating the principles of responsibility and accountability for injustices as part of an attempt to reestablish the dignity of victims. In other words, to avoid a cycle of retributive violence it may be wise to go through a longer phase of retributive justice in the present.

Professor John Borneman, Department of Anthropology, Cornell University, Ithaca, NY 14853, USA. E-mail: jwb@cornell.edu

Very early in life we begin to learn legitimate ways in which we can respond to being injured or wronged. We learn concepts of fairness and methods of judgment that enable us to distinguish between personal revenge and abstract principles of justice. Yet this distinction is often confused, by everyday actors and academics alike. Wronged individuals frequently pursue a strategy of revenge in righting a wrong while convinced that they are actually following principles of justice. Aside from the general problem of self-deception, this misperception results largely because the category of being wronged, while fundamentally indeterminate and open to radically different interpretations, is nonetheless interpreted through self-contained moral worlds that present themselves as definitive and universal principles of justice. Let me illus-

trate this confusion with a bit of contemporary folklore, a 1989 German children’s book written by Werner Holzwarth and illustrated by Wolf Erlbruch, translated into English and printed in Singapore in 1993 as *The Story of the Little Mole Who Went in Search of Whodunnit*.

As Little Mole “poked his head out of his mole hole one day ... something very strange happened. ... It was long and brown ..., and worst of all, it landed right on top of Little Mole’s head.” Angrily, Little Mole goes through the animal kingdom in search of the culprit. He asks a pigeon who was just flying by. “Me? No, not me,” answered the pigeon, who then showed mole how he does it. Mole then confronts the horse, who drops big and round dumplings; the cow, who makes a pie; the goat, whose brown lumps resemble Mole’s favorite caramels; the hare,



who lets fly fifteen little beans; the pig, who drops a smelly heap. Finally, Little Mole asks two flat flies, who direct him to a dog. Little Mole then confronts Henry, sitting in his dog-house, and shits in the middle of his forehead. The story concludes, “The deed done, a happy and satisfied Little Mole disappeared back into his mole hole.”

Is the message of this story, as the publisher states on the credits page, that “Little Mole gets his own sweet revenge?” Or is it more generally a tale about the possibility of retributive justice, affirmation of the belief in the pan-human necessity of rectifying a perceived injury, of righting a wrong through a systematic process of investigation that results in holding the *actual wrongdoer* accountable? Is the Little Mole engaged in something other than an act of revenge, something other than the search for a substitute victim, something other than “political justice?” I want to suggest that this children’s book illustrates a basic principle of the rule of law (*Rechtsstaatlichkeit*), that of learning *how* to right a wrong. Learning this principle begins in childhood, and today the exact same moral tale – the invocation of the same principles of justice – is told in Germany, the United States, and Singapore, if not in most places of the world. The example of the Mole, then, might serve the purpose, to quote Sally Falk Moore (1985: 31), “not to discern the shape of some presumed local culture or morality” nor to ascertain “user satisfaction” with a particular form of dispute resolution but “to discover what kind of residue is left behind by supposedly ‘closed’ episodes, to reconceive the ‘closed’ episode in an ongoing flow of time, and to think about the range of possibility of subsequent consequences.” Is it true, then, as this children’s tale suggests, that, while legal cultures which aspire to the “rule of law” type may represent themselves as hermetically sealed, self-referential, auto-poetic systems, they are in fact based on the invocation of the same, easily translatable set of principles of justice?

Accountability and Retributive Justice

Four months after the Berlin Wall was opened, in March 1990, during a short research trip in

Berlin, I was struck by public demands, often bordering on hysteria, for retributive justice. These demands ranged from requests for rehabilitation of one’s name or reputation to calls for the prosecution of members of the old elite. Initially they had little to do with fights over the return or redistribution of property, which has since occupied the attention of so many intellectuals. People seemed united that the “actually existing socialist” regimes were illegitimate and that their elites had behaved unethically, if not criminally. In this transformative moment, the burning issues in public discourse, not only in East Germany but throughout much of East-Central Europe, became: How and for what reason should people be held accountable, and how could past wrongs be set right? It appeared that the immediate legitimacy of the new post-socialist states of the former East bloc rested largely on formulating adequate responses to what all agreed were intractable problems of rectifying perceived injustice under the old regimes. This reckoning has involved an attempt to invoke the principles of the rule of law. Here I want to make a distinction between invocation and installation.

While each political regime may install different institutional arrangements balancing executive, legislative, and judicial needs, democratic political regimes all require invocation of the same set of principles of the rule of law. These principles enumerate different aspects of institutional and political accountability, for the purpose of making the relation of the sovereign to the ruled transparent, explicable, and predictable. In a comparison of the *Rechtsstaat* with the rule of law, Fuller (1969) and McCormick (1984) reduce the principles to four basic ideals: separation of powers, principle of legality, prohibition on retroactive legislation, and principle of trust in the legal system.

The relevance of the initial topic that interested me in 1990 is no longer limited to the losers of the Cold War, to the former socialist regimes of East and Central Europe. From Western Europe to Latin America to Asia, even the regimes of the capitalist victors and their allies have been unsettled by demands for accountability and justice. An extraordinary anti-mafia campaign continues to shake the founda-

tions of postwar Italian political culture; Chilean and Argentinean officers responsible for terrorizing and killing political opponents have been tried and imprisoned; two past presidents of South Korea were recently convicted on charges of ordering a massacre. Although it is unlikely that many of these campaigns will result in convictions or imprisonment (or general amnesties will be declared, as has already happened in Chile and Argentina), the performative effect of the state's effort should not be ignored. What began quite narrowly as a study of the transformation of East bloc socialist regimes now appears relevant outside the European context. Indeed, we are witnessing a world movement for retributive justice: the conviction of wrongdoers and the restoration of the dignity of victims. This world movement is the globalization of a form of accountability specific to democratic political forms.

Unlike distributive justice, which is concerned with giving persons their proper share, or corrective justice, which is intent on rectifying harms, retributive justice deals primarily with moral injuries, with wrongs that frequently do not result in material injury or harm. In current usage, "retribution" has come to be associated solely with punishing for offenses (*Vergeltung*), whereas etymologically the meaning of the word includes rewarding for good deeds. Only in the course of the twentieth century has the meaning of retribution been reduced to a manifestation of innate revenge motives. Historically, retribution has always been part of a settling of accounts, a tribute much like a gift, that necessarily both punishes evil and rewards good.

I want to place this theoretical discussion in the context of my ethnographic work on retributive justice in East Germany after 1989. First, as to rewarding good.

The Commission of Vindication for Radio and Television¹: Restoring the Dignity of Victims

In December 1990, I began attending the proceedings of the *Rehabilitierungskommission des Rundfunk und Fernsehen der DDR*. Because East German courts during the period of jurial

restructuring in late 1989 and 1990 could not handle the number of claims made concerning past injustices, some people in work units began establishing Commissions of Vindication/Rehabilitation². They were inspired by suggestions made at Roundtable discussions in the fall of 1989 but were also responses to demands made by former victims within companies themselves. Their deliberations were not adversarial but took the form of an open yet limited inquiry into the nature of the wrong, the plausibility and veracity of the claim, and the possibility to procure remedies. The primary need expressed in their work was for the restoration of a lost dignity, for public recognition of primarily two kinds of injustice: harms suffered either directly inflicted by fellow workers or through the political instrumentalization of the workplace bureaucracy ("bureaucratic illegalities"). Some of the types of injustices for which victims wanted vindication included criminalization and imprisonment for "Westflucht" or "Republikflucht" (attempting to flee the republic), "removal and forced adoption of children," "repression, persecution, and judicial illegalities," and "defamation because of a critical position". Petitioners rarely made claims in the domain of corrective justice: to reclaim property, reassert status, obtain monetary compensation – all material harms that the legal system would have felt compelled to address immediately. Instead most of the claims concerned moral injuries: harms that did not result in readily quantifiable injuries but were nonetheless wrong.

According to Herr Grollnitz, Chair of the Commission for Radio and Television that I attended, the function and goal of these Commissions was "to work through the old political burdens of the SED period" ("*politische Altlasten aus der SED-Zeit aufarbeiten*"). For the first four years of operation, the Commissions operated in a legal No Man's Land, neither inside nor outside the law, but as nonlaw. Their proceedings and findings were analogous to law but not regulated by law until a "Second Law for Settling SED-Illegality" was passed in 1994.

The Commissions were to determine the validity of the claimants and to propose a remedy. The most common remedies proposed were

either formal letters of apology (“Ehrenerklärungen”), adjustments of the pensions lost, or “economic compensation” for particular losses. In the letters of apology, the Commission for Radio and Television repeatedly used the expression: we “reaffirm the political and moral integrity” of the victim. It expressed “regret for the repressions and discriminations,” for “the destruction of meaningful career development,” for “the severe psychological stress”. It offered sympathy for the suffering caused, and it “condemned the arbitrary measures employed” to isolate and persecute critical voices. In areas of the world influenced by Christianity, an apology carries a special weight because an assumption of personal guilt or sin can easily lead to legal liability. Moreover, in accepting blame for wrongful action, wrongdoers symbolically lower themselves in the eyes of their victims. This contrasts, for example, with the role of apologies in Japan, where they are more commonplace but frequently made to avoid blame and legal liability (Joshua Roth, personal communication). The Commission vindicated approximately 75 percent of those who appealed to it. It then made the apologies public by sending them to print media so that either the findings could be challenged or the righting of the wrong acknowledged by the larger social community.

Vindication is a relatively minor concern of justice systems, and public or media discussion of the status of victims of the former socialist regimes has been largely displaced throughout the East bloc by a discussion of present harms resulting from privatization and global market pressures. Yet the process of vindication offers a revealing example of how post-socialist states and societies have dealt with the usually neglected aspect of retributive justice: rewarding good. The people who appeared before the Commissions claimed to be victims of a criminality which was, if not state-sponsored, then at least supported or benignly tolerated by the state. In response, the Commissions engaged in a particular form of justice that combines both corrective and retributive aspects. Often this entailed both compensating the victim for harms (corrective justice) and rectifying the status of the victim for moral injuries (retributive justice). Their work was the flip side of punishing wrong-

doers: the issue of governmental criminality. Vindication directs us primarily to redressing the victim’s status and only secondarily is it concerned with the perpetrator.

But it is precisely the relation of the victim to the perpetrator that, as we shall see, is often the core issue in vindication. For in order to confirm the victim’s importance through a procedure of vindication it is often necessary to lower the unjustly elevated status of the wrongdoer. To reestablish the self-worth and value – the dignity – of the victim requires that an event be staged whereby there is a public repudiation of the message of superiority that initially caused the diminishment in the victim’s worth. This public event seeks, as Jean Hampton argues, both to “repair the damage done to the victim’s ability to realize her value” and to defeat the wrongdoer’s claim to mastery over the victim. It does not thereby compromise the wrongdoer’s value as a person, but it “confirms them as equal by virtue of their humanity” (Hampton 1992: 1686–7). Both victim and perpetrator are affirmed as equal in the sense that both are recognized as agents exercising free will – the minimal condition of humanity.

Punishing Wrongdoing: Transforming Misfortune into Injustice

The task of punishing evil was assigned to ZERV (“Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität” “Central Investigative Office for Governmental and Unification Criminality”. Approximately eleven months following unity, on September 1, 1991, the German Bundestag, Chancellor Helmut Kohl, the Federal Ministry of Interior, and the Ministry of Justice followed a recommendation of a conference of interior ministers to create ZERV. It began with a team of three men, working under the leadership of Manfred Kittlaus and the auspices of Berlin’s President of the Police, to coordinate the different ongoing investigations into governmental and unification crime. Public Prosecutor Christoph Schaeffgen became the head of the division “Regierungskriminalität” in the Ministry of Justice. ZERV soon became one of the “five pillars” of the Berlin police department.

ZERV was charged with investigating what has become known as the “*strafrechtliche Bewältigung der Vergangenheit der DDR*” (overcoming off/reckoning with the GDR’s past through criminal law). Technically, its function is to gather and prepare the evidence for the state, and, in cases involving the GDR, to prosecute. ZERV is divided into two divisions: Referat 1 deals with unification criminality, Referat 2 with governmental criminality. Unification criminality refers to crime having to do with the economic background and consequences of unification, in other words, primarily with crime that took place after November 1989. About half of the suspects here come from the old Länder of the Federal Republic, half from the GDR. In fact, most of ZERV 1’s investigations are of suspected criminal activities engaged in jointly by organized criminal gangs from the old Federal Republic of Germany, or other West bloc states, and by former members of the East German state security (Stasi) or former GDR functionaries in the political parties and mass organizations (ZERV 1993: 4).

“Crime” is a socially constructed category of wrong and unjust deeds; such acts are by definition both socially disapproved of and legally prohibited. Needless to say, definitions of crime vary by place and over time, and crime is never merely what is written in penal codes. Determining what counts as “crime” is a result of a complex interaction between the public and the state. And it is an interpretive process, involving the selection of categories of “wrongness” for investigation, the construction of evidence, and a trial. The public pressures the state to react to wrongness; the state, in turn, prosecutes wrongness, sometimes in response to public pressure, but always also according to its own dictates, to which the public is asked to respond. Often public pressure will be insufficient to prompt state action, and the perceived wrong will remain a “misfortune.” Or, alternately, state action will find no resonance and support in the public, leading the state to avoid or truncate prosecution, and the designated wrong will go unpunished. In either case – of the action remaining a misfortune from the public’s perspective or a designated wrong from the state’s – the deed will not become a “crime.”

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

ZERV 2 investigates high-level representatives of the party and government as well as state functionaries who committed crimes while carrying out their offices. These crimes are acts of violence against people and often involve human rights violations. By the end of 1995, ZERV 2 had investigated 7,414 incidents. Moreover, 70 percent of all the investigations of ZERV 2, and over half of the overall total of ZERV investigations, have been for either attempted or completed homicides (Kittlaus 1993: 38). The acts investigated took place over the entire period of GDR history, from 1949 to 1989, and the people subject to investigation worked at all levels of the state hierarchy, from postal employees to members of the Politbüro. Of the 4,691 individual suspects, 213 held high-level posts (first lieutenant, major, major-general, general, ministers of state) (Kittlaus 1994: 29). The Public Prosecutor’s Office has made indictments in three general areas: 1) “attempted and completed manslaughter on the inner-German border,” 2) “*Rechtsbeugung* in acts involving imprisonment or manslaughter though the judicial organs of the GDR,” and 3) “manslaughter, imprisonment, and violation of mail privacy by members of the Stasi” (Schaeffgen 1994: 151).

By the end of 1994, over 700 criminal investigations have either been completed or stopped. Other investigations have been stopped be-

cause ZERV gathered insufficient evidence, the trials were not clearly in the “public interest” (“das öffentliche Interesse”), the suspect died, ZERV was unsuccessful at either the indictment or trial stage, or because higher courts overturned initial convictions. Calculating and responding to public interest has been a decisive issue for ZERV, since prosecuting without public interest would have little immediate effect on either the incidence of crime or establishing the principle of accountability. Prosecuting against the wishes of the public would in most cases create the image of persecution of a surrogate victim. Hence, for ZERV the issue has not only been of choosing actual perpetrators of crime, but also of choosing the “right” ones for prosecution.

Ritual Purification under the Rule of Law

Until recently, anthropological contributions to the regulation of violence have come primarily from the study of societies without states. Legal regimes with the rule of law differ from stateless societies in one crucial respect: the core of their legitimacy rests in identifying the real wrongdoer, or at least in a theory that the actual perpetrator has been identified. And with this identification and trial, the state establishes itself as a moral authority acting for the whole community. Alternatively, when societies without rule of law seek someone to hold accountable for the initial offense, they engage in a form of ritual sacrifice or revenge: the first suspect is often replaced by another, and another, in a chain of substitutes? A substitute is actually preferred, notes René Girard in a summary and theorization of anthropological studies, since it avoids the principle of perfect reciprocity – an eye for an eye – and therefore the necessity for a cycle of reciprocal acts of revenge that would unleash violence and lead ultimately to a sacrifice of the entire group. This substitute requires a “certain degree of misunderstanding,” even deception, so that it appears the god himself is demanding the new (and final) victim. The sacrifice “serves to protect the entire community from its own violence” by suppressing dissensions, rivalries, jealousies, and quarrels. It stems

the tide of indiscriminate substitutions and redirects violence into ‘proper’ channels,” meaning outside the community and toward some exteriorized individual or group that “lacks a champion” (Girard 1977: 8, 10). A substitute victim absolves the group of any further responsibility to seek redress for the initial crime.

One problem for the rule of law is that the actual perpetrator may be too powerful, or it may be too unpalatable politically to prosecute him. In that case, the perpetrator cannot be readily exteriorized, cannot be placed “outside” the society. Hence, a major problem for a Rechtsstaat is determining not only who committed the crime, but also whom is it politically possible to exteriorize, to place outside the group. Which ethnic group, political elite, nation, minority group, or individual can be held accountable for committed wrongdoings without dividing the political community? Since 1989, each new East-Central European state has invoked the principles of the rule of law, which has committed them to prosecuting only the “actual” wrongdoers. But they cannot prosecute all wrongdoing, and their decisions are also embedded in political processes, meaning that they have also been struggling with the question of which offenses to define as criminal, whom to hold accountable for them and therefore worthy of prosecution.

During the period of invocation of the principles of the rule of law following the regime changes in 1989, some East-Central European regimes have nonetheless relied on substitute sacrifices for many purposes: in order to fight corruption, to open institutions to renewal, to assuage victims of the old regimes, and, of course, to avoid holding actual wrongdoers accountable. Their choice of sacrificial groups has been predictable and hardly random: external states or internal enemies, most often gypsies, Jews, and perceived or “exteriorized” foreigners. Association with “communism” has also served as a symbolic reservoir for pollution and therefore a source of substitutes for actual wrongdoers. Thus communist parties or communist parties members have at times been targeted for purification. At this very general level, one can identify two dimensions to the sacrificial process that hold for each of the new

East-Central European regimes: (1) identifying possible culprits to hold accountable, who then were vetted for complicity with the secret police, tried for crimes, or simply vilified in media campaigns, and (2) assuaging injured parties through rehabilitation, vindication, compensatory payments, publication of their stories, or other similar measures.

The work of ZERV and of the Rehabilitierungskommission must be understood within this political-theoretical context. By invoking the principles of the rule of law, ZERV is obligated to hold wrongdoers accountable, and it must make sure that the individuals it prosecutes are not substitute sacrifices. In fact, in order to contribute to the specific form of legitimacy we call “democratic,” it must hold those in the center of the regime accountable. Many of ZERV’s investigations began in response to citizen complaints or tipoffs. During all the probes, the “Staatsanwalt” (public prosecutor) is expected to remain neutral and is bound by law to investigate on behalf of both the defendant and the state. Police investigators follow up an initial tip or complaint by interrogating suspects or questioning witnesses to determine whether the act (“Tat”) constitutes a crime (“Verbrechen”). An “Ermittlungsrichter” (judge who deals with investigations) may be asked to issue search warrants or arrests. If the police gather sufficient evidence to warrant a trial, then the prosecutor is compelled to proceed only if the case is in the public interest. Considered “guardians of the law,” prosecutors are not independent, as are judges, but act in the public interest as “Beamten” (civil servants), supervised by the Ministries of Justice of the different provinces.

ZERV’s primary task in its investigations is to transform misfortunes into injustices. Together with public prosecutors, ZERV creates the possibility to claim “injustice” by constructing a narrative that sequentially links crime, deed, and suspect (agent of crime). The legal name for this narrative is indictment (“Anklage”). A judge need not accept the grounds for this indictment, but can either reject it altogether or reconstruct its legal reasoning. In any case, this narrative is to be constructed from the evidence which, in turn, must be uncovered and

gathered. In addition to evidence that links the deed to the crime, ZERV must find an agent to hold accountable for the crime. If both conditions are not met, then the misfortune of the victim does not become an injustice, and the deed is irrelevant to criminal law. Natural catastrophes such as earthquakes and floods, for example, can be proven to have occurred, but rarely can they be said to be caused by human agency. With nobody responsible for the deed, there is no crime and therefore can be no prosecution. But with sufficient evidence linking a deed to a formal “crime,” and with a suspect to hold accountable for the deed, one can turn any misfortune into an injustice.

The fate of ZERV is closely intertwined with that of the Gauck-Authority, which I will only mention briefly here. For ZERV the archives of the Gauck-Authority have been by far the most important source in the investigation of economic crimes, which is primarily the domain of unification criminality covered by ZERV 2. Both the Gauck-Authority and ZERV were set up to perform a uniquely German postwar function: “Bewältigung der Vergangenheit” (reckoning with the past). In this case, the past is that of the GDR. The Gauck-Authority was charged with a general enlightenment about this past through personal and historical research, ZERV with a reckoning through the mechanisms of criminal justice. The public has been extremely divided about what this reckoning means and in whose interests it takes place, which has meant a continuous politicization and public scrutiny of ZERV’s work. Without public support, the kind of reckoning with the past engaged in by both the Gauck-Authority and ZERV would end. Hence both Gauck and Kittlaus (for ZERV) must convince the public of the need for the continued existence of their offices. To this end, they are frequent contributors to newspapers and appear often on radio and television. The public prosecutor’s office has followed traditional German legal practice of not publicizing its own work except for reports on indictments and trials made by the Ministry of Justice itself directly to the press.

Measuring the Effectiveness of Retributive Justice

How might one evaluate the effectiveness of attempts at retributive justice? Effective criminal law, I have been arguing, establishes the state as a moral agent representing the entire community. It does this by reiterating the principles of accountability for injustices as part of an attempt to reestablish the dignity of victims. Have the criminal investigations and trials in Germany been effective in reckoning with a past? In *Settling Accounts*, the book on which this essay is based, I analyze the trial and conviction of Wolfgang Vogel (Borneman 1997: 80–96). Dr. Vogel was the official East German lawyer responsible for “humanitarian questions,” including arranging the exit of East German citizens to West Germany. In this capacity, he was charged with extorting property from his clients in exchange for their release (or sale) to the West Germans. For purposes of length, I must omit analysis of specific cases here, although I will turn to the reaction to Vogel’s conviction later. Instead, I shall make some summary statements about the performative effects of entire complex of state investigation, public defense, and perhaps most important, of the historical record left for future generations by the prosecution.

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

criticized the work of ZERV and the public prosecutor.

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

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

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

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

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

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

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

In sum, there have been tens of thousands of investigations, there have been hundreds of indictments, there have been some convictions

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

The head Berlin prosecutor, Christoph Schaefer, responds to public reservations by arguing that “justice is obligated to the principle of legitimacy and not that of public or political opinion.” He suggests that the task of justice here lay in “enlightenment and in the prosecution of criminality and criminals who in exercising political power violated the law of their own states, not in reparations (“Wiedergutmachung”) for wrong that originated in the former GDR” (1994: 159). Clearly, a full account of the results of reckoning with GDR’s past through criminal law means more than listing trial results. To focus on trial results alone, that is, on the conviction or acquittal of suspects, places jural work in an economic frame of reference. Efficiency of justice becomes the primary criterion by which results, or the “rationality” of jural process, are evaluated. Such a framework may be useful in the domain of distributive justice, where outcomes most frequently involve material goods whose value can be clearly measured. But it is the wrong framework for retributive and corrective justice. Employing this logic for all types of justice claims, the political scientist Jon Elster (1992: 15–16) went so far as to argue that since “essentially everybody suffered under Communism,” and “because it is impossible to reach everybody, nobody should be punished and nobody compensated.” Surely, comprehensiveness and outcomes consistent with rational actor logic are not what criminal justice is about. Justice is about morality and the principle of legitimacy, which in turn rest not on efficiency but on various cultural standards. *The question is not whether criminal justice is efficient but whether it is effective in reckoning with a past.* It is important not to impose a single efficiency standard on justice systems, for the particular means by which effectiveness is measured var-

ies. I would think that most justice systems have never been particularly efficient, since in most places of the world most crimes are never solved, most suspected criminals go free, and most harmed individuals do not find remedies. Effectiveness – and democratic effectiveness in particular – on the other hand, is a culturally and temporally variable standard, and a matter for not speculative but empirical research. My argument has been that democratic effectiveness relies on the reiteration of particular standards of accountability. In the German case, have the criminal investigations and trials been efficacious?

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

Public reaction to the Professor Vogel trial and guilty verdict, especially of Western commentators who control most of the editorial positions in media in the new Germany, tended to follow a different logic. Many prominent Germans had always shown solidarity with Vogel. Former Chancellor Helmut Schmidt even visited Vogel while he sat in prison during the initial investigation. Following the trial, the voices of West German public figures reached near unanimity in support of Dr. Vogel. In a front page editorial in *Die Zeit*, for example, Robert Leicht (1996: 1) argued that the majority of those who claimed they had been extorted by Vogel were motivated by the desire for profit, by the chance to get their property back cheaply and that because many had given false testimo-

ny, they would now in turn be charged by the public prosecutor. "The great extortionist had been actually the GDR-State itself. ... [Vogel] was neither a resister nor a good Samaritan. He was a tool, not responsible for making the decisions. ... Is justice served," concluded Leicht rhetorically, "by punishing the hammer while the smith goes free?" In an editorial written for the German public, Donald Koblitz (1996: 5), former legal advisor for the U.S. State Department in Berlin, accused the "inexperienced and poorly counselled" public prosecutors of making "pseudo-legalistic and completely ahistorical accusations". He characterized the Vogel trial as a "comical episode" in the pursuit of justice, but he then dismissed this characterization, since Vogel was a "decent man" who had to sit six months in prison awaiting a trial for charges that were based on a "silly and mean-spirited version of history." In my own discussions with East Germans, I found that most either had no opinions or were very conflicted about what they actually thought of the verdict in Vogel's trial. Only those who, as petitioners to leave, had personally experienced Vogel's use of power, adamantly insisted on his guilt.

Even those who have long opposed this reckoning through criminal justice, such as the senior editor and owner of *Die Zeit*, Marion Gräfin Dönhoff (1995: 1), the political scientist Egon Bahr (1993), and the legal historian Uwe Wesel (1995), for example, had reservations about ignoring the feelings of the victims. On the whole, however, they concluded, as did the political scientist Claus Leggewie and legal scholar Horst Meier (1992: 71), in an otherwise extremely insightful article, "that the balance of GDR things must be in the first instance a societal business – meaning free of the state. ... Public discussion ... is always more valuable than all of the paltry results of criminal justice taken together." But, we must ask, why would a criminal trial preclude or in some way foreclose public discussion?

In pleading for an end to the criminal reckoning and a general amnesty, Wesel wrote, "The single serious argument against an amnesty is the feeling of the victims. But everyone must make a contribution to the new beginning. Also the victims." Instead, he proposed a law of

restitution "for which the sentencing of perpetrators is no substitute." He also insisted that the actual "reckoning with the past ... is the task of historians anyway, who are already at work. ... The Honecker trial has brought nothing new to light that was not already well-known" (1995: 3). Finally, he argued for an end to criminalization through an amnesty, drawing a parallel to the West German amnesty of Nazis in the 1950s, which, he claimed, was instrumental in the West German success story. The question he addresses but did not ask is: whose trust in the new West German law is he most concerned with, that of the perpetrators or the victims? Both groups are actually small in number. Regardless of with whom one identifies, it is unlikely that amnestying suspects before they are brought to trial, before there is any finding of innocence or admission of guilt, will contribute to coming to terms with the past.

What Wesel seems to confuse is the task of the historian – to bring something new to light, to make the known unknown – and the task of the justice system – to reestablish the dignity of the victim and to prevent further wrong-doing through the reiteration of principles of accountability. The latter task cannot be readily accomplished by historians whose (idealized) function is diligent research, the uncovering of new evidence, constructing of events and interpreting them in new frameworks. Rather, reestablishing dignity and principles of accountability would seem to require a process more similar to a criminal trial than to historical research, namely, a public participatory process, like that of Dr. Vogel's trial, where following an open hearing one draws a thick line between the victim and those responsible for the injustice. Moreover, laws of restitution, like Wesel proposes, invariably rely on monetary dispensations, so that again an economic framework is imposed on a jural solution. Jewish victims of the Holocaust who received monetary sums from the West German government in its *Wiedergutmachung* policy have by no means renounced the use of criminal justice to hold individuals accountable for criminal actions. A law of monetary restitution is desirable (and indeed, has already been passed) but not in itself sufficient for settling accounts. Individu-

als must also be held accountable for wrongdoing, and the state, I have been arguing, as the only institutional moral representative of the entire community, has an obligation here. The state's obligation is not only a hermeneutic one but also a performative one. Its primary concern is with the consequences of what it does for legitimating the principles of its rule.

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

In Romania, the Ceausescu couple and the Politburo on top served as the objects for internal purification, though in the first moments of euphoric reaction most European observers did not even notice that this sacrifice was accompanied by a scapegoating of Romanian Gypsies and Hungarians on the bottom. Partly through these substitute sacrifices the old power structure was actually preserved. It is unlikely that much will change with the victory of oppositional groups in the most recent Romanian election, since no political party made the idea of retribu-

tion an issue. In Russia, Chechnya was sacrificed, or the Chechens exteriorized, as a means to secure power back in Moscow, though the Russian leaders still want to control what they identify as external to them. In Yugoslavia, archenemies Croatia and Serbia united to sacrifice Bosnia and it appears they have largely succeeded. These regimes "secured" their rule not through the legitimate domination of the rule of law but in violent acts of exclusion and abjection of an internal other. Moreover, an active, non-elected clique of former perpetrators and victims directly incited and manipulated the violence. To be sure, the Croats and Serbs did not act alone but with the complicity of the international community, including the aid of irredentist populations in Europe and the United States. But if we focus solely on the role of the jural "transitions," in as much as the word applies to this situation, they were most frequently subordinated to strategic political operatives, which in turn were directed by former perpetrators who readily identified new scapegoats – the Bosnian Muslims, interethnic couples whom the ethnonationalists could treat as substitute victims.

In none of these states did former victims receive much recognition; there was little or no retributive justice and internal cleansing; accountability was shifted from the political center to some posited exterior, which was then sacrificed. My emphasis here on the lack of retributive justice and on jural process is not meant to deny the significance of other variables in generating the violence of different transitions. In Hungary, Slovenia, and to a large extent in Poland, some people claim no sacrifice was necessary since state form was already a "rule of law" and therefore the transformation was not from one type of regime to another but within the regime. This may be true. And, indeed, the relative inclusiveness of these regimes is to be applauded. But one should not overlook the reappearance of antisemitism in Poland, especially given its history of dealing with internal divisions through demarcation from its minorities, including a history of recurrent pogroms. And in Slovenia, state functionaries have had it easy escaping personal accountability and responsibility for their own

errors by pointing the finger at their “dangerous and barbarian” neighbors and former federal comrades in Serbia, Croatia, and Bosnia.

The political transformation in Germany since 1989 is a part of this political and psychological dynamic in the former East bloc. Reestablishing the dignity of victims required a prosecution of perpetrators among the old elite for their moral-legal wrongs. But since the state’s legitimacy is now tied to the principles of the rule of law, it must also, especially in the hours of their initial invocation, avoid criminalizing politically expedient substitutes. It must prosecute and punish actual wrongdoers, with the understanding that for a variety of political and procedural reasons it will not be able to punish them all. The old East German political elites, Professor Vogel included, do not fall into the category of substitute victims for they are being held accountable for what they actually did. Nothing more, nothing less. When, as has most frequently been the case, it is impossible to convict following the procedural protections of the principles of the rule of law, the new state has not thereby failed, for each trial must be viewed alongside other prosecutions. The major significance and efficacy trials, then, is not a guilty verdict. Rather, trials demonstrate through their performance the ongoing necessity of reiterating the state’s moral principles. Effective criminal law is not to be equated with efficient justice. *Effective criminal law establishes the state as a moral agent representing the entire community by reiterating the principles of responsibility and accountability for injustices as part of an attempt to reestablish the dignity of victims.*

That the German justice system has been effective is attested to by many other kinds of evidence, of which I will briefly elaborate three.³ All evidence will be circumstantial and symptomatic, for it is impossible to isolate retributive justice from all of the other variables contributing to establishing the state as a moral agent for the entire community. I am, however, claiming that a direct relationship exists between the use of retributive justice and lack of violence. My analysis must be tempered by the fact that we are less than a decade into the transformations of justice systems in the Ostblock states.

The effects of judicial efforts can and do also work as memories to be recovered long after the actual events. Such has been the effect of the Nuremberg Trials in Germany, which were largely rejected as efficacious during the 1950s but now are considered a milestone in establishing principles of accountability. They have had a longterm effect in Germany that few would have predicted five years after the trials.

Where, exactly, does one locate the situations in which retributive justice is received? Finding this location is a formidable task given that the primary descriptive evidence to which I am appealing is to the lack of violent demonstrations directed against one’s neighbors, the willingness to defer in social conflicts to the state’s courts and administrative bodies. On the surface, the major contrary evidence to be explained would be the significant increase in violence perpetrated against foreigners in both 1991 and 1992: more than 2,000 acts, including the bombing and burning of homes of asylum seekers and the 17 murders by right-wing groups, of which eight of the victims were foreigners. At that time, the Office of Constitutional Protection estimated that political parties of the radical right in eastern and western Germany had about 40,000 members, of whom 6,000 were ready to use violence. Equally if not more disturbing than these specific acts of murder was the acceptance, often extending to support, of this violence by a large number of German bystanders.

This violence quickly subsided, however, largely in response to a concerted effort by the state to investigate and isolate these perpetrators, by a legal clarification (largely symbolic) of the ambiguous and much abused political asylum laws (Germany has no official immigration policy), and by large numbers of individual citizens to identify with the victims and the groups to which they belonged. In the fall of 1992, several million East and West Germans demonstrated publicly their opposition to this violence, organizing peaceful marches and demanding that politicians and police take resolute action to stop the violence. Following these demonstrations, politicians and significant numbers of relatively apolitical citizens were spurred into action against this new wave of right-wing

violence. To be sure, this action alone did not stop the violence, for at the same time the police and other governmental institutions began taking seriously this violence. One may criticize the kinds of the various responses, but they are clear indications of a successful refusal to exteriorize a part of the social group. And they were in fact effective in preventing the violence from escalating. I am not arguing here that the use of retributive justice contributed directly to the lessening of violence against foreigners. I am claiming that the state's engagement in retributive justice in this same period helped instill trust in legality, and therefore established the space in which that part of the public opposed to other-directed violence could mobilize the larger public for social peace. Public opinion polls lend support to this contention. Public trust in the judiciary has steadily risen parallel to the use of retributive justice. Of all the institutions in the united Germany, eastern and western Germans trust the Constitutional Court the most, followed closely by the other courts and the police. Least trusted are the press and the political parties. In the middle and far below the judicial branch are the legislative branch and the military (Gabriel 1993:3–12).

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

cultural processes and events in Berlin exert a disproportionate influence on national developments, disproportionate in numbers, in the setting of cultural trends, and in media coverage.

A good illustration of the audience reception to retributive justice is the changing reaction to the fate of particular perpetrators and victims in the public imagination. Two of the most prominent public figures identified in 1989 as perpetrators, Erich Honecker and Alexander Schalck-Golodkowski, have by 1996 disappeared from public attention. In the public mind, both figures served as synecdoches for the entire regime. When in the summer of 1996 I asked people what they thought of Honecker, those in the East always mentioned embarrassment at having submitted to his petty rule, along with being the subjects of his political repression, a factor those in the West foregrounded in their comments. Nobody mentioned the base motives of hate, resentment, or revenge. By 1996, people who had expressed so much anger at Schalck-Golodkowski (who was acquitted in his first trial but awaits others) were now satisfied that he was still under a kind of house arrest and they were relatively unconcerned about his eventual fate. As to the voices of victims, in 1995 and 1996 the public esteem of Bärbel Bohley and other former dissidents grew, acclaimed by people across the political spectrum, as they were acknowledged to be speaking from a position of dignity based on past moral actions on the side of "the good". In other words, an actual closing of the books is occurring, a thick line is being drawn, but only through a ritual purification of the center.

This closing of the books does not imply that memory of the past will be accurate and continuous but merely increases the likelihood that future generations will be skeptical about attempts to use these memories to mobilize retaliations against other persons or groups. It therefore decreases the likelihood of retributive violence much as it affirms the principles of the rule of law. In the meantime, many reminders of this past will be erased. Not every memory of harm can or should be permanently memorialized. Honecker's house in the Wandlitz compound north of Berlin, for example, which I

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

In November 1994, ZERV published a small, slick, green bulletin of eleven pages. It is meant both to inform the public about the work ZERV is already doing and to involve citizens in the criminal justice process by asking for their help in investigating criminal activity. It lists a telephone number to call to obtain or provide information, which in the first 12 months following publication resulted in 150 callers (ZERV 1996: 8). For the bulletin's cover ZERV (1994) chose the slogan: "When victims are silent everything always begins again from the start" ("Wenn die Opfer schweigen, beginnt alles immer wieder von vorn"). Coming from the police, this reminder of the past repeating itself serves as a kind of self-critique (cf. Buruma 1994). It suggests that the current German reckoning with the injustices of a particular past through criminal law is a counter-experiment to the silence-induced terror which engulfed Germany, Japan, and Italy in the 1970s – a terrorism that can be understood as retaliation for the crimes committed by the Axis powers in World

War II! In other words, to avoid a cycle of retributive violence it may be wise to go through a longer phase of painful historical reckoning with the past, that is, of retributive justice in the present.

The Context of Retributive Justice

The current wave of retributive justice is part of a global ritual purification of the center of political regimes that seek democratic legitimacy. Of course, not all states, for example, Milosevic's Serbia or Castro's Cuba – seek democratic legitimacy. Those states which try but fail to achieve democratic political form, despite positive intentions, will likely feel compelled to turn to dictatorial means of assuring their domination. For them, retributive justice will probably not be justice at all but precisely "Vergeltungsjustiz," a governmental form of revenge? But for those that do seek democratic legitimacy, only with this purification can the "rule of law" be successfully invoked. Only with an appeal to principles embodied in public "rule by law" instead of personal "rule by men" can the new states in East-Central Europe establish themselves as legitimate democratic authorities. Further, this invocation is not a one-shot injection of justice into former state socialist settings, a return of errant governments to political normality; regime purification is necessarily a periodic process.

One of the most dramatic changes in regime dynamics following World War II has been in the nature of and balance between internal and external legitimacy. Since 1945, international law has had such dramatic effects on national law that it can no longer be seen as purely external to it. In the last several decades, one can also witness the introduction of alternative definitions of legal agency within international law, with shifts from the individual as part of a territory or people to a principle grounded in the dignity of the individual independent of citizenship. Especially following the signing of the Helsinki accord by East bloc states, the dignity principle of recognition had major internal effects on the legitimation dynamics within socialist states. These states became increasingly sensitive to their own citizens as well as to

world opinion, and to world political, legal, and economic regimes. This new density of interpenetration of global and local norms calls for an analysis which has been absent in a culturalist account – that foregrounds not cultural spatialization but the temporality of legal regimes and the legitimization of states.

As to the culturalist explanation, I might again offer Germany as an example that counters this logic. Even before the revolution in November 1989, the East German regime had begun to behave less as a self-contained unit or in a “bloc” mode with other Soviet satellite states, and to pay more attention to international legal norms. The peaceful transfer of power within the regime can at least partly be attributed to a growing respect for the principles of “the rule of law”. And after the dissolution of the state in October 1990, jural reform, while occurring in fully chaotic circumstances, went nonetheless relatively peacefully. Contrary to the myth of the vengeful German judiciary, German judges, both those from the West and retrained Eastern ones, have been extremely reluctant to agree with public prosecutors’ charges of regime criminality. The most successful prosecutions have not been for typical or “normal” forms of wrongdoing but for excesses in the performance of public duties. In the trials of border guards, for example, even though shooting was nominally justified under GDR law, those whose action was so intrinsically heinous that no positive law could be invoked to vindicate it were nonetheless convicted. In those cases, judges appeared to rely on the famous Radbruch formula, that positive law must yield to a higher law when the contradiction between positive law and justice reaches an “unbearable proportion.” This justified a prosecution for excess without violating the principle against retroactive application of the law. While proving excess happened to be easier for clearly defined and identifiable crimes, like embezzlement, than for political oppression, or spying, or restricting the freedom of movement of citizens, the post-unity judiciary was extremely wary of sentencing “substitute victims,” or of holding “small fish” accountable while letting the “big ones” go free. In this, by contrast to the judiciaries in both German states follow-

ing World War II, I think they have been successful.

Although the German use of law to settle accounts has happened under the singular condition of unity with another state and has been of an unusually large scale, it still must be situated within both East-Central European invocation of the rule of law and the global movement for retributive justice. The transformations from state socialism to democratic regimes presents us with a “diagnostic event” (Moore 1994: 365) an appropriate site to examine the question: what is peculiar about the invocation of liability in democratic regimes? Do they require a specific form of accountability? What the eastern German transformation shares with the other East-Central European ones is a dominant concern with the invocation of principles of accountability which socialist regimes had rejected and which are central to democratic regimes. For eastern Germany this invocation is necessary to establish the state as a moral authority with a monopoly on the legitimate use of violence. What it shares with the global movement and therefore with West Germany, Western Europe, and the United States is a need to reaffirm these principles through a kind of ritual purification intrinsic to democratic regimes. In other words, the mole must search for whodunnit.

I have made two theoretical assumptions which, due to the short period of transformation examined here, approximately five years, cannot be demonstrated. First, invocation of the principles will never be final, for these principles must be continually reiterated as part of a process where accountability is made central to the sphere of the political. This “political,” in turn, is culturally and historically variable. Because human memory of injustice is selective and has no natural end, the invocation must be seen as a temporal process which also will never end. Consequently, the invocation of the rule of law in each of the East-Central European states, and in eastern Germany, has its own timeline and trajectory (depending on e.g., institutional arrangements, the role of historical memory in social processes, the perceived extent of wrongdoing). At the same time, these states are also very much interconnected as part of a global

system of nation-states; each is striving to invoke the same set of jural principles to obtain internal and external legitimation. This means that any analysis must balance a universalism about the process of invocation with a relativism about the specific cultural details of installation. Whereas the process of invocation is universal, the chronology, institutional arrangements, and practices involved are case-specific.

Second, although both criminals and victims are culturally and historically variable categories, which in periods of intensive change can easily switch places, it will nonetheless be necessary in a legal regime of the rule of law type to reaffirm the distinction between the two. This is necessary both to reaffirm the possibility of the community to perform justice and to make possible the forgetting of injury. Without this reaffirmation and forgetting, no moral authority, especially that of a democratic state, is realizable.

My own argument about the principles of the rule of law has been both descriptive and prescriptive. Not only do regimes transform in different ways, but some states are transforming better than others. Better because they are more successful at establishing themselves as legitimate moral authorities that provide the possibility of justice. Better because it is more likely that those political communities which invoke the principles of the rule of law will not disintegrate into cycles of violence. What is the key to such a transformation, which, I repeat, has no endstation, but requires intermittent ritual purification of the political center? *The key is the state's assumption of accountability for retributive justice*: rectifying past injuries through prosecution of wrongdoers and restoration of the dignity of victims. This means neither that the criminal justice system is the sole arbiter of all conflict nor that it will eliminate all violence and wrongdoing. Instead its legitimacy, if tied to a democratic political form, must be based on a relocation of accountability in the center of the regime itself – no displacement to the periphery, no scapegoating, no substitute victims – through periodic ritual purification of wrongdoers. Hence my prescriptive conclusion: the longterm legitimacy of democratic states, to the extent states in East-

Central Europe take this form, will rest centrally on belief in the morality expressed by the principles of the rule of law.

Although I have focused on the use of retributive justice in democratic states, my conclusions are equally relevant to non-democratic regimes. By extension, my argument would predict that trials to correct wrongdoing perpetrated by the “center” in monarchies and dictatorial states will often be counter-productive, leading not to justice, but to cycles of revenge. If political regimes are not founded on principles of accountability, their legal systems will tend to function as arms of the executive branch of government, violating one of the fundamental principles of the rule of law. Without formal separation of the executive and judicial and guarantees of the independence of the judiciary, jural systems will most likely be used to harass opponents of the regime. The wrong people will be rewarded, the wrong people punished. Such injustices will delegitimize the political regimes which fail to invoke the principles of the rule of law, and some groups of people will likely feel compelled to use their own devices to seek substitute victims. The dynamics I describe are becoming commonplace; lacking a higher authority which one can trust, the current investigations and trials in Rwanda, Burundi, and Nigeria, for example, will probably turn into political farces. Leaders will find substitute victims, aggrieved parties will perform acts of vengeance, possibly turning to forms of modern terrorism. In Bosnia-Herzegovina, retributive justice has thus far precisely been absent, despite the presence of an international force that is to effect a transformation in the legal and political culture. If there is no legal retribution in Bosnia-Herzegovina, it is likely that injured parties will pass on to their children a sense of obligation to seek personal revenge. I am hopeful that these comparisons will provide new directions for descriptive and theoretical work on legal systems. Moreover, perhaps the insights I present here will contribute to the global invocation of the principles of the rule of law.

Notes

Most of this article is drawn from *Settling Accounts: Violence, Justice, and Accountability in Postsocialist States* (see Borneman 1997). I wish to thank the National Council on Soviet and East European Research for major travel and research support from 1992–94, and the Fulbright Foundation for a research/teaching grant in Berlin in 1994–95. Also, I am grateful for support from the Wenner-Gren Foundation, a ACI.S-DAAD grant for German-American cooperation, a MacArthur Foundation grant to Cornell University's Peace Studies Program, and Cornell University's Institute for European Studies. Much of this article was written while at the Rockefeller Foundation Bellagio Center, which I thank for their incredible hospitality. Among the people I wish to thank, most of all I am indebted to Stefan Senders for discussions and criticism, to Jack Skarbinski for research assistance, to Michael Weck and Professor Iona Stolpe for indispensable support and criticism in different stages of the research and to Thomas Hauschild for important corrections.

I am also grateful for the opportunity to present parts of this material first in 1996 at the American Anthropological Meetings in a panel in honor of Sally Falk Moore, then in talks at Stockholm University, the University of Bergen, the University of Oslo, the University of Copenhagen, the Queen's University of Belfast, the University of Hannover, the University of Texas at Austin, Cornell University, the University of Michigan, and Humboldt University in Berlin. Lastly, my debts to all those jural and political officials in Germany for interviews and materials are too numerous to list, as are those to friends in Berlin who listened to my ramblings and answered my questions. I thank them all.

1. Much of the information presented here comes from an interview conducted on June 15, 1993, with Herr Grollnitz, Chair of the Rehabilitationskommission des Rundfunk und Fernsehen der DDR, the Commission of Vindication of the former state television and radio, the last acting commission of this sort in the former GDR.
2. Calculating accurately the number of potential victims of injustices in the Russian Occupied Zone/GDR is of course impossible, but they number in the hundreds of thousands. Estimates of the number of individuals who disappeared, were deported, or given prison sentences for political reasons between 1945 and 1990, to name merely the most severe forms of victimization, range from 400,000 to 500,000 (Schwanitz 1991: 33; Weber 1991: 41, 43, 45). By February 1991, petitions for legal rehabilitation in Eastern Germany numbered 40,000 (Göhler 1991: 29–30).
3. Many other factors which have contributed to the lack of violence in the transformation of state form in Germany include. Above all, the well-developed German social welfare system cushioned the diffi-

cult economic transitions. Hence despite displacing more than half of the workforce in the East and creating unemployment of from 12 to 40 percent, depending on how it is calculated, the standard-of-living of the vast majority of people in the East has actually improved. German democratic political institutions and the political party system also play an important role. Even the Party of Democratic Socialism, the renamed Socialist Unity Party, has channeled the voices of those who have felt disenfranchised into the institutional structures of the West German state. Finally, there are the non-jural institutions which have taken up the task of reckoning with the GDR's past, especially historians through the investigations of the parliamentary Enquete-Kommission, private citizens who have read Stasi documents about their own pasts made available through the Gauck Authority, and a proliferation of newspaper, television, and public forums for the discussion of discontents.

References

- Bahr, Egon 1993: Drei Jahre nach der Einheit – Für oder gegen eine Amnestie. *Neue Justiz* 12: 537–540.
- Bönker, Frank and Claus Offe 1994: Die moralische Rechtfertigung der Restitution des Eigentums. *Leviathan* 3: 318–352.
- Borneman, John 1992: *Belonging in the Two Berlins: Kin, State, Nation*. New York.
- Borneman, John 1997: *Settling Accounts: Violence, Justice, and Accountability in Postsocialist States*. Princeton.
- Buruma, Ian 1994: *The Wages of Guilt*. New York: Farrar, Straus, and Giroux.
- Dönhoff, Marion Gräfin 1995: Gerechtigkeit ist nicht Vergeltung. In: *Die Zeit*: January 6 1995.
- Elster, Jon 1992: On Doing What One Can. In: *East European Constitutional Review*: 15–17.
- Fuller, Lon 1969: *The Morality of Law*. New Haven: Yale University Press.
- Gabriel, Oscar 1993: Institutionenvertrauen im vereinigten Deutschland. In: *Aus Politik und Zeitgeschichte*: 3–12.
- Girard, René 1977: *Violence and the Sacred*. Baltimore.
- Göhler, Reinhard 1991: Die Verpflichtung von Staat und Gesellschaft gegenüber den Opfern der kommunistischen Gewaltherrschaft. In: *Gerechtigkeit den Opfer der kommunistischen Diktatur*: 27–32.
- Grasemann, Hans-Jürgen 1991: Der Beitrag der zentralen Erfassungsstelle Salzgitter zur Strafverfolgung – Beispiele menschlicher Schicksale. In: *Die Kriminelle Herrschaftssicherung des kommunistischen Regimes der DDR, 3. Bautzen Forum in Bautzen*, edited by Friedrich Ebert Stiftung, Leipzig, 55–65.
- Hampton, Jean 1992: Correcting Harms Versus Righting Wrongs: The Goal of Retribution. In: *UCLA Law Review* 29: 1659–1702.

- Kittlaus, Manfred 1993: *Bericht zum Aufbau der Dienststelle ZERV*. Berlin.
- Kittlaus, Manfred 1994: *Die Akten müssen offenbleiben, die Strafverfolgung ist Verpflichtung gegenüber den nachfolgenden Generation*. Leipzig.
- Koblitz, Donald 1996: Keine Elster, sondern eine Nachtigall. In: *Die Zeit*: January 19, 1996, 5.
- Leggewie, Claus and Horst Meier 1992: Zum Auftakt ein Schlußstrich? Das Bewältigungswerk "Vergangenheit Ost" und der Rechtsstaat. In: *Wir Kollaborateure*. Hamburg: 51–79. (Ed. Cora Stephan.) Hamburg: Rowohlt.
- Leicht, Robert 1996: Auf der Grenze. In: *Die Zeit*: January 19, 1.
- Limbach, Jutta 1993: Justizpolitik in Berlin nach der Einheit. *Berliner Anwaltsblatt* 4: 97–101.
- MacCormick, Neil 1984: Der Rechtsstaat und die rule of law. *Juristenzeitung* 39: 65–70.
- Moore, Sally Falk 1978: *Law As Process: An Anthropological Approach*. Boston.
- Moore, Sally Falk 1986: *Social Facts and Fabrications: "Customary Law" on Kilimanjaro, 1880–1980*. Cambridge.
- Moore, Sally Falk 1994: The Ethnography of the Present and the Analysis of Process. In: *Assessing Cultural Anthropology*, ed. Robert Borofsky. New York: McGraw-Hill, Inc.
- Moore, Sally Falk 1995: Imperfect Communications. In: *Understanding Disputes: The Politics of Argument*, ed Pat Caplon. Oxford: Berg.
- Offe, Claus 1992: Coming to Terms with Past Injustice. *Archives europeenne de sociologie* 32: 195–201.
- Offe, Claus and Frank Bönker 1993: *The Morality of Restitution. Considerations on Some Normative Questions Raised by the Transition to a Private Economy*. Draft Paper, Juni 18–19. In: *Restitution in Eastern Europe in Budapest, Hungary*.
- Rieff, David 1995: *Slaughterhouse: Bosnia and the Failure of the West*. New York: Touchstone, 1995.
- Rüfner, A. 1995: Die Rehabilitierung der Opfer des SED-Unrechtsgrimes. In: *Juristische Bewältigung des kommunistischen Unrechts in Osteuropa und Deutschland*.
- Schaeffgen, Christoph 1994: Die Strafverfolgung von Regierungskriminalität der DDR – Probleme, Ergebnisse, Perspektiven. In: *Recht und Politik* 3: 150–160.
- Schwanitz, Rolf 1991: Rehabilitierung und Entschädigung der Opfer – Auftrag an den Gesetzgeber. In: *Gerechtigkeit den Opfer der kommunistischen Diktatur*: 33–40.
- Senatsverwaltung für Justiz 1966: *Aktueller Stand und Bewältigung der Regierungs- und Vereinigungskriminalität sowie des Justizunrechts-Jahresbericht*. Wiesbaden.
- Tagesspiegel, Der 1994: *Berliner Justiz zieht Bilanz*. October 1 1994, 10.
- Weber, Hermann 1991: Politische Verfolgung im kommunistischen Herrschaftssystem. In: *Gerechtigkeit den Opfer der kommunistischen Diktatur*: 41–45.
- Weber, Jürgen and Michael Piazzolo, ed. 1995: *Eine Diktatur vor Gericht*. Munich: Olzog Verlag.
- Wesel, Uwe 1995: Da lachen die sozialistischen Hühner. In: *Die Zeit*, January 21 1995, 2.
- ZERV. Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität 1993/1994/1995/1996: *Jahresbericht*. Berlin.