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CHILDREN OF A LESSER GOD: GDR LAWYERS IN POST-SOCIALIST GERMANY

Inga Markovits*

Historical events create their own vocabulary. One of the new words spawned by the collapse of socialism is “lustration”: the vetting process by which former socialist officials are examined for their involvement in perversions of justice under the old regimes and for their suitability to be employed by the new ones. East European countries have thrown themselves into the task with differing amounts of energy. Some countries, like Russia and Bulgaria, consumed with more urgent problems, barely have bothered. Others, like Hungary and the former Czechoslovakia, passed lustration statutes that promptly were attacked for violating constitutional principles that lustration indirectly was intended to promote. In Poland, legislators found it so difficult to agree on the goals and methods of the cleansing process that seven different drafts of lustration laws failed in parliament.¹ No other country tackled the job as thoroughly as Germany, where reunification on October 3,

* Friends of Joe Jamail Professor of Law, The University of Texas. Dr. jur. 1967, Freie Universität Berlin; LL.M. 1969, Yale. This essay is part of a larger research project on the rise and fall of socialist law in the GDR, reflected in everyday legal life in one East German town, in the work of its trial court, and in the experience of the court's staff and its users. I am very grateful to the German Volkswagen-Stiftung without whose generous help I never could have embarked on this project, nor carried out the extensive fieldwork it required. I also owe thanks to the National Science Foundation: both for its support of a related study investigating changes in East German legal reasoning accompanying the collapse of socialism (Grant # SES - 9210575), and for the financial help that enabled me to spend a rewarding year at the Center for Advanced Study in the Behavioral Sciences in Stanford (Grant # SES - 9022192), where the present paper was completed. My stay at the Center was also supported by a Faculty Research Assignment from the University of Texas whose help is gratefully acknowledged.

All personal quotes in this paper stem from interviews connected with these two projects. To protect the anonymity of the people I write about, I have renamed my town Lüritz and have omitted all attributions of quotations that might reveal the identity of the speaker. My empirical data, unless otherwise attributed, are based either on court files from the Lüritz District Court or on records concerning the Lüritz court or concerning other matters of judicial administration that originally were kept by the former GDR Ministry of Justice and now are on file with the Bundesarchiv in Potsdam.

1990, brought a sweeping exchange of bureaucratic elites on the territory of the former German Democratic Republic (GDR).

You might say that Germany's lustration policy was shaped and facilitated by the Berlin Wall. Though it had tumbled down, the Wall still lived in people's memory. It still could serve to draw the line between those to be vetted and those who were to do the vetting and thus helped to avoid the conundrum plaguing other East European countries, where guilty and innocent, purged and purgers, were harder to distinguish. And unlike elsewhere in Eastern Europe, posts from which tainted officials had been ousted in East Germany could be filled with applicants from the West, so that former Party hacks did not have to be left in office just for want of a replacement. The Wall, and its continued presence in people's minds, made the lustration process in Germany more ruthless, but arguably also more principled, than elsewhere since decisions whether to remove or not to remove someone from office could be made by outsiders rather than by those themselves entangled in events, and could be reached without concern for such mundane matters as the need to keep things going.

In this essay, I want to investigate German vetting policies by looking at one particular subgroup of examinees: GDR lawyers. In Germany, no other former socialist elite has been submitted to so thorough an ideological cleansing process as the legal profession. After reunification, all GDR judges and prosecutors hoping to remain in office had to undergo investigations that by March 1994 had left only 9.2% of their former numbers in permanent positions.² Virtually all East German law professors were removed from their university posts.³ More than 5000 attorneys in Germany's eastern half are currently being examined for

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2. My figure is based on the data provided by a 1994 inquiry by the East German law journal Neue Justiz of the justice administrations of the new East German states. See Übernahme ostdeutscher Richter und Staatsanwälte in den Justizdienst auf Lebenszeit, 48 NJ 266 (1994). The percentage of East Germans among Germany's judges is likely to have risen since then because not all readmitted East German judges and prosecutors, at the time of the inquiry in March 1994, had successfully completed their three-year trial program during which a candidate for the Bench does not yet have tenure. In 1989, the GDR employed 1493 judges and 1237 prosecutors. See Hubert Rottleuthner, Zur Steuerung der Justiz in der DDR, in STEUERUNG DER JUSTIZ IN DER DDR 28 (Hubert Rottleuthner ed., 1994). Of that total of 2730 officials, 1083, or 39.7%, were admitted into the nontenured trial stage. Übernahme ostdeutscher Richter und Staatsanwälte in den Justizdienst auf Lebenszeit, supra, at 266. Of these, by March 1, 1994, 251 had obtained tenure. Even with new probationary judges receiving tenure after March 1, 1994, I would not expect the percentage of formerly socialist judges in East Germany to more than double.

former contacts with the State Security apparatus (Stasi)\(^4\) and other transgressions.\(^5\) And of all prosecutions for "government crimes" committed by socialist officials, between 75% and 80% are directed at former judges and prosecutors accused of miscarriages of justice.\(^6\)

It makes sense for the new inquisitors to concentrate their efforts on lawyers. Essentially, the move from socialism to capitalism can be described as a change in legal paradigms: from Plan to contract; from criminal law, ensuring citizens' compliance, to constitutional law, protecting their rights; from Party rule to the rule of law. Those functionaries who most intimately were involved in the socialist administration of justice therefore also would seem least suitable to hold office in the new Rechtsstaat. Still, it is ironic that Germany now, at the supposedly festive reunion of its estranged halves, should choose a vetting policy far more rigorous than at previous ideological turnabouts in its history. In 1918, the Weimar Republic absorbed the judiciary of imperial Germany without visible qualms: although judges were offered retirement at full pay if they could not, in good conscience, switch their loyalty from a monarchy to a democracy, only 0.15% made use of the offer.\(^7\) Hitler, too (although he called lawyers "the perfect nincompoops"\(^8\)), did not get rid of the legal professionals he inherited from the Weimar Republic; on the contrary, he found bourgeois judges and prosecutors willing and useful accomplices in the creation of what Carl Schmitt called "the national-socialist Rechtsstaat."\(^9\) Nor did the West Germans, for their part, dismiss the Third Reich judiciary when in 1949 they set out to establish the rule of law. Turning their backs on earlier Allied at-

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4. *Stasi* stands for *Ministerium für Staatssicherheit* (Ministry for State Security), which employed an army of secret informers who kept tabs on the population.


6. The estimate is provided by M. Lemke, *Stand der Aufarbeitung von DDR-Unrecht durch die Strafjustiz*, 49 NJ 237, 238 (1995). Lemke reports that in 1995, Berlin prosecutors alone were investigating about 7,000 suspected cases of Rechtsbeugung (literally, "bending the law") by GDR judges and prosecutors. Only very few of the prosecutions have led to convictions.


tempts at de-nazifying the Western Zones’ administration of justice, they soon began to reemploy former Nazi judges and prosecutors, and by 1951, the so-called “Article 131 Statute” had settled for good the question left open by the Basic Law — what to do about Nazi public servants — by providing for their almost complete reintegration. Only the East German Communists drummed out the lawyers they, in turn, had inherited from the Nazis. While on May 8, 1945, about 80% of all judges in the Soviet Occupation Zone had been members of Hitler’s NSDAP, already by December 1945, vetting campaigns had reduced that percentage to 22%. By the end of 1950, 63% of East German judges and 89% of East German prosecutors, their ranks by now almost completely purged of ex-Nazis, were instead members of East Germany’s Communist Party, the SED.

Are the Germans getting it right this time? Would the integration of socialist legal professionals into East German public life indeed frustrate its renewal by obstructing the creation of a rule of law, which the integration of Nazi lawyers did not do in the case of the West German Federal Republic, or by preventing a reconciliation with the past, which the West German absorption of Nazi lawyers may well have done? I will try to answer this question by looking at East German law and lawyers from the perspective of everyday socialist life. Much of what I will say in the following pages is based on court files and interviews from one small East German town that I shall call Lüritz: a county seat with about 55,000 inhabitants and a hinterland of villages and agricultural collectives. Despite its size and location, Lüritz was no backwater: it had a busy port, a large shipyard, several important factories, an engineering academy, a sizable Soviet garrison, and, as the major town of the district, a Kreisgericht (District Court), which in 1988 employed five judges and handled an annual load of about 1000 cases.

While my Lüritz findings do not provide a random sample of legal data on the GDR, we need not worry that they misdescribe everyday practice. East German policy put such a high premium on the “uniformity of the law” that great efforts were made to standardize judicial output across the entire country. Local judicial statistics were reported constantly to Berlin, even minor departures from the national average

10. See MÜLLER, supra note 7, at 208.
12. SED stands for Sozialistische Einheitspartei Deutschlands (Socialist Unity Party), the East German Communist Party. See generally HILDE BENJAMIN ET AL., ZUR GESCHICHTE DER RECHTSPFLEGE DER DDR 1949-1961, at 66 (1980).
were commented on by superior courts and required explanation, and local case law deviating from the norm was brought quickly back into line. But my Lüritz data, though most likely typical, are incomplete: they do not cover some of the most egregious miscarriages of justice that Westerners expect to find everywhere in socialist legal systems and that in East Germany happened primarily in certain settings. In Lüritz, as elsewhere in the GDR, politically touchy offenses were not investigated by the regular police but by State Security and were not prosecuted before the local court but in the regional capital; in serious cases, before the second instance Regional Court (Bezirksgericht); in lesser cases, before the capital’s own and carefully staffed District Court. Political prisoners were detained in Stasi-prisons, again in the regional capital. What qualified as a “political” case would be determined by the regional prosecutor or the Regional Court director and changed over time. While in the second half of the 1980s, attempts to “flee the Republic,” for example, appeared so ordinary that most cases were tried locally, even minor acts of civic defiance, such as placing a postcard of Rosa Luxemburg with her famous “Freedom is always the freedom of those who think differently” into one’s window, were considered threatening enough to be dealt with in the regional capital by judges and prosecutors specializing in such cases.

Defendants tried before these special judges and panels — the “Ia-panels” — did not on that account alone receive harsher sentences than those tried locally. Someone caught while attempting to cross the border, for example, had to reckon with a much more severe penalty handed down by a Lüritz judge than a Rosa Luxemburg fan would receive in the regional capital. In fact, the group of defendants whose penalties, in Western eyes, were most out of proportion to their actual deeds — people accused of asocial and work-shy behavior, who often received lengthy prison sentences — in East German terms were not political offenders at all and routinely were tried before local courts. Of course, we would consider all these “offenses” political and would be

13. The regional court, upon request of either the regional prosecutor or the court’s own director, could assume jurisdiction over all criminal, civil, family, and labor law cases “if the significance, consequences or implications” of the case so warranted. Gerichtsverfassungsgesetz (Court Organization Act) of Sept. 27, 1974, § 30, ¶ 1, GESETZBLATT DER DDR, TEIL I [GB1. I] 457 (G.D.R.)

14. Under § 249 of the STRAFGESETZBUCH [StGB] (Criminal Code) of the GDR, “infringements of public order and security through asocial behavior” — mostly persistent refusal of employment combined with petty property offenses and/or violations of child support obligations — could be punished with up to five years in prison. In Lüritz, in 1979, the average penalty under § 249 was 18 months in prison. By comparison, the overall average penalty, including sentences under § 249, was eight months in prison.
right to expect that, by our standards, political defendants were treated more harshly by East German criminal law than others were. But whether that treatment was meted out by a "Ia" judge or by his local district court colleague depended largely on the perceived need for secrecy in these cases. "Embarrassing" offenses (and that could include anything from treason to writing a letter to a West German radio station) went to the regional capital. "Ordinary" transgressions were dealt with at home.

My Lüritz data thus exclude many of those incidents, whether minor or grave, that East German authorities were particularly eager to hide from Western view. But it must be remembered that they were also hidden from East German eyes. Ordinary citizens would learn of these incidents only through rumor. Ordinary judges or prosecutors would not be involved in their adjudication. Ordinary lawyers would, as a rule, not have "political" clients: the right to represent defendants before "Ia" panels was reserved to a small group of specially selected attorneys in which no Lüritz lawyer ever was included. And ordinary defendants were different from those whose political reticence would cause them to appear before a "Ia" judge in the regional capital. Most Lüritz defendants belonged to the grumpy and reluctantly loyal majority in the GDR rather than to that tiny group of dissenters that only in the last few months and weeks of the GDR's existence reached any noticeable proportions.

By drawing on Lüritz files and on interviews with Lüritz officials and citizens for my portrait of socialist legal professionals, I thus draw on legal experiences shared by most inhabitants of the GDR and should arrive at a more realistic likeness than those studies of socialist law and lawyers that take their cues only from the most visible and most outrageous socialist perversions of justice. How did East German jurists adapt to the judicial system they worked with? What hopes and fears, what instincts and habits were nurtured in their day-to-day legal lives?

We cannot determine the proper place for former GDR lawyers in the capitalist present unless we know something about their socialist past. So our first question should be: who were these East German lawyers?

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Unlike Western lawyers, who are jacks-of-all-trades and are present wherever power and influence is wielded in capitalist countries, East German lawyers (like those of other East European states) were

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15. See Markovits, supra note 3, at 38.
not generalists, but trained to be specialists. After a common start, East German law students were divided into two subgroups: future judges, attorneys and prosecutors followed the "justice" curriculum, while those meant to serve as legal counsel to the state-owned economy (Justiziare) followed the "economics" curriculum. Their specialization was reinforced by their physical segregation: future judges and attorneys were trained at the Humboldt University in Berlin, future economic lawyers at the universities of Halle and Leipzig, and future prosecutors in Jena. Both curricula shared a heavy dose of ideological training: about one-third of total class hours. The more traditional law courses focused on doctrine rather than practice, with far more time spent on black-letter law than on clinical exercises. At least in later years, politically touchy subjects (such as crimes against the state) tended either to be glossed over or to be taught by special instructors brought in from the Stasi-Academy in Potsdam-Eiche. The segregation of political academics from ordinary professors encouraged a feeling of intellectual respectability among law teachers proper.

On the whole, East German legal training was job-oriented rather than scholarly. Only a few authorized law books — one in each field — served as teaching texts: students were not to be confused with a multitude of sources and views. Studies were highly structured, with many classes shared by students grouped by year of entry or common seminar attendance. Feelings of collectivity were strengthened by students' accommodation in common residence halls, by their universal membership in the Free German Youth movement and their almost universal membership in the Communist Party, and by a superior teacher-student ratio than in West German universities, which allowed for close and often friendly contacts between students and instructors. All in all, the system was geared to produce reliable, cooperative, unselfish technocrats, trained in the application of state rules to that particular area of public endeavor for which they had specialized. Unlike capitalist lawyers, East German lawyers were not preoccupied with processes but with state-defined outcomes.

Not surprisingly, as a professional group, they looked much more modest than their self-assured Western counterparts. East German law graduates were younger than those coming from West German universities: law studies lasted four years, but even with the obligatory military service or, for women, some sort of production work prior to university

entry, one could be a judge or prosecutor by age 24. The GDR legal profession had many more female members than in the West: just over half of the East German judiciary, for example, was made up of women. Lawyers were much more likely to be of working-class background than in the West, even though the official goal of proportional representation of all social classes in the judiciary was eventually abandoned and the term “class-background” could be subject to manipulation. And they were far less affluent than in the Federal Republic of Germany (FRG): judges and prosecutors would make between DM 1400 and DM 1600 (about $1000) a month before taxes, counsel to state-owned enterprises somewhat more, and all three groups considerably less than electricians or plumbers. With the exception of the attorneys (who were supposed to join some party though not necessarily the SED), virtually all jurists were Party members. Unlike West German judges who claim as part of their judicial independence the right to come and go to work as they please, East German judges and prosecutors had fixed working hours and were expected to remain in their offices. They were not allowed to travel to the West, not allowed to have “West contacts” even by mail, not allowed to watch Western television, and many of them, if you ask them today, will tell you that they followed these rules almost until the end.

Only East German attorneys occasionally showed some of the features we usually associate with capitalist lawyers. Maybe they were a little more aggressive, showing a little more freewheeling flair than their state-employed colleagues. Their group contained far fewer women than the three other subgroups of the East German legal profession and probably for reasons familiar to Western women: because, as one male lawyer suggested to me with a knowing smile, “women and mothers were not quite up to the pressures of success.” Attorneys certainly were the biggest earners among East German lawyers. But even they made most of their money in that area of law that in the West

17. On the feminization of the GDR’s legal profession and its continued impact in the new East German states, see Gisela Shaw, Juristinnen in den neuen Bundesländern, 15 ZEITSCHRIFT FÜR RECHTSZOLOGIE 191 (1994).


20. In 1980, 18.4% of all East German attorneys were women. See Hubert Rottleuthner, Das Ende der Fassadenforschung: Recht in der DDR (Teil 1), 15 ZEITSCHRIFT FÜR RECHTSZOLOGIE 208, 236 (1994).
tends to be rather low-status: divorce law. It says something about the socialist legal profession if the same reason (women and children make unimpressive clients) that in the West contributes to the low status of family law in the East ensured the legal vitality of this kind of work: private quarrels between husbands and wives were far enough removed from issues of state importance to allow a lawyer the unabashed use of the tricks of his trade. Other East German legal professionals, by the way, would occasionally complain about the attorneys' unseemly interest in money, and I don't think that it was only envy that caused them to gripe: they found the self-absorbed hunting for profit morally offensive.

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How useful were socialist lawyers to the state or their clients? Let us begin with the judges. From its earliest days, adjudication in the GDR was seen as an exercise in political authority. Judges were functionaries rather than watchmen, aligned with and dependent upon the state rather than charged to supervise its activities. Clashes between individual and government were not considered proper subjects for judicial inquiry. The law should not stand between the socialist state and its citizens. Almost until the end, East German law thus knew no judicial review of administrative decisions, and when in December 1988, a half-hearted reform finally introduced toothless review in a limited number of cases, the new law carefully avoided any confrontation between citizen and government in the courtroom and defined the administration's role in the proceedings not as that of a "party" but only as that of a (supposedly aloof and benevolent) "participant." As in other East European states, East German citizens could lodge informal complaints against their government and did so frequently and persistently. But the complaint process involved neither judges nor attorneys and was governed primarily by internal rules — a sometimes promising but essentially "lawless" process.

Even in situations in which East German citizens could sue the state — namely, in its proprietary role as landlord, employer, or pro-


vider of sales and services — they rarely did so. In the 1980s, only about seven percent of the civil law suits in the Lüritz District Court involved cases in which a citizen took some state-run store, trade organization, or the like to court. Most private litigation in the GDR was between citizens.24 And if East German citizens sued each other, a large proportion of cases would involve disputes over objects or objectionable types of behavior rather than money:25 personal quarrels between people living too close for comfort. In labor law, the vast majority of cases was not, as in the West, brought by employees against their employers but by employers against their negligent or undisciplined employees. In these suits, socialist managers would not look for financial redress but would seek to impress proper standards of a socialist work ethic upon the defendant and his or her fellow employees.26

Compared to private litigation in capitalist countries, which mostly turns on money, East German civil litigation had lost much of its Midas touch. Instead, it concerned itself with social and interpersonal relationships. Accordingly, East German judges would focus not so much on the efficient processing of private claims as on education and peacekeeping. They were expected to investigate thoroughly the social context of disputes and could do so at their own initiative. Even hearings in minor civil cases, by West German standards, took very long: between one-half and one-and-one-half hours. Criminal cases might take even longer. “We started out with the primordial swamp,” a judge once told me, by which she meant: we investigated a defendant’s entire social career beginning from childhood. Even when dealing with the more unruly children of the system such as fugitives or people accused of “work-shy behavior,” East German judges primarily seem to have seen themselves as educators and social workers.

In Bonn, Uwe-Jens Heuer, formerly a member of the GDR Academy of Sciences and now a deputy of the Party of Democratic Socialism (the SED’s successor party), once called the East German political system “eine Erziehungsdiktatur” (“a pedagogic dictatorship”), and

24. In 1982, 66.8% of all plaintiffs and 93.3% of all defendants in first instance civil law disputes in the GDR were citizens. See UNPUBLISHED JUDICIAL STATISTICS OF THE GDR, FIRST INSTANCE — CIVIL LAW 2 (1982). In Lüritz, in the same year, 70.8% of all civil law litigation took place between citizens.

25. In the Lüritz District Court, out of 154 civil lawsuits in 1982, 31% pursued the delivery or return of some object (e.g., apartment, garage, TV), 16% tried to induce certain kinds of behavior (e.g., primarily, to prevent undesirable behavior like noise, trespassing), and 53% asked for money (e.g., damages, rent payments, payment for sales or services).

GDR judges were very much the products of that system: authoritarian, didactic, strict towards the obstinate and willful, lenient towards the repentant and submissive, and, by Western standards, remarkably willing to assist the court's clients in their day-to-day troubles. Every Tuesday, during the court's "legal consultation" hours, judges gave free advice to countless citizens. They mediated between warring spouses or neighbors, helped track down debtors of alimony or support obligations and saw to it that they paid, made sure victims of crimes received compensation from their attackers, and always were available to collectives or social organizations in need of a speaker. As late as 1989, a Lüritz case file shows a judge not only securing overnight accommodation for an out-of-town plaintiff but even supplying him with the schedule of train connections that he had requested. Citizens expected such acts of practical assistance, and a responsible judge would not consider the tasks beneath her. They were part and parcel of her overall duties: to ensure order, peace, discipline and collective cohesion. Unlike our judges, whom we think of as detached umpires between competing individual interests, socialist judges were political functionaries committed to asserting the parental authority of the state.

Accordingly, judges in the GDR differed far less from prosecutors than they would in a Western democracy. To us, judges are neutral, and prosecutors are partisan. Under socialism, both judges and prosecutors were partisan: not to one of the parties before them but to the Party and its goals. They were distinguished by divisions of labor but not by different philosophies. Both were meant to uncover social malfunctionings and to devise those responses most in line with the current political fashion. Both the court and the prosecutor's office belonged, together with the city's "Interior Department," the police, and the local Stasi branch, to the so-called "security-forces" of a district, whose heads met once a month to discuss current problems of law and order: recent border violations, a case of arson, a rise in juvenile delinquency, or any other incident or trend disquieting to public peace or the authorities. Both cooperated beyond their daily casework: if, for instance, in the course of a divorce trial, the court learned of the husband's long-time unemployment, it might inform the prosecutor of the culprit's likely "parasitism." And both judges and prosecutors belonged to the same Party group at the courthouse.

The cooperation sometimes led to rivalry. Both judges and prosecutors, sharing essentially similar tasks and the same superior (the Ministry of Justice), occasionally seem to have vied to show that each could do the job better than the other. In criminal cases, for instance, it was quite common for a judge to return the prosecutor's case "for further
investigation" — usually, to obtain some character reference from the defendant’s work collective or to require some other evidence of collective involvement. As far as I can tell from my Lüritz files, the practice never affected the eventual outcome of a case. But it showed the judge to be more conscientious about his job than his rival: one point chalked up for the judge, one gets the impression, in both protagonists’ common pursuit of carefully tailored social control. There is also some evidence of tensions between judges and the local police, and the court's occasional criticism of shoddy police work indirectly may have been aimed at the prosecutor’s office, which supervised it.

But if, essentially, judges and prosecutors were equals, the prosecutor was the more equal of the two. It was the prosecutor under whose leadership the district’s “security forces” would meet to discuss the law-and-order concerns in their constituency. It was the prosecutor who, as a rule, served as Party Secretary at the courthouse. The assignment reflected the higher political status of prosecutors and the ranking of criminal law (the prosecutor’s domain) over civil and family law (with which the prosecutor rarely would bother) in a legal system that saw law above all as an instrument of state control.

In most cases, therefore, judges would follow the prosecutor’s lead. Prosecutorial requests for arrest warrants, for example, almost always were honored by a judge. Since we have no overall statistics on this point, local figures must do. At the Lüritz District Court, for instance, between 1982 and 1985, out of 559 applications for arrest warrants by local prosecutors, only one was denied by a judge. Reports from other courts show similar judicial compliance with prosecutors’ requests. When, apparently alarmed by such figures, the GDR Ministry of Justice launched several campaigns in 1987 and 1988 to encourage judicial resistance to unwarranted requests for a defendant’s preliminary detention, the percentage of prosecutorial requests denied by Lüritz judges increased to no more than 4% in 1987 and 5% in 1988.

Judges showed similar deference to prosecutors in their sentencing practices. In Lüritz in the 1980s, criminal law judges followed the pros-

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27. The director of the District Court Stralsund, for instance, reported at a district court directors’ meeting in December 1987 that at his court “for the first time in years” a prosecutor’s request for an arrest warrant had been rejected.

28. To educate the judiciary about important policy developments and changes, the GDR Ministry of Justice or the Supreme Court would convene workshops and so-called “judges’ conferences,” at which representatives of the Ministry or the Court would spell out the policy in question and discuss its implications. One such conference dealing with arrest warrants and issues of preliminary detention was a conference of district court directors on February 9-12, 1988, in Fuhlendorf.
executor's penalty suggestions in about 90% of all cases. As one judge told me, he and his colleagues were instructed by the superior court not to deviate from the prosecutor's proposal if the deviation would amount to no more than three months in prison — the implication being that a mere three months was not enough to warrant public confrontation between two representatives of socialist state authority. But since it took some pluck to defy the prosecutor's request, any deviation by more than three months also required more than ordinary backbone. A former regional court judge, coming from one of the admittedly more exposed "Ia" panels that dealt with political offenses, once described to me the issue of whether to override the prosecutor's proposals in terms of a limited number of chips each judge had at his or her disposal. "You wanted to spend those chips very carefully," he said. As a result, most trials at which a judge departed from the prosecutor's suggested penalty resulted in only marginally different sentences. Complete acquittals were practically unheard of. If they deviated, judges often complied with the prosecutor's main request for punishment but differed on the fringes of a case: judges changed supplementary penalties (such as the obligation to work on community projects, for example), or, in the case of suspended sentences, altered the period of probation suggested by the prosecutor. Reading these cases today, one suspects that some of the deviations must have mattered more to the judge than to the defendant himself. Such small acts of judicial insubordination also may, at least in part, have been acts of self-assertion between two competitors: signaling the judge's claim to professional respect without seriously challenging the basic solidarity between two colleagues. I once asked an attorney to describe to me the relationship between judges and prosecutors in the GDR. "A scary alliance" were the words he chose.

Still, there were differences in emphasis. Both judges and prosecutors shared the pedagogical convictions driving a particular decision. But if a judge rejected the prosecutor's penalty demands, she usually would do so in favor of the defendant. As in the case of old-fashioned parents, the judge, more likely to be a woman in any event, was also more likely to play the role of the mother: stern, yes, but more willing to find redeeming qualities in the offspring and at times more forgiving than the rigid and authoritarian father.

Attorneys had to be outsiders in this family drama. The contrapuntal structure of Western procedure provides the defense counsel with a natural role and place: that of a counterweight to the prosecution. Formally, socialist procedure followed a similar pattern. Substantively, however, with judge and prosecutor firmly committed to the same so-
cial purposes, the defense had no logical foothold in the scenario and only could appeal to both disciplinarians' parental generosity.

Especially in criminal cases, an attorney's procedural position was weak. Lawyers were entitled to visit their clients in prison and to have access to the record only after the prosecution had officially submitted its case to the court and the court had "opened" the proceedings. During preliminary investigations, an arrested suspect could see his lawyer only if the prosecutor consented. By their own account, prosecutors were in no hurry to do so until their case had been thoroughly prepared. But even if she allowed a pretrial visit, a former prosecutor once told me, attorneys usually would be in no hurry to meet with their clients. Nor did potential clients themselves appear eager to seek legal help. There is evidence that, at least in the 1980s, suspects were told of their right to retain a lawyer (usually on the day following their arrest) when they were interrogated by an examining judge, who would record the prisoner's own version of events, perfunctorily investigate the reasons for detention, and almost always sanction it. On that occasion, suspects were also asked whom they wanted to be informed of their arrest. Most of those arrested in Lübitz named a relative. Many said: "No one." Nobody ever suggested that a lawyer be called.

The "right to make use of an attorney at every stage of the proceedings," even though it existed on the books, held no sway in socialist legal folklore. Had one ever suggested to them the need for Miranda-style warnings, most protagonists in the East German legal process probably would have thought the idea absurd. If the police got hold of you, good for them and tough luck for you. Judging by the suspects' own statements (attached to arrest warrants) and by the account of judges and prosecutors present in the process, most of those apprehended cooperated in their interrogation, conceded their deeds, admitted to the error of their ways, and hoped for the best. According to one prosecutor, fewer than 1% of the suspects refused to testify. My Lübitz files support that estimate. Although upon interrogation by the examining judge, suspects would correct police reports on factual issues ("I did not need to break into the apartment because the door was un-

29. See STRAFPROZESSORDNUNG [StPO] (Code of Criminal Procedure) § 64 (version of June 28, 1979), GBl. I 139 (G.D.R.).
30. See StPO § 126, ¶ 1 (1979), GB1. I 139.
31. See StPO § 61, ¶ 1 (1979), GB1. I 139.
32. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that a person in custody has to be advised by the police of his right to remain silent, to consult with an attorney, to have an attorney appointed for him if he cannot afford one, and to be warned that any of his statements might be used against him.
locked”), they just as likely would volunteer information on transgres­sions not yet uncovered by the police (“I also took a bicycle from the hallway”). As several judges told me: “The lying started only once a lawyer entered the stage.” But since lawyers were rare participants in the East German criminal process, most suspects confronted their inter­rogators with what appears to have been an honest mixture of fear, re­spect, trust, and the wish to unburden their chests.

Even once in court, East Germans would rarely use the services of an attorney. Under GDR procedure, representation by counsel was mandatory only in first-instance criminal trials before a regional court or in cases before the Supreme Court, that is, primarily in murder or treason cases. All other cases could be tried without a lawyer. There are no national figures on how many citizens chose representation any­way. Official GDR statistics, although very thorough on other issues, apparently considered the participation of legal counsel too insignificant to warrant registration. According to my own data, in 1979, 15.3% of all civil litigants and 5.6% of all criminal defendants in Lüritz had hired a lawyer to represent them. Unlike Westerners, who would consider le­gal help most indispensable in confrontations with as powerful an oppo­nent as the state, East Germans apparently found lawyers more useful in areas removed from state authority. Towards the end of the GDR, grow­ing disaffection with the system seems to have led its citizens to a greater appreciation of attorneys: by 1988, in Lüritz 21.1% of all civil parties and 16% of all criminal defendants were represented in court. But East German legal officials remained suspicious of attorneys until the very end. Although in all other criminal or civil cases judges could order representation for parties or defendants unable to represent them­selves effectively, they virtually never did so. Children and the handi­capped, who needed some representation though not necessarily by an attorney, almost always were assigned social workers rather than law­yers to assist them. “Who needs a lawyer anyway?” East German legal officials seem to have thought. Many of them remembered a slogan taught in law school: “The best attorney is the judge.”

33. See StPO § 63, ¶ 1 (1979), GBl. I 139.
34. See StPO § 63, ¶ 1 (1979), GBl. I 139 (stating that defense counsel should be appointed “if the issue requires it”); ZIVILPROZESSORDNUNG [ZPO] (Code of Civil Proce­dure) (1975), GBl. I 533 (G.D.R.) (stating that the court shall appoint a “procedural representative” for a minor or handicapped defendant without legal guardian, or for any party unable “to intelligibly participate in the proceedings”).
35. See StPO § 72 (1979), GBl. I 139.
36. Consider one example: a 1982 Lüritz case involving an appeal against a tort award resulting from a car accident. The appellant, an insolvent father of four children who at the time of the appeal was serving a prison sentence, asked for the assignment
Compare this attitude to GDR practices in labor litigation, where the representation of workers by union counsel or the participation of union or workplace delegates in the proceedings was common.\textsuperscript{37} But union representatives differed from lawyers in significant ways. Although they received some labor law training, they were neither legal professionals nor intellectuals. And instead of one-sided loyalty towards their clients, they owed loyalty to both the worker and the work collective. This ambiguity, confusing and suspicious to a Westerner, redeemed the work of union counsel in East German eyes. To socialists, attorneys in civil law cases represented private, and very likely egotistical, interests; worse yet, defense attorneys operated as apologists for offensive and self-seeking antisocial behavior. But labor law representatives embodied collective concern for what happened at the workplace and thus could speak up for their fellow worker without having to fear the disapproval of a legal system suspicious of all manifestations of self-interest. And they could also, as they frequently did, speak out against a worker-plaintiff or worker-defendant. No wonder that their participation in labor law cases was thought important enough to be recorded by East German judicial statistics.\textsuperscript{38}

A criminal defense counsel, by comparison, had to watch his steps. As one Lüritz lawyer described it, his “spectrum of possible options was narrow.” Asking for an acquittal was rare and could be a risky strategy. Demanding a milder sentence than suggested by the prosecution was common but frequently ineffective; some attorneys would not even try and instead simply seconded the prosecution’s proposal. We should not rush to condemn such strategies: as files occasionally show, the prosecutor too (swayed, perhaps, by the defense counsel’s presentation of the case?) may have intended to let the defendant off lightly. One 1988 decision of my Lüritz District Court, for instance, in which the defendant in a fraud case had been sentenced to nineteen months in prison because “both prosecutor and defense counsel agreed that only a significant deprivation of freedom could be expected to successfully re-

\textsuperscript{37} In 1982, out of 12,323 district court labor law proceedings in the GDR, 14% involved the participation of union counsel, 44% the participation of union representatives providing collective input into the deliberations, and 12% involved both union counsel and union representatives. See UNPUBLISHED JUDICIAL STATISTICS OF THE GDR — FIRST INSTANCE, LABOR LAW 24 (1982).

\textsuperscript{38} In 1982, attorneys were involved in 8% of all district court labor law cases. See id. Presumably, those data were of official interest, since attorneys were perceived as competitors to the more numerous, and ideologically favored, union representatives.
educate the offender,” was promptly quashed by the Regional Court and replaced with a thirty-month term: supposedly, the lower court had underestimated the gravity of the offense. The example shows how defense attorneys may have had to resort to devious tactics to undercut the severity of socialist criminal law without appearing to challenge its authority.

Often it was more promising to try to gain victories at the periphery of a case: for example, attack monetary sanctions slapped onto a criminal penalty. Defense counsel would routinely depict their clients in the rosiest light and dwell on their likely rehabilitation. But their main function, as several criminal lawyers have told me, was to offer “pastoral help”: cheer people up, serve as liaison between the defendant and his relatives, help with the domestic problems caused by someone’s arrest, provide a shoulder to lean on. Only in areas further removed from state authority like civil or family law — a lawyer’s main bread and butter in any event — could GDR lawyers officially display some of that argumentativeness and aggressiveness for which Western lawyers are famous and infamous.

Where does that leave us? With a legal profession that unlike its Western counterpart was not united by a common belief in individual autonomy, the legitimacy of conflict, the sanctity of procedure, or even by a common style. The East German legal profession showed little professional cohesion. Although judges and prosecutors cooperated during working hours, they rarely socialized. Attorneys not only did not privately interact with their colleagues from the courthouse, they even claim that such interaction was frowned upon by the Party. When I asked them about their circle of friends, many GDR jurists took care to point out that it did not include other legal professionals. Nor were East German lawyers held together by that common professional language that signals membership in a particular vocation and excludes outsiders from its interactions. There was no such language, no real “legalese” in the GDR: socialist law, intending to educate and to steer its addressees towards socially useful goals, had to remain simple and accessible. Lawyers’ briefs used the language of the common man. Judges and prosecutors were admonished constantly to make themselves understood by everyone in the courtroom. The participation of so many lay people in the East German legal process — members of social courts, lay assessors, representatives of the collective — reinforced the simple and straightforward quality of East German law-talk. It also helped to blur the line between lawyers and nonlawyers even further. “We were nothing special,” an East German judge once told me. So why search for special contacts with others equally unremarkable? Although virtually
all East German jurists belonged to the Vereinigung demokratischer Juristen der DDR ("Association of Democratic Lawyers"), membership seems to have existed mainly on paper. As one lawyer put it: "Oh, them; all they ever did was pass out red armbands." It was only after the Wende that professional association became meaningful to East German lawyers: today in Lüritz, attorneys, judges and prosecutors regularly convene over glasses of beer in a local restaurant, and attorneys will even travel out of town for meetings of the Bar Association.

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To summarize up to this point: the East German legal profession was staffed by people quite unlike those we usually encounter in West Germany's legal landscape. Moreover, the legal process itself differed in significant ways from the legal process we know. I want to list only some of those differences that, I believe, had the greatest impact on the intellectual and psychological make-up of East German legal professionals and their clients.

To begin with the written word: the East German legal process was influenced by legal texts looking singularly nonlegal to Western readers. In our law world, written documents play an important role: they fix events in the past and remove them from legal dispute, facilitate proof, allow for greater precision than spontaneous oral communications, and streamline the legal process by replacing time-consuming palavers in court with the speedy exchange of briefs. The East German legal process, too, was deeply buried under paper. But most of those texts did not, like ours, aim for the indisputable assertion of rights but instead served autocratic purposes: demands for loyalty coming from above (expressed in the endless stream of guidelines, standpoints, concepts, directives, and the like) and assurances from below that everything was indeed proceeding according to Party wishes (such as evaluations and self-evaluations, summaries of meetings, local progress reports, etc.).

These documents were not precise and to the point but often extraordinarily long-winded and florid: ritually repeating the most recent Party line for pages on end until finally, almost as an afterthought, the document's specific purposes would be mentioned ("You've got to read them starting at the back," a Party Secretary once advised me). Much of the vocabulary was political rather than legal, with already ambiguous terms changing their importance and meaning in line with the twists and turns of political developments. Many of the written exchanges be-

tween central and local authorities served to collect information in a society that could not rely on the open word; hence, for instance, the constant demands for Wochenmeldungen (reports on weekly events, which every East German court had to submit, usually by Tuesday, to its superior court), statistics, evaluations, and progress reports. But given the loose and loaded political terminology, success stories were easy to fabricate. Moreover, the socialist obsession with secrecy removed even potentially meaningful information (like statistics) from public use. An East German judge once, jokingly, translated for me the frequently used classification "nur für den Dienstgebrauch" ("for internal use only") as "vor dem Lesen vernichten" ("destroy before reading") — the ultimate condemnation of the communicative value of these texts. In the East German legal process, the written word, the traditional weapon of Western lawyers, had lost much of its power, and whatever power it retained was in most instances wielded by the Party.

As a corollary to this development, oral communications had gained in breadth and significance, but, again, with different functions than in the West. In capitalist legal systems, oral proceedings are meant to ensure authenticity and to enable those involved in a dispute to have their say. They are linked closely to our demand for publicity, which aims for the democratic control of the legal process: if ordinary citizens can watch and listen to what is going on in the courtroom, those in a position of authority will not get away with misusing their powers.

In East German law, the oral character of many interactions served other purposes. It was meant to facilitate the participation of non-professionals: social courts, for instance, staffed entirely with lay-people, decided most first-instance labor disputes and many petty civil and criminal matters in the GDR and by their very nature relied on oral and informal transactions, with only very rudimentary written summaries available for later review and with a happy-go-lucky approach to procedure that encouraged digressions by the judges and interference by the spectators. Many communications were oral so that they would leave no trace, such as Party deliberations preceding important decisions, or instances of that infamous "telephone justice." At times, writ-

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40. Both East German judicial statistics and the only Supreme Court case law collection published since 1977, the Informationen des Obersten Gerichts der DDR (Supreme Court Informations), were classified "nur für den Dienstgebrauch" ("for internal use only") and were distributed on a need-to-know basis. Although the classification "nur für den Dienstgebrauch" was abolished on January 1, 1988, sensitive instructions by the Ministry of Justice continued to be labeled "Dienstsache" (official matter) and were numbered, and thus presumably distributed in restrictive fashion.

41. On East German social courts, see Markovits, supra note 26, at 701.
ten law issued at the top levels of government would be transformed into oral law at lower levels: for example, politically sensitive instructions by the Supreme Court or the Ministry of Justice might be read by a high official to lower court judges convened in so-called "judges' conferences" that served to disseminate new policies to those who were to apply them in the field and at which participants only took notes. And, most importantly, communications were oral because the pedagogic purposes of socialist law called for direct and vigorous persuasion, difficult to achieve in written texts. For instance, at trials before a "selected public," the public was not invited to monitor the proceedings but carefully chosen to include those most in need of the moral and practical lessons a case had to offer. The technique was said to be especially effective in rent collection cases, to which the court would invite an audience of other delinquent tenants living in the same apartment block as the defendant. On such occasions, it could happen that some of the invitees felt sufficiently persuaded or pressured by the legal morality play unfolding before their eyes to pay their own rent debts right then and there in the courtroom. A flyer, say, publicizing the court's decision among all defaulting tenants of a housing project, probably would not have had the same result.

Reliance on oral communications in a political system bent on Party discipline was not without its costs. Oral communications are difficult to hold to a previous game plan and difficult to check up on afterwards. As early as 1957, an inspector charged with investigating the performance of a regional court complained to the Ministry of Justice about the tendency of judges to base too much of their activities "on talks across their desks," a practice that "undermines control and self-control and lures people into somewhat haphazard work habits." I have been told of cases in which the Party's reliance on the spoken word backfired in strange fashion: as for instance in a politically touchy 1988 criminal trial in Lüritz, at which a judge from the regional Bezirksgericht, sent to make sure that everything went according to plan, had been instructed to dictate the District Court's judgment. The Lüritz judge, furious, rejected the suggestion, and when she stuck to her guns, the inspector abandoned his mission and let her have her way — with the tacit understanding that neither would let the Regional Court Director know that it was not her emissary who had drafted the verdict.

Despite such pitfalls, reliance on face-to-face communications was indispensable to a legal system hoping to change the character of man. East German legal officials were great believers in Aussprachen, a term for which I can find no English equivalent. The usual translation — "talk" or "conversation" — conveys nothing of the heart-to-heart seri-
ousness by which an *Aussprache* would try to lead anyone deviating from the accepted norm (a rebellious judge, a prosecutor contemplating divorce, a first offender not yet hardened into a criminal) back into the fold. *Aussprachen* were undertaken in and out of courtrooms; in personal matters and in those of public concern; before a case went to trial and after it had been decided; by judges, prosecutors, bosses, Party functionaries, or administrators. Occasionally, the possibility of defusing a conflict by way of an *Aussprache* was mentioned in a code.42 Mostly, *Aussprachen* were undertaken without specific statutory authorization. They were extralegal attempts to resolve disputes by tapping into individual and collective human resources. The proximity between speaker and spoken-to was meant to provide an occasion for a culprit to confide in his interrogator, air personal problems, wake up to his obligations towards society, allow a person with authority and experience to steer him in the right direction, and, if possible, involve collective helpers in the task. Whatever this method of dispute resolution gained in human warmth did not come cheaply. In all *Aussprachen*, the oral character of the interaction facilitated overbearing or misuse of authority (no outsider with clout was usually present to check it) and excluded most violations of individual rights from later review (since *Aussprachen* virtually never left a record).

A third feature of socialist law, linked with the previous one, was its highly personal character. A legal system aiming for collective warmth rather than cold efficiency is much more dependent on the human qualities of its personnel than one that contents itself with the technical processing of claims. Whether an *Aussprache*, for instance, would do its job depended at least in part on the pedagogic talents of the official engaged in it: imaginative and tactful advice might defuse a conflict that authoritarian righteousness would only harden. Since *Aussprachen* usually left no trace, we can only guess at what went on in them. But a few files on predivorce *Aussprachen* at the Lüritz courthouse that for some reason were recorded in the 1960s suggest that personal attributes, such as the gender of the official trying to talk a couple out of a divorce, had much to do with his or her evaluation of the marriage conflict. While the Lüritz court secretary, at the time a woman, tended to focus on aspects favorable to the wife, the family-law judge, at the time a man, was much more likely to acknowledge grievances of the husband.

42. See ZPO § 28, ¶ 2 (1975), GB1. I 533 (G.D.R.), under which a plaintiff could be asked for an *Aussprache* in court, in the course of which he could be encouraged to alter, amend, or “if so warranted” withdraw his claim. None of this was mandatory.
With private characteristics exerting so much influence over an official’s public performance, it is not surprising that the East German administration of justice placed great emphasis on the personal behavior of judicial cadres. When in 1982 a Lüritz judge contemplates divorce, the court’s “weekly report” advises the Ministry of Justice of the fact. When, six years later, personal quarrels erupt in the prosecutor’s office, the Ministry of Justice sends several officials to Lüritz who in nine Aussprachen try to soothe hurt feelings and to restore collective peace. When in the same year, one of the Lüritz junior judges, in a dispute over a garage, sues his antagonist, the court’s director simply strikes the complaint from the docket. “A judge does not sue,” she tells her colleague. A socialist role model does not engage in the petty pursuit of self-interest.

East German court files mirror this personalized approach to socialist justice. If West German civil records reveal dry and methodic records interspersed with receipts, balance sheets, affidavits, photocopies and the like, East German civil court files tell straightforward human-interest stories. Since most complaints are either written or dictated by the parties themselves, they echo the passions of immediate experience. Divorce complaints are documented with lengthy personal confessions. Civil law suits tell tales of private woes. Even the lawyers join in the emotional fray. “The plaintiff considers it an outrage,” a Lüritz attorney writes in his brief. “The defendant is deeply pained to hear,” his colleague on the opposite side replies. Exclamation marks abound.

The personal style matches a litigation process that seemed consumed with family-style quarrels. Since in the GDR neither complaints against administrative decisions nor contract disputes within the state-owned economy could be pursued in court, the judicial stage, as we have seen, was largely left to citizens suing each other. In doing so, East German plaintiffs and defendants defied the capitalist experience that people closely acquainted with each other try to avoid confrontations in court. On the contrary, human proximity in the GDR seems to have been a stimulus for litigation. People sued each other not despite their closeness but because of it. They got into fights, I think, because life under socialism left so little room for personal escapes. In Lüritz, for instance, in the 1980s, almost 60% of all civil litigation among citizens took place between parties who once had been married, had cohabited, were related to each other, or lived in the same house. If litigation erupted over the ownership or use of things, the objects of contention

43. See supra note 24 and accompanying text.
often were fought over not because of their monetary value but because of the human input they embodied: a car for which the purchaser had spent over a decade on the waiting list, or an allotment garden that had consumed many hours of labor. Even claims for money seemed more personal than under capitalism: in Lüritz, in 1988, 70% of all monetary claims enforced in civil court did not originate in commercial exchanges on the market, but in private deals between private citizens, or were not based on exchange relationships at all, such as personal injury or inheritance claims. While West German civil litigants tend to keep at arm’s length from each other, East German litigants seemed engaged in a kind of personal clinch.

And, finally, a fourth feature of the socialist legal process, much made of these days and most offensive to Westerners, was its embeddedness in a tight, hierarchical command structure. The previous pages have provided many examples. East German legal officials were always dependent upon those above them. Contrary to common West German beliefs, most interventions would not come from outside Party functionaries: telephone calls from the local Party Secretary were, at least in theory, frowned upon by the system since they sidestepped central authorities and allowed for deviations and cover-ups. “Telephone justice” of this sort could be resisted (even if it not always was). Instead, the telephone call most likely to ring an alarm bell in a lower court judge’s mind (“What did I do wrong?”) would come from the superior regional court. Like any other aspect of socialist government, the judiciary, too, was controlled by the principle of “democratic centralism”: local judges had to report and were responsible to the regional courts (and ultimately the Supreme Court), which in turn supervised and directed the work of local courts. Regular inspections by teams of full-time court revisors made sure that the instructions from higher levels were carried out below. If individual judges too persistently departed from the party line (a few and well-spaced deviations might be tolerated), they would be first admonished by their court’s director and later, if need be, called in by the regional court and given a talking-to. The system ensured that GDR judges usually knew what was expected of them.

But it was a far more ambiguous and contradictory system of judicial control than Westerners usually will allow. East German legal doctrine never renounced the concept of “judicial independence” proclaimed in the GDR Constitution.44 Judges were not to be told how to decide individual cases, and if they were, it was possible to resist that

44. DIE VERFASSUNG DER DDR (Constitution) art. 96, ¶ 1 (G.D.R.) (as amended on Oct. 7, 1974).
kind of crude and unveiled interference, at least in later years. But they were meant to get their answers "right": not to find fair solutions by impartially applying formal rules to some private dispute of concern only to the participants, but to find the politically correct solutions to social ills whose diagnosis and remedy usually had already been prescribed by the Party.

Only a legal system that does not claim to know all the answers (and therefore does not favor one prospective outcome over another) can place its faith in procedural justice. Socialist law believed in substantive justice: it knew the answers (even if those answers changed over time) and therefore had to make sure that each individual judge would find them. Hence the innumerable instructions, analyses, inspections and consultations constantly keeping judges abreast of the current political line. The Party, in this scheme of things, was the medical authority on all social ills. The judge was the local practitioner treating the patient. The responsibility — according to the official claim — remained his or hers in each individual case. The GDR Ministry of Justice's official catalogue of the qualities required in future judges thus listed both "political steadfastness and an unflattering commitment towards the Party" and a character trait likely to undermine that commitment: "Zivilcourage" — the courage to speak up in the face of authority.

It was an attempt to square the circle. The Party wanted to have its cake and eat it too: have a self-confident, vigorous, authoritative judiciary, yet be assured that it would always toe the line. East German judges and prosecutors accepted the contradictions without visible complaints. "Judicial independence is a constitutional principle," the Lüritz court director, for instance, noted in her diary at an October 1983 judicial workshop convened to study the lessons of the Eleventh Party Congress. "A judge enjoys a high degree of autonomy. Judicial decision-making, too, is governed by the primacy of politics." And, three years later, at a meeting for district court directors, she jotted down this formula: "Unity of democratic centralism, individual responsibility, and judicial independence." "Important," she added in the margin of her notebook. I cannot imagine how the words could have made sense to her. But as far as I can tell, most East German judges, like she, did not question the fundamental inconsistency of their instructions but did their best to fulfill both demands of their job: act out their limited, case-

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45. See Anforderungen an die Absolventen der Sektion Rechtswissenschaft der Humboldt-Universität zu Berlin of Febr. 22, 1987, cited in Gängel, supra note 19, at 400.
by-case independence and render decisions in line with current political priorities. They felt both burdened by the constant obligation to get it right ("always this pressure from above," one judge confided) and grateful for the advice and guidance of their superiors ("I always thought that consultations were helpful," another judge said).

One way to deal with the dilemma was servility. Another was positivism: East German judges liked to stick closely to the letter of the law since it could be trusted to reflect authoritative Party positions and, at the same time, provided shelter against interferences from the outside. Many judges seem to have played it by ear, stressing their "independence" when possible and their political loyalty when necessary. Those who truly believed in socialism may have found it easiest to juggle their conflicting tasks: sharing the Party's ultimate belief in substantive justice seems to have given socialist functionaries the confidence to interpret official goals with greater creativity and authority. But most judges, over years of navigating the treacherous currents of democratic centralism, must have developed habits, or at least pretenses, of obedience distasteful not only to Westerners but also, possibly, to themselves.46

At times, it seemed as if East German authorities, too, were dissatisfied with the subservience their own orders and monitoring practices had bred. Interspersed with criticism of judges who did not toe the line, one finds criticism of those who toed it too readily. Especially in the 1980s, directives from above encouraged GDR judges to show more spiritedness and self-reliance: reject unjustified applications for arrest warrants by the prosecutor, for instance, or more often appoint legal counsel for defendants needing help. Instructions like these were taken down duly in judges' diaries at workshops and conferences. But can independence be ordered from above, especially by authorities who tended to take with the left hand what the right had given? Instead, I believe, most GDR judges and prosecutors looked for meaning where unambiguous meaning could be found more easily and identified with

46. Occasionally, one catches glimpses of such self-disdain. The Lüritz files, for instance, contain a 1986 petition of one of the court's former directors, now legal counsel to a state-owned enterprise, in which she asks the GDR Council of State, and its Chairman, Erich Honecker, to overrule the local denial of a travel visa to West Germany to attend a parent's eighty-fifth birthday. Since East German judges and prosecutors were not allowed to have any "contacts" with the West, the writer, during her time on the bench, had broken off relations with her family members in the Federal Republic. In her letter to Honecker, she confesses to being ashamed of her compliance. "Sometimes, when thinking back on the meaning of our lives, we think that we have lost respect for ourselves," she writes of herself and her husband. Her petition is denied, because the "no-contact rule" applied not only to current, but also to former officeholders.
the caring aspects of their work: their tasks to educate the ignorant and faltering, protect the weaker party, keep the peace, see to it that everyone had a job and a roof over his head.

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What follows for the attitudes of East German lawyers toward that central element of our legal faith: our respect for legal forms and procedures? Leaving aside the "antiformalism" and "antineutralism" of its earlier years, the East German legal system, throughout most of its history, stressed the importance of legal order and discipline. Law was the Party's blueprint for building socialist society and had to be carried out religiously. "Socialist legality" was defined as the "strict observance of the law combined with Party spirit" (again, the attempt to square the circle), and while the "Party spirit" introduced uncertainty and manipulability into the equation, the "strict observance of the law" was something socialist legal officials could hold onto. East German judges and prosecutors were taught to work in an orderly manner and with care, to investigate each case thoroughly and to follow exactly prescribed procedures. If local courts occasionally got their signals wrong and slipped (no wonder, given the fundamental inconsistency of the official demands for both precision and partisanship), regional courts (who, as a Lüritz judge put it, could be "real sticklers for form") would usually call them to order. Regular court inspections from above made sure that everyone at the trial court level followed the rules. Reports of such inspections provide detailed, even finicky, accounts of the inspected judges' compliance, or lack thereof, with whatever provisions governed their work.

But the East German regard for rules lacked jurisprudential conviction. Initially, the observation of legal formalities was clearly not more than a cover-up meant to deflect West German criticism of East German perversions of justice: as when in a 1954 show trial, the GDR Prosecutor General criticized defense attorneys for "not having posed a single question throughout the entire proceedings," which ended with a death penalty for economic subversion and would have done so whatever the efforts of the defense.47 By the early 1970s, when East Germany, like other socialist countries, turned to the law as a means of ensuring economic and social progress, formality began to be respected as order: laws had to be strictly obeyed because the Party behind them had said

47. See Falco Werkentin, Die Strafjustiz im politischen System der DDR: Fundstücke zur Steuerungs- und Eingriffspraxis des zentralen Parteiapparates der SED, in STEUERUNG DER JUSTIZ IN DER DDR, supra note 2, at 93, 111.
so. But socialists never believed that the impartial observation of legal rules might produce justice. To them, procedure determined the sequence of steps by which a particular enterprise should be carried out — a timetable rather than a summary of the rules of the game. In particular, East German legal officials did not see procedure as a method of allotting strategic advantages to two warring parties that required an even distribution of bonus points to ensure fairness of outcome. While judges and prosecutors were taught to observe procedural requirements carefully, I suspect that they saw no real point to them. And was there? For example, to judge by the files, East German judges, when signing arrest warrants, took care to inform the suspect of his right to lodge a complaint. But almost nobody did, and even if someone was tenacious enough to follow up on the advice, it virtually never seems to have made any difference. Not surprisingly, GDR courts were very forgiving of missed deadlines and the like, and almost any excuse would do to change the date of a hearing. Why not, judges seem to have thought. They attributed no great significance to these matters.

Take the East German attitudes towards defense attorneys. As we have seen, their position in criminal trials was weak. The system perceived no structural need for their services; no urge to achieve a procedural equilibrium by balancing the weight of the prosecution against the counterweight of the defense. Some judges and prosecutors seem to have felt something close to contempt for defense attorneys. "I never really saw what they got their money for," one Lüritz judge told me. The same judge, incidentally, had prevented a defense lawyer from using a dictaphone, obtained with great difficulties by way of Sweden, to record information from the files of a client to which the attorney, as usual, had access only on the premises of the courthouse. I am sure that it did not occur to this judge that her interdiction might weaken the likelihood that the truth about that particular client's offense would emerge at the trial. Were not she and the prosecutor there to examine the matter fully?

Attorneys were especially unwelcome in situations involving encounters between citizen and state. If in a civil dispute between private people one or the other party hired a lawyer to represent solely his or her interests in court, the inevitable one-sidedness of the lawyer's arguments might put into question their validity but could be tolerated by the system because, after all, the issue mattered more to the disputants than to the state. But confrontations between citizen and state were an-

48. For example, in Lüritz in 1987 out of a total of 126 arrest warrants issued, 23 were challenged by complaints to the Court of Appeals, none of them successfully.
other matter. Socialism did not like individual challenges to state authority. It liked even less for such challenges to be articulated and sharpened by professional squabblers. I noted already that attorneys played a lesser role in East German criminal procedure than in civil cases. They played virtually no role at all in administrative matters. Without judicial review, they lacked, for one thing, the proper stage to parade their talents: the courtroom. But even nonforensic lawyering appeared suspicious to GDR authorities if it pitted a citizen against his government. Attorneys were not supposed to assist clients with applications for an exit visa, for example. They were not supposed to help citizens draft complaints against the administration. When in 1986 a Berlin woman used the services of her attorney to submit a petition to the Minister of Justice, she caused a minor uproar in the Ministry, and the file made its way all the way up to the Minister himself. "This is not what I imagine to be a lawyer's proper role," a high official noted in the margins of the lawyer's brief. "Yes," the Minister himself added approvingly.

No intermediary should come between the citizen and the parental state. It is no accident that East German attitudes towards criminal procedure resemble American pre- *Gault* views of the juvenile justice system: ranking the court's "care and solicitude," and, if necessary, punishment and control, as more beneficial to a defendant than the manipulative services of a lawyer. Even those former judges or prosecutors who speak with respect of a particular attorney do not appear to have seen him as a legitimate opponent to be reckoned with. One Lüritz prosecutor, for example, mentioned with pleasure the rare spunk and belligerence of one of the local attorneys. Did his combativeness achieve more for his client than the more typical cautious defense of the other lawyers, I asked. "No, not really," the prosecutor replied. "But it made for a more thrilling trial."

49. See StPO § 63, ¶1 (1979), GB1. I 139 (G.D.R.); supra text accompanying note 33.


51. In its decision *In re Gault*, 387 U.S. 1 (1967), the U.S. Supreme Court rejected the parental informality of the American juvenile justice process as well-meaning but illusory and insisted instead that juvenile defendants, like adults, were in need of, and entitled to, the basic constitutional protections of due process.

Not all GDR jurists viewed procedure with equal cynicism. But most, I believe, respected legal formality, if at all, for its surface qualities: as decoration, as the caprice of one's superior, as a hoop to jump through; at best, as a schedule ensuring the orderly execution of one's tasks. Although many lawyers took obvious pride in their professional skills and liked to get their i's dotted and t's crossed, one gets the impression of aesthetic pleasure rather than of philosophical commitment. Few, it seems to me, saw formality as a sine qua non of justice. I remember a conversation with the former director of a regional court about a lengthy lawsuit between two neighbors over the height of a hedge between their gardens. The case had originated in Lüritz, had traveled back and forth between the Lüritz District Court and the Regional Court of Appeals, and after several years (and, as I knew from other sources, after the pulling of Party and Stasi strings) had been decided by Supreme Court cassation. My conversation partner was clearly annoyed at the outcome of the case, in which her own court, which had stood firm in resisting high level pressure to favor one of the parties, finally had been overruled by the Supreme Court. “All this to-do about a hedge,” she said. “It was all so silly. We had to laugh about it.” The manipulation had offended her professional sense of honor but not her sense of justice.

It is this different attitude toward form which lies at the heart of most cognitive dissonances now clouding East-West German interactions. I have had difficulties, for example, explaining to East German lawyers why that popular GDR practice of judges’ regularly giving legal advice to citizens whom they might later encounter as plaintiffs or defendants in the courtroom might conflict with judicial impartiality; why trials conducted before an “invited public” to drive home a particular moral lesson must have favored a particular outcome of the case and therefore could not be called unprejudiced; or why in reunited Germany neofascists cannot more easily be locked up. Even if East German judges observed what to us looks like demands of procedural fairness, they often would do so for motives quite different from our own. A former Lüritz judge once told me about a case involving a prosecution for attempted rape. As luck would have it, not only the judge but also the prosecutor and both lay assessors had been female. When the defendant, aghast at this phalanx of women, complained about their likely lack of sympathy for his case, the judge adjourned until the next day and went in search of some male lay assessors. Why did you do that, I asked. “Why, what use is a trial if the defendant is so upset that he won’t talk to us?” she replied. It was not fairness she had been after but effective pedagogy.
Nonlawyers in the ex-GDR share this incomprehension over legal formality. The civil rights activist Bärbel Bohley's famous complaint — "We hoped for justice, but we got the Rechtsstaat" — echoes the disappointment of people who longed for substantive justice and instead had to make do with the intricate and bewildering rules of an essentially foreign game. Today, many East Germans believe that they have been given stones instead of bread. What good can come of all these complicated forms? And, for that matter, what good has come?

* * *

To sum up, East German legal professionals were not generalists but specialists, with relatively brief and narrow training, much lower status than Western jurists, little professional cohesiveness, accustomed to close supervision and control, unaggressive, supportive rather than critical, inexperienced in the free-for-all of Western litigation, and probably without much respect for, or even understanding of, the significance of legal forms. No doubt about it—they were different. As the second man in the Berlin Administration of Justice, Detlef Borrmann, once told me: "They don't fit." For Undersecretary Borrmann, it was this lack of fit rather than any individual guilt that justified the Berlin policy of excluding all but 15% of East Berlin's judges and prosecutors from the united city's administration of justice. 53

But then, how could they "fit"? East German jurists are the products of their society, and it would be miraculous if they were not. Their entire country, one might argue, "does not fit," emerging, as it is, from a confining, coddling, and manipulating system of government in which law that needs freedom, contention, private property, money, and a market to flourish played only a minor role. East German citizens, in this sense, "do not fit": used to withdrawing from an overbearing state into their private lives, inexperienced in the interactions of civil society, unaccustomed to being left out in the cold, afraid of the competitiveness of the market, unfamiliar with its laws. As Gregor Gysi once said: East German citizens lived "as in a monarchy." 54 Rules did not always hold, connections counted more than entitlements, decisions were never final, law just as easily could give way to leniency as to oppression.

But East German lawyers were not only marked by the society from which they came. They were also, in significant ways, misfits in

this society. This is most obviously true for the attorneys who (ex officio, so to speak) were expected to have a different opinion from the prosecution's and thus incorporated "a tiny bit of opposition" in a system afraid of discord. Not surprisingly, they always were viewed with suspicion. "Liberalist loners," the Minister of Justice Hilde Benjamin called them at a 1958 meeting on the state of East Germany's administration of justice. "The weakest link" in the system, her Undersecretary Heinrich Toeplitz (who, two years, later would become President of the Supreme Court) agreed. At that time, the campaign to domesticate the East German Bar by grouping its members in lawyers' collectives — so-called "colleges" — was in its fifth year; a little over half of all East German attorneys had been organized in colleges.

By the end of the GDR, 96% of the country's 606 attorneys were members of collectives, and most of them, motivated by what seemed a mixture of professional contrariness and a healthy instinct for what is feasible and profitable, had made some kind of uneasy peace with the system. But the profession never lost its faintly capitalist perfume of manipulative and clever contentiousness. Ordinary citizens, too, appeared put off by what they saw as a lawyer's excessive preoccupation with private interests. We know this from complaints about attorneys submitted to the Ministry of Justice, which almost always criticize either the financial morals of attorneys or their supposedly slick and polemical ways of serving their clients. The comments also show how deeply at least some East German citizens had become imbued with the Party's dislike of discord. "In my opinion, no attorney practicing in our country should be allowed to behave in such fashion," a man complaining about the aggressive lawyering of his ex-wife's attorney writes in 1987. Another disappointed litigant in 1988: "Until now, I believed that lawyers practicing in our state had to fairly defend the interests of our citizens instead of spending all their energies on the one client who paid them." And, in March 1989, a complainant criticizes an attorney whose name I recognize from my Lüritz files: "Instead of seeking conciliation, he only searched for conflict. I was unpleasantly surprised to

55. Id. at 43.
56. A report on the meeting is contained in a collection of documents on East German lawyers' collectives, or "colleges," now held by the Federal Archives in Potsdam.
57. See Thomas Lorenz, Die "Kollektivierung" der Rechtsanwaltschaft — als Methode zur systematischen Abschaffung der freien Advokatur, in STEUERUNG DER JUSTIZ IN DER DDR, supra note 2, at 409, 426.
58. Id.
59. See Lorenz, supra note 57, at 427 ("The majority of (East German) attorneys had made their peace with the circumstances in which they found themselves; only a fraction fought aggressively for the preservation and extension of civic rights.").
find that such demeanor is tolerated in our legal system.” Note the emphasis on “our” country in these letters. Attorneys, even in a collective state like the GDR, stand for “my” and “mine.” Asked by the Ministry to comment on the complaint, the Lüritz attorney gives the reply that every Western lawyer also would have given: the complainant “fails to see that I must exclusively represent the interests of my client.”  

In GDR times, it was not always easy to apply a lawyer’s special skills to this task. A legal system that does not believe in precedents, for example (because not the older but the most current decision incorporates the correct Party line), does not reward a lawyer for the clever comparative analysis of case law. Still, in the course of the years, the East German legal system relaxed many of its ideological assumptions. Under the guidance of the Supreme Court, legal reasoning became increasingly ambitious. While courts still would not cite other courts’ decisions, an attorney might use them to support his client’s viewpoint in oral arguments or in his briefs. The East German law journal *Neue Justiz*, on its back cover, carried short summaries of recent case law, which conscientious lawyers would cut out and collect for future reference. Supreme Court case law, which since 1977 appeared only in a xeroxed, limited, and classified edition and which, for lawyers, was very hard to come by in the early 1980s, had become fairly easily available by the middle of the decade and — away from printed records — was cited. And there were other — in the Western sense, lawyer-like methods by which an attorney might further his client’s interests: in a divorce suit, he could carefully establish the couple’s assets, for example, or in a prosecution for theft, he could dispute the value of the stolen objects. East German attorneys routinely used legal arguments to bolster individual autonomy: a decidedly “unsocialist” approach to law.

East German judges and prosecutors, too, by their professional attitudes and training were set apart from other survivors of socialism. All were taught to be orderly and meticulous in their work. All shared skills that at least potentially facilitated their dissociation from an essentially fuzzy and ideologically loaded legal system: the arts of close reading, of precise articulation, of unambiguous definition, of analogical reasoning. These faculties should help them to adapt far more easily than their compatriots to the new times. Take a 1980 case from the Lüritz archive.

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60. The complaints, and the responses, were investigated and filed by the Ministry of Justice of the GDR and are now held by the Federal Archives in Potsdam.

61. In the early 1980s, attorneys from Lüritz wanting to check up on Supreme Court case law had to travel to the regional capital to use the only copy of the “Supreme Court Informations” available to lawyers in the region, which was kept at the head office of the regional lawyers’ college.
that exemplifies both the strengths and weaknesses of socialist adjudication. It is a cohabitation case from one of the villages in the court’s district. After ten years of life together during which a couple pooled all its efforts and resources, the woman died, leaving the couple’s common savings of more than DM 15,000 in a bank account under the woman’s name. A law suit between the surviving cohabitant and the woman’s statutory heirs followed, and the Lüritz court decided that since the savings were held in the woman’s name, they were her property and under the rules of succession would have to go to a niece. The decision was upheld upon appeal. Knowing the protagonists and their life history first hand, the entire village was outraged. The mayor wrote to the Supreme Court suggesting that the judgment be quashed by way of cassation (a certiorari-type proceeding, also called “review in the supervisory instance,” that was initiated by the Supreme Court itself, usually upon suggestions by other institutions or by the parties). The Supreme Court wrote back a sympathetic and carefully worded reply that in effect said: “Sorry, law is law.”

Two features of this case stand out: the fact that all three courts, contrary to socialist philosophy, sided with formal and against substantive justice and their unimaginative way of doing so. An American court, faced with the same facts, would have looked for unjust enrichment, implied contract, or some other device that might at least have salvaged the survivor’s own contributions to the couple’s savings.62 In other words, an American court would have manipulated formal law in its search for justice, and with a perfectly good conscience, too. Socialist judges probably were too cautious and respectful to do so. As one West German judge said about his new East German colleagues: “They lack interpretive courage.” “We would have been more precise,” a former East German judge, now an attorney, told me when she described the differences between West German judges and her own former self. “We seem to have approached legal problems with clenched teeth,” she added. Today, former East German jurists seem a little shocked at some of the practices they encounter in capitalist courts, such as the surreptitious plea-bargaining increasingly common even in West German criminal procedure. East German judges obeyed the law. They did not cut deals about it, and they certainly did not play with it. But their respect for the letter of the law sets GDR judges and prosecutors far apart from ordinary socialist citizens, who could not care less about the law, evaded it whenever possible and desirable, and at best accorded it lim-

62. See, e.g., Watts v. Watts, 405 N.W.2d 303 (Wis. 1987); Marvin v. Marvin, 557 P.2d 106 (Cal. 1967).
ited instrumental use. Unlike their landsmen, East German jurists already have taken the first step towards the Rechtsstaat: formalism. The next step — filling that form with life — will be easier for them than for anybody else in the ex-GDR.

* * *

I have drawn a contradictory picture of East German jurists: different from ourselves, yet also similar; both in line and at odds with the society they come from; not quite socialist fish nor capitalist fowl. Most of them greeted the Wende with anxious optimism. It threatened the security of their routines, but it also promised to relieve them of the ambiguities of their work. No more of that “dialectical unity of legality and Party spirit” under which at any moment “Party spirit” could undermine and defeat legality. At a meeting of Kreisgericht directors in December 1989 called to assess the situation after the collapse of the Wall, the Lüritz court director wrote into her notebook: “No more discussions about ongoing proceedings. No guidance by the Supreme Court or the Regional Court.” “From now on, courts will enjoy considerably more authority than they did in the past,” the director of the Rostock Regional Court asserted in a letter of December 14, 1989, addressed to the mayor of Rostock in which she requested the use of the Rostock Secret Police headquarters, now vacated, to serve as an annex to her crowded courthouse. Elsewhere in the GDR, former Stasi buildings were similarly claimed or reclaimed for judicial use. Those were symbolic moves: the Secret Police driven out by the Rule of Law.

But one can also hear the worried tremor of voices whistling in the dark. With the growing anarchy of post-Wende days, and with mounting public anger at those who for decades had ordered citizens about, judges and prosecutors too began to fear for their positions. A “Justice Committee,” set up, as in many other East German towns, by the Lüritz City Council to investigate “injustices, misuses of authority, and unjustified privileges” of state functionaries, soon got sidetracked by largely exaggerated stories of Party luxuries and never accused local courts of any wrongdoing. But their association with an authoritarian and corrupt regime condemned judges and prosecutors nonetheless. I doubt that most felt very guilty: looking back upon their disciplined and modest professional lives, they probably thought that they had done the best they could. “Judges can produce no better case law than their legal sys-

63. In Potsdam, for instance, the district court in 1989 moved back into its turn-of-the-century courthouse that for many years had been occupied by the Stasi. See Markovits, supra note 3, at 165.
tern will support," the Lüritz court director wrote in her lecture notes at yet another judges' meeting in February 1990. Would it be enough of an excuse?

From the first days of the Wende, GDR lawyers thus oscillated between hope and fear. But in the months immediately following the collapse of socialism, hope was dominant. A former judge once described to me the first and last meeting of the East German Association of Judges (Richterbund, dissolved, and swallowed by the West German Judges' League, upon Reunification Day) in June 1990 in East Berlin's biggest courthouse, the former Stadtgericht in the Littenstrasse: how judges had come from all over the GDR to take part in a new beginning, crowding the balconies around the building's beautiful rotunda, dizzy with the sudden changes, excited by their new autonomy, fearful of the future.64

But in those early days, East German lawyers still believed that they could play a part in it. Relations between East and West German lawyers seemed simple. Common seminars and working groups sprang from the ground like mushrooms. West Germans were encouraging and supportive. East Germans were eager to learn: looking for advice, for inspiration, for allies for the days of reckoning that looked more and more inevitable. They also were willing to inspect their own past, discover what went wrong, acknowledge guilt, and learn from their mistakes. When they were searching for words to describe and denounce the past, East Germans did not yet fear that everything they said would be held against them. The GDR Richterbund, for instance, developed criteria for a self-examination process that would weed out those too deeply compromised by their subordination to the Party, and the term "vorauseilender Gehorsam" ("anticipatory obedience") figured in the East Germans' own catalogue of socialist sins. Their belief in the need for change was tempered by fears for their own survival. But it was not yet buried under West German suspicions.

Because of its many legal implications, lawyers seemed natural leaders in the GDR's political transformation. More than others, they had at least some of the skills needed in the new society: arguing, bargaining, familiarity with legal forms. For the first time in GDR history, lawyers began to occupy positions of political influence: Gregor Gysi (head of the new Party for Democratic Socialism), Lothar de Maiziere (first Prime Minister). I believe that GDR lawyers would have made good mediators between East and West: sharing the social concerns of

64. See also Andreas Gängel, Die DDR-Justiz im Prozess der "Wende," in STEUERUNG DER JUSTIZ IN DER DDR, supra note 2, at 429.
their fellow citizens but more than they willing to concede the need for rules; confused themselves, but better able to articulate their confusion and with a better grasp of what one needed to learn.

In the event, West German reconstruction policies excluded no other East German professional group from participating in the remaking of their own country as thoroughly as legal professionals. Today, those former judges and prosecutors who passed the vetting process are, as a rule, too young, too inexperienced, and too preoccupied with learning the ropes to be able or willing to push for reform. East German lawyers presently in private practice — most of whom are not former attorneys but ex-judges, -prosecutors, -jurisconsults, and newly admitted Diplomjuristen — are struggling to survive in the new market and also are unlikely to peddle reform proposals with the smell of socialism. Former socialist academics have disappeared from East German law faculties. As a result, the legal debate in the Federal Republic is dominated by Westerners. When in 1991 the German Association of Administrative and Constitutional Law Teachers convened to discuss East Germany’s integration into the rule of law, not a single East German law teacher spoke up and, for all I know, was even invited. 65 When a year later the first postreunification Convention of German Lawyers took place in Hannover, of the roughly 2600 participants, only about twenty-five had come from the new East German states. 66 East German jurists do not appear at national meetings, have no real voice other than the PDS and the journal Neue Justiz (the first considered disreputable, the second ignored by most Westerners), and are unlikely to leave a mark on the profession. The rule of law in Germany’s Eastern half — conceived by Westerners, built by Westerners, staffed with Westerners, and, by all signs, efficiently and smoothly run by Westerners — is likely to remain for some time a largely Western enterprise.

I see two problems with this development. One concerns legal culture in the former GDR. Truly democratic reform must be self-made. Yet East Germans today do not experience the Rechtsstaat as something self-made, but as something others — West Germans — imposed on


66. See Horst Sendler, Gesamtdeutscher Juristentag?, 25 Zeitschrift für Rechtspolitik 449 (1992). Sendler also reports that at the previous annual convention in September, 1991 — post-Wende but pre-unification — of the roughly 3500 participants, about 300 had come from East Germany — evidence of the cautious optimism East German lawyers, at that time, still felt when considering their own role in the establishment of the Rechtsstaat.
them from the outside. The West German colonization of East Germany's administration of justice deprived East Germans of a role and voice in their own liberation and turned events that might have been cathartic into impositions. That may be one of the reasons why East Germans today seem strangely disaffected by the legal system that they themselves use in ever-growing numbers. According to a 1995 opinion poll, 53% of East Germans consider their present social system to be unfair; 73% believe that the law does not ensure equal protection; 60% are dissatisfied with German case law and legislation; and 72% do not feel protected by the law.67 The rule of law has not won over the hearts and minds of former socialists.

My second worry concerns historic memory in Germany. It is always difficult to face unpleasant periods and events as part of one's own make-up. West Germany avoided that look into the mirror when, in 1951, it quietly integrated former Nazi judges and prosecutors into its new administration of justice. Today, the almost total exchange of legal elites in the former GDR — West for East — may well prevent both sides’ coming to terms with Germany's communist and anticommunist past. Usually, proponents of a thorough cleansing of socialist officialdom advance just the opposite argument: we must not repeat our post-war leniency towards the Nazis, they say, that also enabled us to stay mute about the crimes of the regime that they represented. Even assuming that the evils of Hitler and Honecker could be equated, that argument is unpersuasive. The integration of Nazi judges and prosecutors was an internal West German affair: one hand washed the other, and the resulting silence lulled the consciences of both pardoners and pardoned. The present German reunification process is a coming together of opposites, with built-in discords and clashes, and the inevitable criticism and disagreement arising on both sides should make it impossible to sweep past injustices silently under the carpet. But the uneven distribution of power and the fact that in the process of national soul-searching only the victors may pose all the questions raises another danger: that under the weight of Western accusations, East Germans become defensive, clam up, excuse behavior they otherwise would criticize, and begin to look upon the search for historic truth as other peoples' business. A recent study of East European attitudes towards the socialist past seems to justify this fear: despite the fact that the East Germans supported their regime with less reluctance than did most of their socialist neighbors, they are today less likely to find fault with their own biographies than

former Czechs or Romanians. Ideally, the process of Germany's reunification could have been a historic learning process for both sides. Instead, West German self-righteousness and East German defensive-ness are likely to block, once again, a difficult and troubling past from German view.

But perhaps I have drawn a typically German picture of events: unnecessarily ponderous and gloomy and with an exaggerated view of the significance of ideology. Perhaps what people think matters not nearly so much as how they actually behave. Perhaps, instead of arguing that things went badly, one could with equal justification argue that they went extraordinarily well. East German courts are functioning smoothly and efficiently. Litigation rates are soaring. In Lüritz, where in 1988 five judges (three of them women) had decided an annual total of 1027 cases, in 1995, eight judges (all of them men, and only one an East German) together decided 4494 cases. Over 1200 suits alone were filed by tenants complaining about rent increases after the recent easing of rent controls in East Germany — the new citizens use the law to defend their interests. Instead of three attorneys, as in socialist days, Lüritz now has thirty-three: twenty-three West Germans and ten East Germans, among them several former judges and prosecutors who did not pass, or did not try to pass, the vetting process. Although several of them are struggling, some of the Western newcomers also find it hard to hold their own against the competition.

East German citizens seem to prefer East German counsel: not only because they are cheaper but also because they are more sympathetic and attentive listeners. At present, legal business in the former GDR seems to be distributed in line with the pre-Wende structural differences between the two legal systems: personal matters, like family or

68. See Uwe Ewald, Strafrecht und Umgang mit der staatssozialistischen Vergangenheit in Ländern Mittel- und Osteuropas, in "UNRECHTSSTAAT"? POLITISCHE JUSTIZ UND DIE AUFAFARBEITUNG DER DDR-V ERGANGENHEIT 64 (Lothar Bisky et al. eds., 1994).

69. First-instance civil law case loads in the five new East German states rose from a total of 76,800 new suits filed in 1991 to 317,600 suits filed in 1994. See Sabine Leutheusser-Schnarrenberger, Wege zur Justizentlastung, 48 NEUE JURISTISCHE WOCHENSCHRIFT 2441 (1995). In 1988, in the then-GDR, a total of 62,210 first-instance civil cases were filed. See STATISTISCHES Jahrbuch der Deutschen Demokratischen Republik 1989, at 399.

70. The figures include cases from civil, family, and criminal law, but exclude labor law disputes, which no longer are adjudicated in Lüritz, but now go to a special labor court in a nearby town serving a much larger area than the present Lüritz Amtsgericht.
labor law disputes, tend to go to East German attorneys, moderate-size financial disputes go to both East and West German lawyers, and the big, complex, and financially rewarding litigation is handled by West German law firms or by their East German branch offices. Native East German lawyers occasionally complain about this unwritten pecking order, report tensions between East and West members of some new "mixed" law offices, or are hurt by what they perceive as West German snootiness or exclusivity. "What we now lack most is callousness," one East German attorney told a British interviewer.\(^1\) Even if the statement exaggerates the callousness of Western lawyers, it correctly reflects East German perceptions of what the Rechtsstaat is about and is a testimony to what went wrong in Germany's legal reunification. "Have you changed since the Wende?" I asked an attorney in my little town. "I hope not," he replied, "at least not in my basic attitudes." But he admitted to some change already: he no longer accepts clients whom he knows will be unlikely ever to pay him. And when I recently called him again and found him strangely inattentive during our conversation, he revealed a further symptom of adjustment. "You must excuse me," he said. "But while we're talking, I am also trying to fix something on my computer screen."

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If you look up "lustration" in Webster's Third New International Dictionary of 1971, you will find a definition reflecting simpler times: "Purificatory ceremony performed as a preliminary to entering a holy place."\(^2\) The religious emphasis should give us pause. The Rechtsstaat is no holy place. On the contrary, it is a place structured by laws that are well aware of its unholy nature. The rule of law does not strive for a "new man" but trusts that the old Adam, if only he sticks to the rules of the game, can govern himself. Even the old socialist Adam.

\(^1\) Gisela Shaw, East German "Rechtsanwälte" and German Unification, 61 GERMAN LIFE AND LETTERS, NEW SERIES no. 2, at 211, 224 (1994).

\(^2\) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1348 (16th ed. 1971).