# Selective Memory: How the Law Affects What We Remember and Forget about the Past—The Case of East Germany

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This is an essay about public memory and about the ways in which the law selects and shapes our recollections of the past to fit the purposes of those who dominate the present.

Public memory works in ways very different from the haphazard and fickle habits of our personal memory. As individuals, we have no power over our recollections: We forget what we would like to remember, remember what we would like to forget, are at the mercy of such volatile reminders as smell and taste (remember Proust's madeleines), and have to accept that we recall events not only because they were important, but that events become important just because we remember them. In our individual memories, the past rules over the present.

In public memory, the present rules over the past. In every generation, those in positions of authority decide which of the names and events that preceded them are worthy of remembrance. Official history is chosen as much as it is inherited. Take an example: the construction of public monuments. Before the cloth is pulled from the memorial on dedication day, its hero must be picked, funds must be allotted, land bought, architects and sculptors must be hired. All these are conscious and, in a democracy, often contentious choices in which each decisionmaker will push for that version of the past which best advances his interests in the present. A public monument will not be built unless its builders are convinced that by honoring the past they also will honor themselves. Rarely do nations build monuments to immortalize their shame. America has built no memorial to slavery. And if the Germans have such difficulties

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reaching decisions on their Holocaust Memorial, it is because the world at large will not allow them to achieve what nations usually achieve with monuments, that is, to find at least some rehabilitation and satisfaction in building it.

If public memory thus serves not only to recall the past but also to legitimate the present, it needs to be selective: preserve those memories most flattering to current users and reject those most prone to cause them embarrassment. Law seems a likely candidate to help in this selection process. It is an expert both on matters of the past and on issues of legitimacy. Law routinely hands out verdicts of guilt and innocence. It defines our prototypes of model citizens and their opposites: the prudent merchant, the reckless driver. It validates those past events that we approve of and invalidates those of which we don't: by honoring past promises, punishing past wrongdoings, by rehabilitating victims or by offering compensation for losses. In doing so, law has developed rules on how to investigate the past: for instance, by assigning burdens of proof, or by devising criteria to distinguish reliable from unreliable evidence. And as a discipline relying heavily on the written word, law has helped to assemble some of our most valuable records of the past in courthouses and archives. It is both an important source and an interpreter of history.

In this article I examine how legal institutions participate in the production of public memory by filtering information about the past. Law, I shall show, has a significant say on what we remember and forget about history. It is an important medium for defining our past. This is a rather sweeping claim and I shall try to specify and narrow it by focusing on that particular slice of history with which I am most familiar: the legal history of the former German Democratic Republic (GDR). Germany is a good subject for my kind of study. Since reunification, it has had to absorb and integrate 40 years of East German history into the collective memory of a nation that, until then, had largely ignored what happened on the other side of the Berlin Wall. There is much talk today in Germany about the *Aufarbeitung* (literally, the "working over") of its recent history—a very German word that is usually translated as "coming to terms with the past" (on whose terms?) but that also evokes Freudian connotations of working out the personal impact and significance of events hitherto repressed, and that, in a more mundane and domestic meaning, also can be used to describe the remodeling of an old garment ("*ein Kleidungsstück aufarbeiten*") to make it look as good as new.

But this is *not* an essay about post-Socialist Germany's coming to terms with its traumatic past.[1] Instead, this is a study of *how* the

[1] The collapse of Socialism has given rise to a vast and exhaustive literature that examines the various ways in which post-totalitarian countries have tried to deal with an

past that the Germans are trying to come to terms with was chosen and construed. A nation's past, I argue, is not a well-defined and undeniable reality that, like a piece of ancient pottery, only must be unearthed and cleaned before it is displayed to everybody's satisfaction. Instead, each generation invents and reinvents its past. In doing so, it will be constrained by its understanding, in von Ranke's famous words, of "what really happened,"[2] but that understanding will, in turn, be shaped and colored by the present generation's needs and self-perception.

My essay investigates the role the law plays in this process. By filtering our knowledge of the past and by laying memory tracks, so to speak, that steer our understanding away from some interpretations and toward others, the law helps in the construction of history. In post-reunification Germany, this construction job seems bigger than elsewhere. Before the fall of Socialism, two German histories existed side by side, with schoolbooks, public speeches, museums, and monuments in both countries telling conflicting, and often, warring, stories. After reunification, the 40 years of separation had to be blended into one consistent tale. With such a large chunk of history to come to terms with in one fell swoop, we can expect the use of law to sort out memorable from unmemorable events to be thrown into starker relief, and its impact thus to be easier to trace, than in a selection process happening over many decades or centuries. Since Germany's reunification also marked the victory of one ideological system over another, the subsequent remodeling of East Germany's past to fit the post-reunification West German–dominated presence will also appear more ruthless than an adaptation process in which the "correct" view of history had to be bargained out between contestants of equal power and authority. My choice of subject thus may lead me to overstate my case.

But it will also help to clarify my argument. Dramatic happenings provide stark evidence. My paper traces the sudden feverish activity of mechanisms usually operating discretely and quietly. We should be aware of their existence, however, whatever the drama of the period. How does the law affect our recollection of American opposition to the war in Vietnam? French memories of German occupation under Hitler? The history of the relationship between the United States and Cuba? Black history? While the law's methods of contributing to the writing of history will differ in each case, I am confident that studies similar to mine could find its fingerprints on public memories in many places.

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offensive past. Much of this literature focuses on the use of law to punish past wrongdoings, to vindicate past victims, and to uncover the truth about past lies (Kritz 1995; Redaktion Kritische Justiz 1998; Eser & Arnold 1999).

[2] "*Wie es eigentlich gewesen*" (my translation) is cited by Gay 1974:68.

## I.

It took almost a generation after the debacle of Hitler's Reich before public debate in Germany could seriously and openly address the Nazi past (Frei 1996:484; Perels 1996:504). By contrast, public efforts to examine and analyze East Germany's Socialist past began soon after the collapse of Socialism (Wielenga 1994:1054). Unlike in postwar years, when the discussion of the Holocaust was initiated slowly and haphazardly by isolated individual voices from below and gained momentum only when a new generation of sons and daughters was old enough to question the behavior of their parents, public discussions of the evils of Socialism were encouraged, and even orchestrated, by the German government. The *Bundestag* (Federal Parliament) itself, in a number of projects, set out to forestall public amnesia in the face of yet another totalitarian epoch of German history. The first of these projects—the preservation and opening of the *Stasi* (Secret Police) files[3]—sprang from popular demand when in the revolutionary fall of 1989 a group of angry East German citizens prevented the destruction of the files (Mitter & Wolle 1990:9).[4] The idea to return control over Secret Police records to those who had been spied upon was taken up by the GDR's only and short-lived democratic parliament (Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit/Amtes für Nationale Sicherheit 1990) and reaffirmed in the East–West German Unification Treaty (Einigungsvertrag 1990:Appendix I Chapter IIB; Kloepfer 1993:17). In December 1991, an Act of the now all-German Parliament established the "Gauck Archive"(Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik 1991; Henke 1993a:575) (named after its first director, a former East German pastor and dissenter) that today assures the safekeeping of the files and administers access for users.

Reaching beyond the Stasi, the Bundestag also instituted two task forces to investigate more general aspects of East German political history. The first of these two "Enquete Commissions," set up in 1992 to inquire into the "history and consequences of Socialist dictatorship in Germany" produced an 18-volume report collecting the testimony of hundreds of experts and eye witnesses

[3] "Stasi" was the popular shorthand term for the GDR's Ministerium für Staatssicherheit (Ministry for State Security), East Germany's enormous Secret Police apparatus, also abbreviated as MfS.

[4] Two months after the opening of the Berlin Wall, on January 15, 1990, several thousand demonstrators forced their way into the MfS headquarters in East Berlin to prevent Secret Police employees from destroying evidence of State Security activities. Citizen committees were formed to guard the building and to protect the Ministry's enormous archives. Following their lead, the East German Round Table appointed experts to catalogue and secure Stasi holdings.

(Deutscher Bundestag 1995a). The second Commission, charged in 1995 with devising ways and means of effacing the marks left by a 40-year dictatorship on post-reunification Germany (Deutscher Bundestag 1995b), resorted directly to the utilization of public memory. One of its proposals suggested the creation of a federal foundation that would support and finance the efforts of civic groups and victims associations (such as the "Association of Victims of Stalinism") to research and record their sufferings under Socialism (Deutscher Bundestag 1997). The Commission also advocated setting up a Federal Memorial Program to coordinate and fund the construction and maintenance of monuments recalling the horrors of "both German dictatorships," which would add to the current list of those memorial sites commemorating Nazi victims a number of new memorials honoring the victims of Socialism (Deutscher Bundestag 1998:226). The first suggestion has since been enacted into law (Gesetz über die Errichtung einer Stiftung zur Aufarbeitung der SED-Diktatur 1998), the second still awaits realization.

Whatever else these pieces of legislation will achieve—comfort victims, keep alive memories of past injustices, warn against the repetition of mistakes—they also have important uses for their draftsmen. By fixing in the public mind an image of the GDR that shows it to be an evil and inhuman place, the Federal Parliament also painted a historic backdrop whose somber colors would allow its own democratic practices and sensibilities to shine all the brighter. And by linking, in one breath, Socialist and Nazi pasts ("both German dictatorships"),[5] the Bundestag both removed its condemnation of the GDR from possible critique (nobody can come to the defense of Nazis) and offered

[5] The parliamentary debates on the two Enquete Commissions and the resulting legislation are filled with references that suggest, if not outright, at least implicitly, the comparability of Socialist and Nazi rule. The Second Commission's recommendations speak of "both German dictatorships" and of the GDR's "second dictatorship in Germany" (Deutscher Bundestag 1997), thus implying the essential similarity of National-Socialism and Socialism. The resulting statute refers to the need for an "anti-totalitarian consensus" (Gesetz über die Errichtung einer Stiftung zur Aufarbeitung der SED-Diktatur 1998: § 2 par. 1) in Germany and thus suggests that the rejection of Socialism can also be read as a rejection of Nazi ideology. In the parliamentary debate of the recommendations, a speaker refers to German "experiences with 20th-century dictatorships," implicitly equating the sufferings under Hitler with those under Socialism, and goes on to say, "Today, the public is not sufficiently aware of the dictatorial character of the SED-state. Often, people focus only on the injustices of Nazi-rule" (Koschyk 1995). "The monuments commemorating Nazi-dictatorship and SED-dictatorship are the strongest pillars of our democratic memory-culture," says another member of the Bundestag (Vergin 1995), linking, again, Socialist and Nazi atrocities in a single breath. To do Commission members justice, such Nazi-Socialist comparisons evoked sufficient opposition within the Commission to lead to several dissenting opinions. As one might expect, the members of the Partei des demokratischen Sozialismus (PDS), the successor party to the East German Communist Party, which now is represented in the Bundestag, objected to the Commission's "permanent equation of Nazi Germany and the GDR" (Deutscher Bundestag 1998:246). Representatives of the Social Democratic Party and four expert witnesses participating in the hearings criticized the Commission's euphemistic description of West German postwar attitudes toward the Nazi years (Deutscher Bundestag 1998:233).

restitution for its own previous silences about the crimes of Fascist Germany ("this time we spoke up") (Markovits 1999a:189, 212 & n106). Like any public monument, the work of the two Enquete Commissions served to enhance the reputation of its architects.

For present purposes, the "memory projects" of the Bundestag represent such unabashed examples of government speech (Shiffrin 1980:565; Yudof 1978) that they fall outside the scope of this article. I am less interested in cases such as these (where law is brazenly used to promote a particular view of history) than in the more incremental and subtle ways in which seemingly neutral rules or practices result in the preservation of some and the repression of other information about the past. If I draw attention to the Bundestag memory debates, it is because these debates reveal so clearly the energies and motives driving them and thus explain the setting in which the more technical and innocuous rules that are my topic will operate. Ostensibly, the two Enquete Commissions were meant to contribute to the "honest and objective writing of history" (Deutscher Bundestag 1995a: Vol. I at 27). In the words of their chairman, "We must look back upon the past in a reflective, differentiating, sensitive, just, and understanding manner" (Deutscher Bundestag 1995a: Vol. I at 27). "Reconciliation requires truth," said someone else (Deutscher Bundestag 1995a: Vol. I at 70). And Willy Brandt, at the opening of the five-hour debate on the First Commission: "Remembrance may not be selective. It must encompass everything" (Deutscher Bundestag 1995a: Vol. I at 31).

The words were spoken imploringly, but with neither much hope nor reason to be hopeful. As the record shows, everyone knew well in advance what an exploration of East Germany's political past would and should uncover: a "topography of terror"[6] and injustice. The Commission "must reveal the dictatorial power structure and the repressive subjugation methods" of the Party, said one delegate (Deutscher Bundestag 1995a: Vol. I at 45), blithely anticipating the results of its inquiry. It must "fill in the blank spots left in the GDR's history of repression," said another (Deutscher Bundestag 1995a: Vol. I at 97). With the exception of the few, and heckled, members of the PDS[7] (the SED's[8] socialist

[6] The "Topography of Terror" is a memorial exhibition in Berlin that recalls the crimes of Hitler's Secret Police in the building that used to house the former *Gestapo* (Geheime Staatspolizei) headquarters. Implying, again, an unarticulated association of Socialist and Nazi crimes, the Second Enquete Commission suggested the creation of a similar memorial, to be called "Topography of the SED-Dictatorship" that would commemorate the victims of Communism in Germany (Deutscher Bundestag, ed. 1998: 225).

[7] PDS stands for Partei des Demokratischen Sozialismus (Party of Democratic Socialism).

[8] SED stands for Sozialistische Einheitspartei Deutschlands (Socialist Unity Party of Germany), the GDR's version of the Communist Party.

successor party in the Bundestag)[9] none of its other members saw any reason to actually find out what happened under Socialist rule. Details apart, one knew what had happened. The Enquete Commissions were not set up to discover the Socialist past but to expose it.

With the results of the inquiry a foregone conclusion, the parliamentary debate turned not upon the past but upon the question of who had been right about the past and who, therefore, deserved most respect and credibility in the present. Quarrels from Cold War days were resurrected and, with the benefit of hindsight, were reinterpreted to score points over political opponents. Which party never had lost faith in Germany's reunification? The Christian Democrats (CDU) pointed to their record of reunification speeches; the Social Democrats (SPD) denounced those speeches as no more than cant.[10] Whose conduct had helped to expand the lifespan of Socialism in the GDR? Accusations of ideological appeasement against the SPD, of unseemly financial deals with the East German government against the CDU. Whose policy contributed to the fall of Socialism? Willy Brandt's *Ostpolitik* was praised by one side and denounced by the other (Deutscher Bundestag 1995a: Vol. I at 35, 55, 61, 79, 790, 807, 831, 839). Even the Nazi past crept up again, with debates over which of the two postwar German states could boast a better record toward Jews: with East Germany's criminal prosecutions of Nazi crimes pitted against West Germany's restitution payments; open East German anti-Zionism against latent West German anti-Semitism; distorted anti-Fascism in the GDR against belated anti-Fascism in the Federal Republic (Deutscher Bundestag 1995a: Vol. I at 873). "The past is a scarce resource" (Appadurai 1981: 201), and all parties scrambled to secure as large a share of it as possible.

Even the stagings of these memory events were used to exploit the past to present advantage. In Germany, the preferred date for historical soul-searching is June 17, in memory of June 17, 1953, when the brutally repressed rebellion of East German workers against the Socialist Workers' state took place. Many Germans still can recall the photographs of unarmed workers throwing stones at Soviet tanks. Their image now is used to legitimate official memories of East Germany's entire political past. The report of the first Enquete Commission to Parliament took place on June 17, 1994; that of the second on June 17, 1998. The debate of a previous "Statute to Eradicate SED Injustice" (Erstes Gesetz zur Bereinigung von SED-Unrecht 1992) had been held

[9] Thus the protest of one of its members, Uwe-Jens Heuer, "The very complex history of the GDR is being abridged into a history of injustice." "That's all it was!" a Christian Democrat retorted (Deutscher Bundestag 1995a: Vol. I at 82).

[10] CDU stands for Christlich Demokratische Union (Christian Democratic Union), SPD for Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany).

on June 17, 1992. By selecting these dates, the organizers seemed to suggest a direct and logical connection between the hallowed events of 1953 and their own current projects of the 1990s: The Bundestag claimed heirship to the early East German freedom fighters (cf. Wolfrum 1999).[11] The rule of law was represented as redeeming the unfulfilled hopes of all good East Germans. Whatever happened in the GDR between 1953 and 1989, in this view, appears as a perverse and futile deviation, bound to fail. And everyone involved in the debate claims that his or her own view of the past reflects what really and truly happened. Those who disagree are branded as bad historians. Most criticisms are directed at the PDS, whose speakers try to salvage from the debate at least some bits of GDR history untainted by terror and injustice. No one will let them. "Cut-and-paste history!" (Deutscher Bundestag 1995a: Vol. I at 36) protests a speaker of the Social Democrats on one such occasion. "An historical lie!" (Deutscher Bundestag 1995a: Vol. I at 815) shouts a member of the CDU. The past is a scarce resource and losers shall have no claim to it.

Against this background let me now investigate how information about the past is filtered and eliminated or preserved. Before remembering, we must first know. So, what determines whether knowledge of certain events or facts will ever reach us? Ordinarily, the question seems impossible to answer: There are too many channels of transmission. But for present purposes, the narrowness of my chosen topic helps. I want to know how authentic information about the workings of East Germany's legal system is preserved. In all developed legal systems, the sources of such information are fairly standard: court records; records of other legal transactions; case reports; with luck, occasional eyewitness accounts; and contemporary writings about the law (although the latter are likely to be colored by the writer's position and purposes at the time, and in a closely controlled and censored system like the GDR have to be used with caution). By far our most enduring and dependable sources are case files and other judicial records. How do we know what happened in the courts of ancient Egypt (Seidl 1954:235)? What was the role of law in Renaissance England (Baker 1978), or, for that matter, in rural California in the early 1900s (Friedman & Percival 1976:267)? What will a future (or contemporary) historian be able to learn about justice and injustice in the GDR? What records are at his or her disposal? Let us see. (And if I write with feeling it is because I am currently working on a local history of

[11] Compare Iniguez et al. 1997:238 on the construction of memories of the Spanish Civil War: "Depending on the implicit or explicit ideological historical studies of the Civil War, the results of the conflict are shown as obeying a careful plan designed to one end. . . . The whole process is converted into a perfectly linked, modulated progress of a predetermined plan."

East German law [Markovits 1996:2270; 1997b:849; 1999b:315] and therefore speak from personal experience.)[12]

**A.**

I must begin my story with the German *Aktenordung* (Decree on Court Files) of 1934, passed at a time when neither the establishment of a Socialist state in Germany nor its collapse could be anticipated. Like similar decrees in other countries, the Aktenordung sets up a schedule for the preservation and destruction of court files. In all courthouses, storage space is finite and judicial systems must periodically weed out those records no longer considered necessary for an orderly administration of justice. Criteria for selection are governed by practical needs rather than by historical curiosity or reverence. The Aktenordung establishes a hierarchy of durability that, not surprisingly, focuses on the potential enforcement of titles and echoes statutes of limitations in substantive areas of law. As a rule, records involving disputes over property or inheritance are to be preserved longer than records dealing with contracts or torts disputes; bankruptcy files have a longer shelf life than most criminal case files; judgments last longer than the rest of the case records, which in Germany may include more meaty sources (such as the lawyers' briefs, witnesses' testimony, transcripts of oral arguments, and the like); and the vast majority of records are to be destroyed no later than 30 years after the opening of a case, with many—judgments excepted—to be kept no longer than five years.

As we can see, the Aktenordung focuses on the end results of judicial decisions rather than on the processes by which decisions are reached and thus, from a historian's viewpoint, silences too soon the voices of ordinary people involved in the legal process (plaintiffs, defendants, witnesses, even lawyers), preserving only the final word of the judge. Its memory is biased in favor of those asserting durable rights, particularly rights to land, and it does not care about what a trial transcript might tell us about the participants' hopes or strategies for securing justice. It is an administrator's, not a historian's, tool, uninterested in the thick description of everyday life that we can find in trial transcripts (Markovits 1997a:259).[13]

[12] My project traces the rise and fall of Socialist law in the GDR through the records of one East German trial court and through interviews with the court's staff, with notables in the town where the court was situated, and with citizens who came into contact with its work.

[13] Unlike American trial transcripts, which are verbatim accounts recorded by a court reporter but which, because of the costs involved, are only rarely transcribed into ordinary print, East German trial transcripts, both in civil and criminal matters, were taken down not in stenography but in ordinary script by a secretary attending the proceedings. Thus, they do not contain verbatim records but exhaustive, though hasty, summaries of what was going on in the courtroom. The pressure to record as much as possible led to rushed handwriting and many abbreviations, but also to what often appear to

To what extent the Aktenordung is actually observed, however, is yet another question. Usually, a date stamped on the cover of a case file will tell when its contents are to be destroyed. In well-run court archives, the staff will check these dates periodically and act accordingly. Whether all this happens is a question of bureaucratic discipline, available personnel, and above all, storage space. Spectacular discoveries of court files long supposed to be destroyed—a cache of Nazi court files unearthed in Hamburg (Bundesminister für Justiz 1989), a whole attic full of records dating back to the 1850s found in a courthouse in East Berlin (Markovits 1995:151–56)—suggest that, luckily, not all court administrators play by the rules. I myself discovered a treasure trove of trial court files covering the entire life span of the GDR in an old courthouse in a small town on the Baltic that I have called Lüritz. But I had to investigate the archives of 24 trial courts to make my find and, as I now know, such discoveries are rare. Most courthouses simply do not have the space to hoard their superannuated records. Any reorganization of the court or any move to a new building will further empty shelves. In East Germany, the contents of court files also were weeded out to regain use of file folders, a scarce commodity in an impoverished judicial system. East German staff shortages, on the other hand, may have resulted in the preservation of more outdated files than in the Federal Republic. When West German court directors took over the administration of run-down Socialist court buildings, the new brooms very likely swept away what, even by East German rules, should have been discarded long ago. My own store of records had survived only because, when I discovered it in 1991, the money had not yet been found to pay a removal company for carting it away. By the year 2002, most of those hauling bills will have been paid. The Aktenordung will have left researchers with systematically depleted records that will offer only a spotty and truncated version of what happened in East German (and for that matter, West German) courtrooms.

**B.**

The next station on our trip from past to present is the *Bundesdatenschutzgesetz* (Federal Data Protection Act), passed in 1977 and introducing what must be the most perfectionist system

be relatively unguarded registrations of events, since the writer had not time to carefully choose her words. Because once a plaintiff had brought suit, few cases were settled out of court (in-court settlements were fully recorded), and because, like other Continental legal systems, GDR criminal law knew no plea bargaining, most legal disputes in the GDR, both civil and criminal, left records containing quite extensive accounts both of the issues and of the reactions of the participants. West German trial transcripts, by comparison, tend to focus primarily on the legal issues under dispute.

of data privacy in the world.[14] It established the principle that everybody should be protected against the unauthorized collection and dissemination of data relating to his or her personal life. On its face, the Data Protection Act did not concern court records at all but dealt with the electronic storage and utilization of personal data assembled by databanks and other institutions for governmental or commercial use (Berg 1989:77). But the Act led to a shift of balance between private and public interests in information that had much further-reaching implications. In the Federal Republic, the right to privacy had always been protected, and protected well, by Article 2 of the Basic Law, which safeguards the "free development of one's personality" and which has been used by the Constitutional Court and other high courts to develop a comprehensive case law protecting an individual sphere of intimacy and personal self-determination (Currie 1994:316–321; Eberle 1997:963; Kommers 1989:332). But the mere gathering of factual information for what appear to be legitimate public purposes had in the past not caused offense. By including under its protection not only intimate and private matters but all "person-related data providing information about the personal or factual circumstances of identified or identifiable individuals" (Bundesdatenschutzgesetz 1977: § 3 para. 1), the Data Protection Act expanded the area of privacy that buffers people against unwanted interferences by others and, in the process, redefined the meaning of privacy. Now, even seemingly innocuous characteristics such as age, schooling, family status, and the like began to be perceived as intimate reflections of personhood. In 1983, the Federal Constitutional Court, in its "Census Decision," established each person's fundamental right to "informational self-determination" and held that this right could be invaded only for reasons "of overwhelming public interest" (Bundesverfassungsgericht 1983:1, 43, 44).

The Data Protection Act was designed by lawyers (who, as a professional group, have little interest in empirical data) and was written in a legal culture that only reluctantly grants individuals access to public records (Scherer 1979:389). Indeed, under German law, the right to access usually presupposes a viewer's "legitimate" interest in the records' content, such as a prospective buyer's interest in consulting the *Grundbuch* (real estate register) before purchasing a piece of land (Grundbuchordnung 1935: § 12).[15] Unspecified civic curiosity, as a rule, will not be consid-

[14] Professor Ian Lloyd, commenting on the English Data Protection Act of 1998, calls the German system "currently the most extensive regime" (1998:4). On data protection in comparative perspective, see Bennett 1992.

[15] Similarly, the German Public Registry Act (Personenstandsgesetz 1957: § 61 para. 1) conditions access to public records containing information about births, deaths, marriages, etc., on an applicant's "legal interest" in such information. Courts have acknowleged "legal interests" in situations in which the applicant needs the information to enforce a legal right such as rights to property. But the thirst for knowledge does not qualify

ered a sufficient reason for prying into matters that do not affect oneself (Wyduckel 1989:327). Although the German Constitution also protects the "right to research" (Art. 5, para. 3 Grundgesetz 1949)[16] the Data Protection Act is largely oblivious of this right and deals with the use of "person-related" data for scholarly purposes only in two peripheral provisions (Bundesdatenschutzgesetz 1977: § 14 para. II 3 & § 27 para. II 3). A 200-page expert's report, written in preparation of the Act, did not even mention the possible tensions between the protection of privacy and the gathering of social science data (Berg 1989:64).

After the passage of the Act, problems of access to information involving any kind of individual subject matters soon arose (Berg 1989:81). Medical researchers complained about restrictions in their use of patients' data (Wagner 1979:71). Education specialists no longer could employ survey research in schools (Bull & Dammann 1982:213). Administrators, taking refuge behind the Data Protection Act, refused to reveal statistical data gathered by their agencies (Bull 1983:835). The Act officially seemed to delegitimate curiosity about other people's lives as nosey invasions of their privacy. In a country of closed doors and tightened window shutters, it further broadened the gulf between the self and others, and between the *bourgeois* and the *citoyen*.[17]

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as a "legal interest." A 1985 decision thus denied access to the Public Registry to a university professor requesting information that he needed for a research project (Landgericht Frankenthal 1985:2539).

[16] German courts and commentators usually interpret the right to research as a negative right, granting a scholar protection against state interference or discrimination, but promising no access to records administered by the state (Bundesverfassungsgericht 1986:1243; Bundesverwaltungsgericht 1985:1277; Jarass & Pieroth: Art. 5, notes 80, 81).

[17] The Federal Data Protection Act is too significant, and in many ways, too impressive a piece of legislation, to be dealt with in a few lines of text and a footnote. I do not want to dispute the legitimacy of its concerns nor to belittle the wisdom of its solutions. In this context, I want only to take issue with interpretations of the Act that see it as encouraging participation. Paul Schwartz, e.g., writes: "German law has accepted an idea of privacy as related to and promotive of participation. To do so, it developed a new aspect of the right of personality: the right to informational self-determination. In its pathbreaking *Census* decision of 1983, the Constitutional Court carried out a decisive step in German law's acceptance of the model of privacy as participation" (Schwartz 1995: 471, 562).

There is some language in the Constitutional Court's *Census* decision to support this view, and Schwartz cites it: "The person who cannot oversee with sufficient certainty which of the information about him is known in distant domains of his social environment, and who is unable to evaluate the knowledge of a possible communication partner, can be greatly inhibited in his freedom to decide or plan in personal self-determination. . . . [S]elf-determination is an elementary . . . condition of a free democratic community based on its citizens' capacity to act and participate (Bundesverfassungsgericht 1983:1, 43; Schwartz 1995:471, 562).

But the citizen whose interaction with others needs to be bolstered by assurances that they can't know about the personal aspects of his life seems a suspicious creature. Indeed, the Constitutional Court justifies its *Census* decision by pointing to "the apprehensiveness, even among loyal citizens" caused by the prospect of having to reveal personal data on state questionnaires and to the "fear of uncontrollable inquiries into one's personality" even in situations in which the law makes only "pertinent and justifiable" requests for information (Bundesverfassungsgericht 1983:1). Even the Federal Commissioner for Data Protection at the time reported "unneccessary fears" and "strong resistance" among Ger-

Technically speaking, legal historians were not yet affected by the new barriers sheltering the nitty-gritty of everyday lives against outside inspections. Any case record, by definition, involves the personal affairs of plaintiff and defendant and therefore might reveal details subject to the "informational self-determination" of the protagonists. But in Germany, court files, though public records, are in any case not publicly accessible. As working government institutions, courthouses are not considered "archives" and their depository of records, therefore, is subject only to internal use (Bundesverfassungsgericht 1986:1243; Scherer 1979:390). Even the defendant in a criminal case can request access to his case file only while the case is pending, and even then, only through his attorney (Oberlandesgericht Düsseldorf 1986:508; Strafprozessordnung 1987: § 147 para. I). For research purposes, state administrators can grant exceptions to this rule and usually will do so (Peglau 1993:440; Richtlinien für das Strafverfahren und das Bussgeldverfahren 1999:1864).[18] Although in the wake of the Datenschutzgesetz, both the Federal and State parliaments appointed "Commissioners for Data Protection" (Bundesdatenschutzgesetz 1977: §§ 36–38) (who in West Germany soon would claim to have a say in such decisions), it took a while after reunification before data commissioners were also installed in the new East German states. In 1992, when I applied for access to my Lüritz court files, the state's Minister of Justice, a Westerner and himself a scholar, gave generous and unencumbered permission for my project. When, five years later, I needed access to a prosecutor's file, now with an East German Minister of Justice and an East German Data Ombudsman in place, the situation looked very different. Although data protection law does not, per se, rule out investigations that require on-

man citizens confronted with perfectly legitimate state efforts to gather information for public purposes (Bull & Dammann 1982:213, 219).

The Constitutional Court's *Census* decision, by assuaging such fears, has also legitimated them and, whatever the Court's intentions, can be said to have contributed to their perpetuation. The right to be unknown in public interactions, well guarded by the Data Protection Act, also implies the right not to stick one's neck out. In the 1980s, many participants in public demonstrations in Germany seemed to make use of that right when they swathed their faces in scarves so that they could not be recognized, a practice known in German as "*Vermummung*," for which I can think of no suitable English translation. Like the Data Protection Act, Vermummung could, of course, be said to foster the participation of people otherwise too timid or suspicious to let their views be known in public. But this is a crabbed form of participation, one that, I suspect, neither the Constitutional Court nor Professor Schwartz would have welcomed, which reflects the alienation and political distrust of people who think of the state as "they" rather than "we." In 1989, the practice of "Vermummung" was outlawed by an Amendment to the German Criminal Code that, with a nod to fearful potential demonstrators, also significantly curtailed the authority of the police to photograph or otherwise record the presence of participants in public demonstrations (Gesetz zur Änderung des Strafgesetzbuches 1989:1059).

[18] Rules as to which particular office has to grant permission for a research project differ from state to state. In the state in which my current research project is located—Mecklenburg-Vorpommern—access to court files for research purposes can be granted only by the Minister of Justice.

the-premises research in courthouses, it has had a decidedly chilling affect on those officials who must grant permission. To stay on the right side of the law, permissions now—already an exceptionnow—usually come with many strings attached.[19] Would sources other than the courts' own collections of case law be more readily accessible? How about regular archives?

**C.**

The question brings us to the third stop on our road: the *Bundesarchivgesetz* (Statute on Federal Archives) of 1988, passed one year before the collapse of Socialism. Prior to the Bundesarchivgesetz, the use of archives had been governed mainly by internal regulations designed by administrators. Now, people began to worry whether the many bits of personal information contained not only in such intimate records as letters or diaries but also sprinkled throughout the more official papers one might find in public archives—such as personnel files, minutes of meetings, memoranda, and, yes, legal records of all kinds—would not touch upon the "informational self-determination" of their subjects and thus should be shielded against the curiosity even of scholars (Heydenreuter 1988:241). In 1982, a *Land* (state) appellate court ruled that the Basic Law's protection of free research did not entitle a researcher to gain access to the records of a subject who had not yet been dead for 30 years (Oberverwaltungsgericht Koblenz 1982). Three years later, an administrative court allowed a city archive to block its holdings for as long as 50 years (Verwaltungsgerichtshof München 1985).

The Bundesarchivgesetz was meant to settle such concerns about the privacy of people whose lives were captured in archival records. It did so by distinguishing between two types of records: those dealing with *public* events, which should be accessible to "everyone" 30 years after an event's occurrence, and those relating to "*natural persons*," which could be viewed only 30 years after that person's death (or, should that date be unknown, 110 years after his birth), unless the subject or his heirs consented (Bundesarchivgesetz 1988: § 5 para. 1 & 2). The new rules would have removed an entire generation's worth of archival history from the reach of scholars. Social historians and other social scientists, whose work involves the study of ordinary lives rather than great events, would have been most affected. One cause for the restriction seems to have been the Legislature's suspicion of

[19] In my own case, I was granted access to criminal case files kept in a prosecutor's office only under the condition that I took no notes of any names encountered in the files; that I approached no one for an interview of whose experiences I had learned through the files; that every day, I photocopied all the notes taken that day and left the copies with the prosecutor's office; and that I studied the files only in the presence of an office employee. The last requirement proved so impractical that, once I was on the premises, it was silently dropped.

people "who rummage through old records in search of interesting tidbits about their . . . contemporaries" (Hirsch 1987b:3226). Proper history, in this view, looks like a chain of remote and momentous happenings: wars, treaties, great men reaching great decisions. "We must find suitable technical ways to constrain the remarkable curiosity of contemporary historians," said the main speaker for the Liberals discussing the draft law in the Bundestag (Hirsch 1987a:1832 [PD]). The Christian Democrats even suggested expunging all "person-related" information from any document or record to be placed in archives: history purged of all its human smells and body warmth (Neumann 1987:3224 [PD]).

Before the final reading of the draft law the media got wind of the proposed restrictions and imputed to the Legislature more sinister motivations than an unreconstructed view of history. "Data protection for Nazis," shouted the weekly *Spiegel*. "A cover-up," claimed the *Frankfurter Rundschau* (Neumann 1987:3223). The draft was changed, and its final version now allows the 30-year quarantine to be shortened "in the interest of scientific research or of significant and legitimate personal interests" (Bundesarchivgesetz 1988: § 5 para. 5). Reductions of the 30-year delay require that any violations of privacy "must be excluded by suitable measures, in particular through the anonymized reproduction" (Bundesarchivgesetz 1988: § 5 para. 5) of the text in question. In practice, this means that a researcher will be given a photocopy of the document requested, in which all personal names and references have been blacked out. Access to files involving "notables of contemporary history" (*Personen der Zeitgeschichte*) and "officeholders in the exercise of their duties" is somewhat easier to obtain: in their case, the 30-year grace period can be reduced if their legitimate interests are only "suitably protected" (Bundesarchivgesetz 1988: § 5 para. 5). Presumably, "suitable" protection does not require the anonymization of all personal data under all circumstances.

What did the Bundesarchivgesetz imply for my topic: the authentic preservation of East Germany's legal past? At first sight, not much. In 1988, when the law was passed, West German archives held next-to-no primary sources accurately reflecting how the East German legal system worked. Until the Wall collapsed, West German scholars had to rely mainly on East German law reviews and on sparsely and selectively published case reports for their research. They did not even know of the existence of East German court statistics. One West German archive specialized in the collection of eye-witness accounts (primarily of criminal trials of former refugees),[20] but their reports, coming after

[20] The archive, called "Zentrale Erfassungsstelle der Landesjustizverwaltungen" (Central Registry of State Judicial Administrations) was established in October 1961 in Salzgitter, West Germany, in response to the construction of the Berlin Wall, which began on August 13, 1961. It was financed by the West German *Länder* (States) and was assigned

traumatic experiences and often unsupported by any written evidence,[21] proved so incomplete and inaccurate that prosecutors who today investigate GDR border killings and other "government crimes" (see Erstes Gesetz zur Bereinigung von SED-Unrecht 1992) cannot rely on them.[22] The Bundesarchivgesetz simply did not care about the GDR. It regulated West German investigations of West German history.

In this capacity, even the redrafted law placed formidable obstacles in the path of people researching recent or contemporary history. Political historians fare somewhat better than cultural or social historians,[23] since they will focus on "events" and "notables" rather than on ordinary people and thus are not reduced to working with photocopies of sources that a scholar cannot select herself (having no access to the originals) and for which she must pay to boot. All scholars interested in current or recent history have to rely on the liberality of archive administrators, who determine whether the protective delay of 30 years or more "can" (Bundesarchivgesetz 1988: § 5 para. 5) be reduced. Although the denial of access to a state archive theoretically can be challenged in court, I know of no case in which a researcher successfully did so. Quantitative research involving the examination of numerous undistinguished workaday existences (such as a legal historian's study of the role of law in ordinary lives) seems particularly threatened since archives can refuse the reproduction of records if it entails "unacceptable administrative burdens" (Bundesarchivgesetz 1988: § 5 para. 6, no. 4) (as large-scale photocopying surely would).

Why do I note all these restrictions if they affected only the study of West German history? Because the view of history that motivated the Bundesarchivgesetz also informed legislation that later dealt with the East German past and that affected what as-

the task of collecting reports on human rights violations and other illegalities committed by GDR authorities in connection with the Wall or with political trials. Information came from West German border guards, newspaper accounts, and the reports of fugitives and East German prisoners released to West Germany (Vultejus 1991:106). Because of the Archive's Cold War reputation, West German *Länder* under Social-Democratic governments ceased to provide financial support to the Salzgitter Archive in January 1988 (Deutscher Bundestag 1995a: Vol. I at 61).

[21] Defendants in political trials in the GDR did not receive a written copy of their sentence but were allowed only to read it at the end of the proceedings (Strafprozessordnung 1974: § 88). As a result, details of political trials, such as the reasons given for convictions or the names of judges and prosecutors, were often misremembered by defendants and could not be checked against a record.

[22] Reported to the author by a member of the Special Prosecutor's Office in Berlin (Staatsanwaltschaft II) charged with the investigation and prosecution of crimes committed by East German government and Party officials in the course of their duties.

[23] The German historian Herman Weber, i.e., complained: "All of us scholars know that . . . by and by, data protection has become the arch enemy of our research efforts since the very things we want to know will often be off limits for us" (Weber 1993:118). According to his colleague, Reinhard Heydenreuter, "in the last years, archives have been surrounded by an invisible wall of secretiveness. . . . The main victims were contemporary historians" (1988:241).

pects of that past would be deemed worthy of remembrance. By distinguishing between historical events and "notables" causing these events on the one hand, and undistinguished ordinary people on the other, the Bundesarchivgesetz foreshadowed a distinction that later would gain importance for the accessibility of East German Secret Police files: the distinction between perpetrators and victims. Information about events and notables, or, if you want, about the perpetrators of history, would be far easier to obtain than information about ordinary citizens (the victims of history) and their ordinary lives. As a result, East German history could be depicted as a chain of evil events caused by evil officials in which the everyday, humdrum experiences of Socialism—usually a mixture of good and bad—remained largely invisible.[24] The social history of the GDR, or what the Germans call its *Alltagsgeschichte* (workaday history), would be crowded out by the political history or, to use again a much-flaunted German term, by the *Unrechtsgeschichte*[25] (history of injustice) of a totalitarian state.

I also dealt in some detail with the Federal Statute on Archives because West German history is the foil against which East German history is evaluated. If, on the West German side, it is more convenient to study remote rather than current events and if political historians find their work less constrained than do their colleagues in cultural and social history, any investigation of East Germany's recent history (after all, the system lasted for only 40 years) will play itself out against the backdrop of a West German postwar history in which the political embarrassments of the past 30 years and the human failings of the past three generations have been well sheltered against the excessive curiosity of scholars. As we shall see with our next step, these limitations do not apply to the history of the GDR. As a result, its recent sins are far more visible than those committed by the Federal Republic.

[24] The distinction between perpetrators and victims, and between notables and ordinary people, suits well the lawyer's inclination to see the world in absolute contrasts of black and white and conforms to what Leo Katz has called the law's proclivity "to be so either/or" (2001). However, an "either/or" approach—while maybe necessary for the law's preoccupation with drawing lines between right and wrong, guilt and innocence, debits and credits, and the like—is not particularly useful in historical analysis. For instance, the law's assumption that former East German citizens in their interactions with the Stasi were either perpetrators or victims of Secret Police machinations clashes with everyday Socialist reality in which most people, in some way, both cooperated with and undermined the state's claim to totalitarian control. The filtering of public memory through law thus not only may make us lose sight of once important aspects of the past that are filtered out but may also lead to a simplistic "either/or" distortion of once complex and ambiguous experiences that the law helps us to remember.

[25] The term Unrechtsgeschichte is often used in political debate (e.g., by Heuer 1992:82; Thierse 1992).

**D.**

Two years after the passage of the Bundesarchivgesetz, the Wall collapsed. The GDR, until then a state obsessed with secrecy and in many ways terra incognita even to its own inhabitants, from one day to the next became a far more open place than the Federal Republic had ever been. Mountains of government and Party documents about whose existence one previously could only speculate became suddenly accessible. Spy masters published their biographies; secret police agents went public on television shows. One hundred twenty-two kilometers of Stasi files (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:108) were about to be thrown open to the public.[26]

Initially, German politicians disagreed about what to do with the mass of records the East German party bodies had left behind. Unlike the Soviet Union, in which the one and only Communist Party had ruled without competitors, the GDR, for purposes of appearance, had boasted a multiparty system in which the Communist Party (the SED) played the "leading role" but in which other parties, the so-called "block parties," were tolerated to provide a political home to voters who could not define themselves as "Communists." Some of these block parties, in particular the Christian Democrats and Liberals, shared names, and even some of their political rhetoric, with sister parties in West Germany. Since all of the non-communist parties in the GDR were largely managed and controlled by the SED, they played, in Socialist days, the role of puppets rather than opponents of the system. But after the collapse of Socialism, some of the "block parties" provided valued new members for their sister parties in the Federal Republic.

Faced with the huge legacy of historical records from the GDR, West German Christian Democrats and Liberals, who feared for the reputation of their new East German allies, suggested that only those party files should be made publicly accessible that concerned "state activities" undertaken "in the execution of state duties" (Deutscher Bundestag 1991:1307). The proposal was meant to expose the records of the former SED to general inspection but to leave the records of the former East German Christian Democrats and Liberals in the safekeeping of their new West German hosts. The Social Democrats, who, in Socialist days, had had no namesakes in the GDR from whom they now could inherit members, rejected the idea: It was absurd, they said, to claim that the SED-controlled "block parties" had managed to stay aloof from carrying out "state duties." Given the omnipresence of the Party, all political parties in the GDR, whatever their name and platform, were deeply contaminated by totalitarian

[26] The figure of 122 kilometers is composed of files, index cards, microfilms, diskettes, etc.

rule. Again, like previous fights over the meaning of the past, this fight, too, was a fight over present interests.

In the end, good sense prevailed and all political parties in the Bundestag (the PDS included) agreed to the foundation of a state archive that would serve as the combined repository of all party records in the former GDR, including the records of the Communist Party, the bourgeois "block parties," and the numerous "social organizations" that under Socialism grouped citizens in collective activities such as unions, the "Free German Youth Organization," the "Cultural Federation" (*Kulturbund*) and many others. In March 1992, a "Law Amending the Federal Law on Archives (Gesetz zur Änderung des Bundesarchivgesetzes 1992)" established the new foundation. The statute introduced one other significant innovation: It exempted the holdings of the new "Archive of the Parties and Mass Organizations of the GDR" from the 30-year grace period that shelters West German current history from premature inspection (Gesetz zur Änderung des Bundesarchivgesetzes 1992: § 2a, para. 4). Unlike the sluggish exploration of West Germany's past, the Aufarbeitung of East German history could begin here and now.

Considering that the GDR was a defunct regime, consigned to the "garbage pile of history," the distinction, seen with West German eyes, made sense. Historians, now working under "excellent conditions" (Büttner 1992:6107 [PD]), would dissect a cadaver, not a living organism. If, in the process, they would also treat the human survivors of the system as has-beens, that is what they were. Political reputations were no longer at stake; on the contrary, the abolition of the 30-year protective buffer should expose the former rulers of the GDR to immediate shame. "Our goal is the public exploration of the injustices committed in more than forty years of SED control," a prominent CDU member said in the Bundestag debate of the amendment (Schäuble 1991:1327 [PD]). "This is about the investigation and condemnation of an entire political system," said one of his allies from the Liberal Party (Schmieder 1992:6113 [PD]). Although the amendment preserved, for the new Party Archives, the rule that exempted documents concerning private persons from immediate inspection (Bundesarchivgesetz 1988: § 5 para. 2; Gesetz zur Änderung des Bundesarchivgesetzes 1992: § 2a, para. 4), the politics and institutions of the former GDR were thrown wide open to the investigation of scholars. As in the original Law on Federal Archives, records reflecting the role of political notables and functionaries "could" be made available for research if the privacy interests of their protagonists were "suitably" protected (Bundesarchivgesetz 1988: § 5 para. 5). Records of unimportant people would remain closed for 30 years after their death unless "anonymization" could ensure that any identifications of real live

people were impossible (Bundesarchivgesetz 1988: § 5 para. 2 & 5).

Good news for legal historians? Obviously. The new Archives hold many documents that throw light on the Party's use of law and on its manipulation of the legal process that now are easily accessible to scholars. Actually, even before the passage of the new amendment, other Federal Archives that after reunification administered the records of many now-defunct East German institutions had been generous in providing access to researchers. Why not? The GDR was dead. Most Westerners felt little but contempt for the deceased. Delicacy about the relics it had left behind seemed out of place. And so, the GDR's legacy of government and Party files now offers opportunities for research that would seem unthinkable in the Federal Republic. Internal records of the Supreme Court, of the GDR Ministry of Justice, documents from the Party's Central Committee, records of government inspections and meetings of all kinds are now available to the public that, in the West German counterparts to these institutions, are part of an institution's working files and therefore out of bounds to outside readers. Even after archivization, these records, in West Germany, are publicly available only with a 30-year delay.

Set against the genteel and muted background of West German legal studies, research into the East German legal system suddenly became exciting. Before the fall of Socialism, the study of East German law in West Germany had been a dull and doctrinal field in which a few law professors had made the most of meager and largely derivative sources. Now, the field was full of authentic thrills. Legal historians and sociologists got interested. A mass of useful publications used the newly opened archives to investigate the mechanisms of Socialist corruptions of justice: how the Party steered and controlled the processes of judicial decisionmaking (Rottleuthner 1994); how law was used to delegitimate political opponents (Bauman & Kury 1998; Fricke & Engelmann 1997). Two biographies of the infamous GDR Minister of Justice, Hilde Benjamin, also known as "red Hilde" and "bloody Hilde," appeared in short succession (Brentzel 1997; Feth 1997). A former Justice of East Germany's Supreme Court used the archives to recount the early political trials of his court to which he himself, as one of the Court's members, in Socialist days had only had restricted access (Beckert 1995). Although some of the post-1989 legal research also relied on nonarchival sources such as case law (Schröder 1999) (or what of it survived) and interviews, most scholars preferred to frame their questions in ways that would allow them to search for answers in the East German government and party records that now were so easily accessible.

Their former shrouds of secrecy made these documents particularly tempting. Untying a stack of confidential SED materials that an archive's librarian would place upon your desk would always feel a little like opening the door to King Bluebeard's forbidden room. Moreover, scholarly courthouse work in Germany, as we have seen, may require the permission of a Minister of Justice himself, and of a state's Commissioner for Data Protection. Obtaining their approval of a project is far more cumbersome than applying for a reader's pass to the Federal Archives. Given the zeitgeist and its preoccupation with political guilt and blame, most students of East German legal history looked for systemic pervasions of justice, which arguably would be easier to find in internal government and Party documents than in the civil, family, or labor law case law of trial courts. The one area of law that scholars expected to yield the most revealing information about the inner workings of the system—political criminal law—could not, in any case, be researched in courthouse archives. In the GDR, "political crimes" were investigated not by the regular police but by State Security, the Stasi (Strafprozessordnung 1974: § 88 para. 2, no. 2).[27] After reunification, all East German government and Party files involving the participation of the Stasi, whatever their provenance, were transferred to the so-called "Gauck Archive," which today administers the legacy of East Germany's Secret Police and which follows its own rules on the accessibility of its materials. It is here that a student of East Germany's political criminal law will have to look for authentic sources. Let us turn to the Gauck Archive, then, as the final stop on our journey through the institutions that shape collective memories of Socialist injustice.

**E.**

Of all the Secret Police organizations that flourished under Socialism, none has been as thoroughly exposed after the turnabout as the East German Stasi (Rosenberg 1995:261). None had left as much incriminating evidence behind: 122 kilometers of surveillance files; 39 million index cards (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:108, 113); 6 million personal dossiers; roughly 100,000 private informers in a nation of 16 million (Gauck 1995:11, 27). Initially, many politicians (East and West) favored the destruction of the Stasi files for fear that "murder and mayhem" (Geiger 1993:35) would ensue if hundreds of thousands of East German citizens should learn who

[27] Besides engaging in its conspiratorial tasks, the East German State Security also functioned as a branch of the police and, in this capacity, investigated criminal offenses. "Political crimes" usually were not adjudicated by ordinary trial courts but by a trial court in the regional capital or, in more serious cases, by the so-called Ia-panels of appellate courts.

among their friends and neighbors had spied and ratted on them during Socialism.[28] But in the end, East German dissidents (who were the first to push for the opening of the files) and their West German allies prevailed, and on December 20, 1991, the "Law on the Records of the State Security of the Former German Democratic Republic" (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991; Stoltenberg 1992:65) created the "Archive for Stasi Records" under the directorship of the Pastor Joachim Gauck, who had already headed a provisional Stasi archive created soon after the opening of the Wall.[29] Although since its inception, about 1,060,000 citizens applied to see "their" file (Engelmann 1999; Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:105),[30] the exposure has not led to noticeable civic unrest and hostilities. But the Gauck Archive has significantly contributed to the public image of the former GDR, above all, to popular views of its legal system. How did it do so?

Like the Federal Law on Archives and its 1992 Amendment, the Statute on Stasi Files regulates rights to the access and use of archive holdings by distinguishing between two categories of documents: those relating to events and institutions on the one hand and those containing "person-related" data on the other. Researchers have unrestricted access only to the "events related" files (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 32 para. 1, no. 1). Given the nature of the Stasi, relatively few of the Gauck holdings fall into this category. Since it was the main task of East Germany's State Security to ferret out what any malcontent or disaffected person in the country might be about to think or do, and since its methods of surveillance relied heavily on the reports of friends and neighbors, most Stasi files are not only "person-related" but contain private and even intimate information about their subjects. Unless such documents have

[28] "Murder and mayhem" are the words of Lothar de Maziere, the first and last democratically elected Prime Minister of the GDR.

[29] The German Archive for Stasi Records is without parallel in other post-Socialist countries. While all, to various degrees, suffered from Secret Police surveillance and repression, no other country managed to preserve and institutionalize the relics and the memory of that repression as thoroughly and as comprehensively as Germany. The Stasi Archive today holds all records of the former Secret Police regardless of their provenance, is responsible for their preservation and archivization, and provides access to the files to former Stasi victims and, more restrictively, to former collaborators of the Stasi and to researchers (Gauck 1995; Kritz 1995: vol. 2 at 596; Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991). A similar institution planned in Poland—the "Institute of National Remembrance"—was established by the Polish *Sejm* on Sept. 9, 1998, but met with so much opposition and parliamentary haggling that by the Spring of 2000, its president had not yet been appointed (Constitution Watch 1998:25; Constitution Watch 2000:30).

[30] My estimate is based on the figure of 1,590,151 citizen requests reported by the Gauck Authority itself (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:105) and on the report of a research associate of the Gauck Authority, according to whom, due to multiple applications, the actual number of applicants is "approximately one-third lower than the number of applications" (Engelmann 1999).

been thoroughly "anonymized," a scholar will be able to use them only with the written consent of each protagonist (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 32 para. 1, nos. 2 & 4). Consent may be difficult to obtain and is practicable, if at all, only in studies focusing on a small number of cases. "Anonymizations" are costly and time consuming: Each page containing names or other identifying features must be photocopied; on the copy, all personal indicia must be blacked out by felt pen; and every page, thus sanitized, must once more be photocopied to prevent a reader from holding it against the light and thus, perhaps, deciphering an inky shadow of a name or place. Since many Stasi files contain hundreds of pages, research without authorization by its subject, for practical reasons, is limited to the use of only a few "person-related" files at best.

But like the Law on Archives, the Statute on Stasi Files eases its restrictions for research touching upon the lives of those in influential and exposed positions. Whereas the Law on Archives distinguishes between "notables" and ordinary people, the Statute on Stasi Files gives this distinction a moral twist by classifying the protagonists of Stasi files as either victims or perpetrators. Victims—or in the Statute's more genteel vocabulary, "affected persons" (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 6 para. 3)—are those who were spied upon. Perpetrators (or "collaborators") are those who did the spying (whether professionally or, as "unofficial collaborators," only as a sideline) and those who held offices that legally or factually enabled them to give orders to Stasi staff (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 6 para. 5, no. 1). "Notables and functionaries" are grouped with the "collaborators" as long as they themselves had not been spied upon and therefore now deserve refuge in the victim category (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 32 para. 1, no. 3).[31]

Victim files, unless anonymized, are only accessible to the victim him- or herself (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: §§ 13, 32 para. 1, no. 2). Perpetrator

[31] In real life, the distinction between Stasi perpetrator and victim was often blurred. *Stasi* contamination could reach far and wide, and someone might have been a perpetrator in some section of his life while he was a victim in another. The Law on Stasi files, grounded on the assumption (or the fiction?) that the heroes and villains of Socialism can be sorted out, thus cannot separate black sheep from white based on some obvious characteristic of a protagonist. Instead, it has to ask in each instance whether a particular bit of information gathered by the Stasi shows its subject to have acted as either traitor or betrayed. Section 6 para. 8 of the Law states: "Whether a person is a collaborator . . . or a person affected by the State Security Service must be determined separately for each piece of information. The determination shall be based on the purposes for which the information was included in the file." The very same person thus may be the protagonist of both perpetrator and victim files. Given the different rules on access to both kinds of files, a researcher, in that case, would find it easier to study a person's Mr. Hyde acts than his Dr. Jekyll experiences.

data, on the other hand, can be made accessible without anonymizations as long as those interests of their subjects that are "worthy of protection" do not outweigh the interests of research (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 32 para. 1, no. 3). The interest to hide one's former complicity with the Stasi is never considered "worthy of protection" (Schmidt 1993: § 34, n4 at 218). The Statute on Stasi Files thus handles GDR notables more roughly than the Federal Law on Archives does. The statute seems to assume that through his former contact with the Stasi, a perpetrator has forfeited much of his right to privacy. Outside the Stasi context, even GDR officials and functionaries are entitled to the anonymization of their personal records. But with respect to Stasi records, agents, or those who used (or only could have used) Stasi services, can ask no more than that their privacy interests are *balanced* against a researchers' interest to learn about the Secret Police. The Gauck Authority, which controls the balancing process, by its own admission feels more solicitous of the public's right to know than of a perpetrator's interest in self-determination.[32] The agency is fiercely protective of victim files.[33] But access to notable or agent files, at least to those of the more famous or infamous perpetrators, seems rarely to be barred.[34]

What does this mean for law? It means that the political case files of East German criminal courts, all of them "victim files," only with great difficulty are accessible to scholars. All were investigated by the Stasi. All had to be transferred from their previous storage places (mostly the prosecutors' offices) to the control of the Gauck Authority (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: n105, §§ 8 & 9). All, by definition, contain "person-related" data gathered through Stasi surveillance.

[32] The Gauck Authority, for instance, rejected the request of a former "informal collaborator"—a journalist—who planned to write an autobiography and for this purpose wanted to gain access to the surveillance reports that he himself had written for the Stasi. Under the Stasi Records Act, perpetrators can require access to their own reports if they can claim "a legal interest" in reviewing them (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 16 para. 4). The Gauck Authority refused to recognize the wish to render an account of one's own life in an autobiography as a "legal interest." The case is currently being litigated (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:85).

[33] The Gauck Agency thus refused to hand over non-anonymized victim files to a prosecutor's office in a case in which, according to the Agency's own judgment, the prosecution did not need unexpunged access to the information that the file contained. The prosecutor's suit for unrestricted access failed (Oberverwaltungsgericht Berlin 1993).

[34] "In practice, [the Gauck Authority's] application of § 32 Statute on Stasi Files (which regulates access to the files of notables and perpetrators for research purposes) . . . proved to be less restrictive than was originally feared" (Henke 1993a:582). The Agency thus insisted, for instance, on publishing the name of a well-known East German author in a book that accused him of collaborating with the Secret Police in the surveillance of East Germany's literary circles. The author's suit, denying the allegations and claiming that his "predominant" personal interests deserved protection (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 32 para. 1, no. 3 ) was settled on appeal (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:88).

All, therefore, can be studied only after the usual anonymizations. Here is what will happen in the course of a typical research project involving Stasi files.[35] A scholar will begin her quest by asking the Agency to see those records that she considers essential to her project. As in any large bureaucracy, the staff of the Gauck Archive—who have to do the necessary reading, blacking out, and copying—will try to keep their own workload to a minimum. The applicant will be told that her request will take too long to satisfy and that it will help her application to drastically reduce the number of case files she has asked to see. Having already waited a year or more,[36] the researcher will reluctantly do so. Since average case records of political crimes may contain hundreds of pages, even of those records to which access is granted, only a limited number of pages will eventually be copied and anonymized. In the end, someone researching, let us say, the role of lawyers in East German political trials, or the change, over time, of sentencing practices in cases involving crimes against the state, will have to make do with a modest stack of copied case pages, over the selection of which she had no control.

But does the fact that most East German political case records will remain buried in the Stasi Archive not shelter the reputation of the former GDR by hiding Socialist injustices from public view? At the beginning of this article, I had claimed that the legal devices for public memory production usually serve the interests of the winners of history. Will the quasi removal of the most offensive branch of the East German criminal justice system from scholarly investigation not rather serve the losers? Will our collective memory see East German courts in too rosy a light?

Not really. The legal rules governing access to Stasi records removed the bulk of ordinary political case law in the GDR from scholarly and popular investigation. Under these rules, all quantitative research, studies of legal developments over time, or other studies involving a large number of cases for all intents and purposes have become impossible. But only the mass of average political trials has been barred from the reach of scholars. Extraordinary criminal cases can still be studied. A famous victim of political persecution can be asked to give permission to a re-

[35] When, for my own research project, I requested access to case files dealing with political offenses committed in the city that I am studying, I was in a far better position than most scholars using Gauck files since I knew the names, birthdates, offenses, penalities, etc., of all my subjects from the records of my city's prosecutor's office and thus did not have to rely on an employee of the Gauck Authority to select my sample. Nevertheless, I was told that I could not view any of the files without the usual anonymizations. Since anonymizations are time-consuming, I had to reduce my request by more than half the number of case files I had asked to see to allow an employee of the Agency to carefully expunge from each photocopied page all the identifying features of the case that were already known to me.

[36] It currently takes 12 months before a scholar's application for access will even be examined by the Agency (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:69).

search project, and is likely to do so. Individual case files of show trials can be copied and anonymized. Perpetrator data are accessible. The scandalous, which is likely to be singular, still is within the reach of scholarly investigation.

Injustices committed, or suffered, by the famous or notorious are easier to research for other reasons, too. Gauck files are classified not by name and letter of the alphabet but by the subject's birthdate. While the birthdates of well-known people can be easily discovered, those of ordinary citizens, of interest to a scholar not as individuals but as members of a group, are usually hidden in the darkness of anonymity. To ascertain the birthdates of large numbers of unknown people in order to request their files will often be impossible. The fact that the pages of a record to be copied and anonymized are not selected by a researcher herself but by staff members of the Gauck Authority, further contributes to the process's bias in favor of the scandalous. Most of the employees of the Gauck Archive are not trained archivists but formerly unemployed, now retooled, East German citizens from all walks of life. As a rule, they know nothing about an applicant's field of scholarship. Their choice of pages to be copied will depend largely on their own tastes and preferences. They will prefer to copy typed, over handwritten, pages of a record since handwritten pages are difficult to read and therefore are difficult to purge of all references to personal names and dates. Since the most important part of a criminal case record, the oral argument, is always recorded by hand, often in hasty script, a scholar very likely will miss out on a trial's most decisive moments. Gauck employees will also bring their lay sensitivities to the selection of the cases to be copied. They will attribute greater significance to the sensational than to the normal. A scholar looking for the unexciting and the average will often be shortchanged. "You don't want to look at all these cases on your list," the Gauck official who was selecting and preparing files for my inspection told me. "Those are mostly cases of truants making trouble. But here I've got a fascinating case of a whole family trying to flee by hiding in the trunk of a car."

And finally, there is one other way by which the Gauck Authority contributes to our current view of East German law: through the work of its own research department. The department was created, together with the agency, in 1992; its staff of 68, 20 of whom are fulltime scholars, among other tasks engages in the historical *Aufarbeitung* of East Germany's State Security (see Henke 1993a:581). Unlike outside scholars, staff researchers have access to the uncopied, unexpunged, original holdings of the Archive. Outside collaborators, hired by the department to work on specific research projects, are also given unrestricted ac-

cess to the files.[37] In what one critic called "a relapse into pre-enlightenment days" (Schönhoven 1993:114), the Archive, a state institution, thus undertakes "privileged state research" (Schönhoven 1993:113) into one important aspect of East German history.

The Gauck Authority is independent of the German government, and there is no reason to doubt the academic qualifications of its research staff, whose members were appointed after fierce competition.[38] But there is reason to worry about the openness of the scholarly debate and about the historical accuracy of the emerging picture of East Germany's past. Outside scholars will often not be in the position to check the reliability of studies produced by the Gauck Research Department or to dispute their implications. There can be no equal give and take in scholarly debates between insiders and outsiders. And, most importantly, their monopoly control over the sources enables Gauck scholars to define the research agenda in ways that may do injustice to the data.

The imbalance of access to the sources is particularly troubling in the field of law, where a technical rule of East German police organization—namely, that all "political crimes" were investigated by the Stasi (Strafprozessordnung 1968: § 88)—led to the fact that East Germany's entire political caseload has now been placed in the custody of the Gauck Commission. Gauck scholars' professional preoccupation with the Stasi and with Stasi machinations will make them less sensitive to other, more subtle and didactic forms of totalitarian rule that pervaded East German law and that to my mind made the system far more complex, more contradictory, more human, but in significant ways also more debilitating for its citizens than the evil empire pictured in much of the official Gauck research. The Research Department's list of publications certainly reads like a catalog of horrors.[39] The Stasi was a horrible organization. But it was no Gestapo. Its major weapons were not torture and bloodshed but forced intimacy and betrayal; its goal not the physical annihilation of all opponents but the gathering of all in one suffocating family embrace. Socialism dreamt of a time when everybody would be everybody's keeper. The Stasi, invading its victims' lives with neighborly and brotherly surveillance, acted as if the barriers between public and private realms had already broken down.

[37] For a product of such collaborative research, see Fricke & Engelmann (1997:94). Roger Engelmann is a member of the Gauck research staff. Karl Wilhelm Fricke, a journalist and scholar, former political prisoner in the GDR in the 1950s, longtime foe of Socialism and one of its most conservative and unforgiving critics, has been given, on this and on other occasions, access to the non-anonymized holdings of the Gauck Authority.

[38] The research department's first four scholars were selected from a pool of 856 applicants (Henke 1993b:116).

[39] The titles are listed in Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999: Appendix 6 at 114.

Most of its reports are filled with the banal details of humdrum daily life: Big Brother peering through the keyhole into a sibling's room. Many Stasi strategies resembled the nasty pranks of destructive juveniles: repeated senseless phone calls; the spreading of rumors about a victim's sex life; quantities of unordered merchandise delivered to a victim's door.[40] This was the spying apparatus of a parental system that could tolerate ordinary deviance but not dissociation from the fold. As a thoughtful East German judge once said to me, "In the end, we would have all been members of the Stasi."

The Gauck Authority has shown little interest in the human and moral ambiguities of Socialism. Led by a man who, as a pastor, had a professional stake, and as a former dissident, a personal stake, in seeing the world divided into light and darkness and in classifying its inhabitants as either righteous or sinners, the Agency has done its best to keep these distinctions clean by sheltering the victims and by exposing the perpetrators to public shame. In the process, it has fostered an image of East German history that makes it look much like a "subdivision of the history of the Stasi" (Lemke 1993:115).[41] Even survivors of the system may accept this view. Thus, three times as many East German citizens applied to see "their" Stasi files than turned out to actually have one (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:11): Seen with Gauck-trained eyes, the Stasi may have achieved more power over people's imaginations and beliefs today than it held in the days of Socialism. With personal experiences increasingly buried under public memories, the past, even the recent past of the GDR, will soon become a distant country.

## II.

Let me return to my argument and remind you once more of the various stations on our journey through the statutes and institutions that shaped the current views of law and justice, or their opposites, under Socialist rule:

- The 1934 Decree on the Preservation of Court Files regularly empties the shelves of German court archives of their holdings, leaving only the bare bones of most court records—namely, the judgments—and even those, at best, for no

[40] On the Stasi's methods used to undermine a victim's self-confidence and reputation, see Rosenberg (1995:298, 303).

[41] This view of GDR history as Stasi history is also reflected in the Gauck Commission's self-representations. See the Commission's proud description of the exhibitions on the Stasi that the Commission's regional offices tend to arrange in their office buildings: "It is to be welcomed that among the most frequent visitors of the exhibitions are young people who from their own experiences have no or only a vague picture of the GDR and who, in this fashion, can find reliable information" (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1997:14).

longer than 30 years. As a result, data allowing for a thick description of the judicial process are vanishing fast. Most surviving information will be "thin," focusing on the end result of legal disputes, not on the actual workings of the system.

- The 1977 Federal Law on Data Protection enlarges the zone of privacy surrounding individual lives by placing all "person-related" data under the control of their subjects. As a result, research into the workaday experiences of Everyman is likely to collide with the "informational self-determination" of a study's protagonists.
- The 1988 Federal Law on Archives blocks researchers' access to West Germany's political history for 30 years and social scientists' and historians' access to information about ordinary lives for three generations. Access to "anonymized" personal data is possible but cumbersome and costly. As a result, recent West German history is sheltered against the curiosity of scholars. Investigations of "events" are easier than investigations of daily life experiences.
- The 1991 Statute on Stasi Files, through its rules on access, facilitates investigations of the scandalous and hinders research into the "normal" impact of Stasi activities (if we can ever called the Stasi "normal"). Practices such as the registration of Stasi files by the dates of birth rather than the names of their subjects, the vagaries of an anonymization process that places the selection of research materials in the hands of untrained lay people, and the preferential treatment of the Gauck Agency's own staff of scholars contribute to the production of historical research that is far more likely to stress the excesses of Socialism than its ordinary (and possibly less-shocking) aspects. As a result, East Germany's legal past, to the public mind, is likely to appear a Stasi-dominated wasteland.
- The 1992 Law Amending the Federal Law on Archives exempts the holdings of the newly created "Archive of the Parties and Mass Organizations of the GDR" from the 30-year grace period protecting West German historical records against premature inspection. Other federal archives holding GDR sources also make all but personal data immediately accessible to readers. Unlike West Germany's recent history, the history of the former GDR can be studied without tactful delays. As a result, the history of Socialism in East Germany—already filled with shocking events—appears all the more shocking when set against the discreet background of West Germany's past. Recent sins of Socialism are far more visible than the more distant failings of West Germany's political past.

My survey has described a recollection process in which what actually happened in the past (assuming we could ever fully ascertain that) is gradually filtered and condensed into a few handy images that fit the self-perception and political interests of those

who do the recollecting. Before a reader can object to this description, let me add a few disclaimers to my story.

*1.*

I do not claim that just because much information about the former GDR has been buried by our selective transmission practices the information that survived the selection process is untrue. East German Socialism was repressive, dishonest, and suffocatingly possessive of its citizens. The East German legal system operated under many degrading constraints. Especially in the early years of the GDR, glaring injustices were frequent. Most of the current research into East Germany's legal past deals with the 1950s and early 1960s. Most of the horror stories it unearths are probably true. Some will be false: In fact, one of the harshest accusations against the GDR—that it used forced psychiatric care to repress dissenters—has recently been discredited in a book published by a member of the Gauck Authority's own research staff (Süss 1998). Other, equally gory, charges have never been proved.[42] But enough corruptions of justice happened throughout the history of the GDR to satisfy the curiosity of the many scholars now bent on uncovering them. I do not want to question the trustworthiness of their scholarship. I want to draw attention to the large, untilled area of East Germany's legal past that their work ignores. The current image of the GDR as an "*Unrechts-Staat*" (critically Rottleuthner 1995:401) (state of unlawfulness or injustice) draws its persuasiveness from the amnesia about everyday legal life under Socialism that, at least in part, was fostered by our selective public memory.

*2.*

I do not claim that the selection process by which events are chosen and preserved for public recollection is so hermetic that no other than officially sanctioned memories can pass it. My own current work, based on trial court records that long should have been destroyed, proves the opposite. Mine is not the only case of

[42] Wolfgang Schäuble, former Minister of the Interior, at the Bundestag debate of March 12, 1992, that dealt with the tasks of the First Enquete Commission recounted the horrors that the Commission should investigate: "It seems as if the full measure of misery and repression (in the GDR) is only now becoming visible: the perfection of its surveillance system, the misuse of psychiatry to destroy those considered undesirable, forced resettlements, forced adoptions, treatment of newborns that expressed contempt for human life, and the death tracts of the Bautzen prison, to list just some of the perversions of a system that knew no respect for the human dignity of individuals" (Schäuble 1992:59). Several items on this list have never been substantiated: in particular, the psychiatric confinement of political opponents; the so-called "forced adoption" of the children of political dissenters; and the killings of frail newborns right after birth, allegedly to improve infant mortality statistics that, by international convention, trace only babies older than three days. Not surprisingly, all three of these allegations have figured visibly and extensively in press reports.

records' surviving against the odds. Blunders and (sometimes conscious) oversights happen all the time: files are left inadvertently in the wrong place; archivists turn a blind eye to unconventional uses; even Gauck files are not always properly anonymized. And there are other sources besides those channeled by the processes I described: newspapers; eyewitness reports; private or local archives that should, but not always will, follow strict anonymization procedures. Moreover, a large part of the government and Party documents that are currently the backbone of most research will not reflect the outrages of totalitarian rule but the mundane problems and solutions of ordinary day-to-day government. In any case, even high-level documents can be read "against the grain" by researchers who focus not on a text's ostensible objectives but on the hidden habits and assumptions it reveals between the lines.[43] In fact, long before the collapse of Socialism, the few official sources then available, if read with enough curiosity and imagination, could reveal more about the inner workings of the system than the sources' authors ever had intended.[44] The past that is filtered by our memory devices is not closed off to all inquiries.

I do want to point out, though, that such inquiries will often be discouraged and derailed by our collective memories' fascination with Socialist injustice. The mnemonic processes I have described will, like a highway, channel the traffic in ideas away from intriguing little side roads into the mainstream of condemnatory research that corresponds to the West German winner's views of East German history. Lawyers are more likely to follow the road signs than are historians and other social scientists: They tend to believe in authority and rules and therefore, by professional temperament, will attribute greater significance to documents reflecting Central Party and government decisions (like those now easily accessible in the Federal Archives) than to the traces of ordinary life under Socialism (that in the public recollection process largely have fallen by the wayside). But while lawyers may be more conventional and rule-bound in their research than their social science colleagues, they also exert greater influence on Germans' perception of their past. Law paid a crucial role in the transition from Socialism to Capitalism. Indeed, one can describe that transition process as an exchange of legal paradigms: State property was replaced by private property; the plan by contracts; utopian hopes for substantive justice by a pragmatic reliance on procedure; collective man by the rights-bearing individ-

[43] I owe this observation to Thomas Lindenberger, Zentrum für Zeithistorische Forschung, Potsdam.

[44] For some ingenious examples of such scholarship consider, e.g., these pre-1989 Western attempts to make sense of Soviet election rituals: Gilison (1968:814); Zaslavsky & Brym (1978:362).

ual.[45] What lawyers say about East Germany's past will be accorded greater credibility and trust than the pronouncements of almost any other analysts of East German history. And lawyers speak in many roles and places: as legislators addressing issues of Socialist guilt and punishment; as judges adjudicating them; as attorneys, defending or accusing the protagonists; as scholars, describing and evaluating past events. The current image of the *Unrechts-Staat* is so persuasive because it seems legitimated by respect for law.

*3.*

I do not claim that the various steps that led to the production of public memory were part of a conspiracy. I do not claim that those involved in memory choices intentionally omitted certain information; in fact, I do not even claim simple causality, that is, I am not sure that without the laws and institutions that are the subjects of this article, our current recollections of East German Socialism would look very different. Most political decisionmakers who at one or the other stage along the road helped to preserve some memories of the GDR and to weed out others did not do so as part of a conscious plan. They simply followed their interests, instincts, and convictions. Most did not lie, and even those who did not speak the truth may often have spoken in good faith.[46] Few will have thought beyond the respective issues at hand: how long to preserve superannuated court files; what to do about the Stasi records. If the drafters of the Federal Law on Archives favored researchers' access to events-related files over their access to person-related files, it probably was because their view of history was that of their old schoolbooks, filled with the dates and places of important battles and treaties, in which unimportant people appeared, if at all, only in anonymous and passive statistical roles such as "unemployed" or "war victims." If legislators distinguished between information concerning ordinary people and notables, facilitating access to the latter, it was because they saw political history as a more legitimate intellectual undertaking than social history. If the makers of the Federal Data Protection Act expanded privacy protections beyond the realm

[45] The central role of law in the historic transformation process explains why, after the collapse of Socialism, no other group of East German professionals were vetted as thoroughly as were judges, lawyers, and law professors (Markovits 1996).

[46] Just one example: The former GDR dissenter Vera Wollenberger, herself a victim of the Stasi (who enlisted Wollenberger's own husband to spy on her—see Rosenberg 1995:xi) claimed in the Bundestag debate of May 14, 1991, that about one-third of all "so-called criminal cases" in the GDR involved, in reality, political offenses and were investigated by the Stasi (Wollenberger 1991:1790 [PD]). The estimate, no doubt offered in good faith, is almost certainly wildly off the mark. My own research on one East German trial court suggests that only between 1% and 3% of all first-instance criminal trials dealt with political offenses that were investigated by the Secret Police. Based on MfS statistics, Hubert Rottleuthner reports a figure of 3% (1998:26).

of the intimate to cover all, even the most innocuous, "person-related" data, it was because they were imbedded in a legal culture whose members are more likely to seek self-fulfillment in the retreat from society than in public participation.

Collective memory is a matter of political and legal culture. With the collapse of Socialism, it also became a matter of victory and defeat. The last two items on our checklist—the Amendment to the Federal Law on Archives and the Law on Stasi Files—not only echoed the cultural convictions of preceding legislation (such as their views of history and privacy) but also were intended to demonstrate the moral superiority of West Germany over the former GDR. Both the Amendment to the Law on Archives and the Stasi Files Act do so: the first, by exposing East Germany's past to immediate condemnation; the second, by fostering research into the Stasi's worst excesses. The blacker East Germany's past, the shinier West Germany's past and present must appear. But it would be a mis-description to say that the processes I listed "caused" our contempt for Socialism. The reverse is just as true: Our contempt for Socialism "caused" laws to be passed that would confirm our blackest memories of it. The laws I cited reinforced beliefs already in existence. Their good fit with public preconceptions made them all the more effective.

## III.

Selective public memory not only affects what we remember about the past but how we remember it. Current images of the East German legal system appear primarily in two forms, both influenced by the laws and institutions that channeled our recollections.

The first might be called the institutional approach to Socialist legal history. Drawing on the many Party and government documents that are now available, this kind of research treats the legal system of the GDR as a manifestation of the use and misuse of political power under Socialism. Researchers examine the relationship between Party and government authorities in the GDR; they trace political hierarchies and institutional pecking orders; they look for jealousies and conflicts between the different players in East Germany's legal system (such as the rivalry between the GDR Supreme Court and the Ministry of Justice); spend much attention on cadre politics and investigate how central decisions were disseminated to lower government authorities. Since the daily work of East German judges and prosecutors was "steered" (Rottleuthner 1994) by an intricate system of reporting obligations of those below and orders, inspections, and guidelines issued from above, insight into the structures of this web of supervision and command is indeed critical for understanding the role of law under Socialism. Not surprisingly, a central theme

of this type of scholarship is the East German judiciary's lack of independence. "Institutionalists" are also interested in ways the system violated its own rules, such as the Party's interferences in death sentence cases (Werkentin 1998), in the "anatomy"[47] of the Ministry of State Security, and in the Stasi's involvement in political trials (Engelmann & Vollnhals 1999; Werkentin 1995; Beckert 1995; Baumann & Kury 1998).

Much of this scholarship is good and useful—indeed, essential. But to my view, much of it also suffers from a failing that can be explained by looking at the sources scholars of this school of thought rely on. Most information for the institutional analyses of the East German legal system come from internal government and Party documents that deal with the administration of justice: records of Politbureau meetings, ministerial decrees and briefings, high-level government decisions, written or verbal statements of important functionaries, and orders and instructions of all kinds. Once classified, these sources can now easily be consulted in the Federal Archives. They show the extraordinary fragility of law under Socialism: the conscious use of law for political purposes; the efforts spent by government and Party to turn law into an effective social tool; the tight supervision and control of the judiciary; the—with the years decreasing—readiness of central authorities to interfere with local decisionmaking. These sources easily establish the profound structural differences between East and West German legal institutions. They show, if it needed showing, that the GDR was no *Rechtsstaat*, in which political power was constrained by law. They show how Socialist government and Party bosses wanted to use the law.

But these sources do not necessarily show whether the East German legal system conformed to its political role. Even in a totalitarian state, central goals must be realized by local people. There is no reason to believe that the famous gap between law on the books and law in real life did not exist under Socialism. Officials at all levels were more tightly steered and supervised than under Capitalism, but since no other real controls existed besides those coming from the center (such as a free press or citizens' litigation against the state), the monitoring system, as in all state bureaucracies, often must have failed. Plan targets and reporting obligations were to keep local officials on their toes, and even courts worked under annual and quarter-annual plans and had to report significant events weekly to their superior court. But the reporting system, while keeping courts on a tight leash, at the same time offered chances to bypass supervision by allowing those writing the reports to play down local failures or to inflate successes. Padded plan reports, notorious in Socialist state

[47] One of the main projects of the research department of the Gauck Authority is the edition of a multivolume handbook on the State Security (Henke et al., n.d.).

economies, were just as likely to happen in other sectors of state activity. In fact, the enormous efforts spent by the East German government on steering and supervising its judiciary suggests how much those in control mistrusted the workings of their own legal institutions.

Scholarship that relies on the structures of the state and Party apparatus and on the goals and pronouncements of those in authority to draw a picture of the role of law under Socialism thus underestimates the influence of the law's addressees on how that system did (or did not) work. Ignoring the little man and his impact on the world is, of course, in line with that view of history that informed much of the legislation that is the subject of this essay: a view of history in which ordinary people play only insignificant and passive roles and therefore must be allowed to hide in anonymity. It is a view both protective and condescending. Bertolt Brecht complained about it in his poem "Questions from a Worker Who Reads":

> "Young Alexander conquered India.
> All by himself?
> Caesar defeated the Gauls.
> Did he not even have a cook along?" (Brecht 1975:656)

One need not believe in the dictatorship of the proletariat to suspect that the powerless have many ways to bypass, evade, undermine, or bend to their own purposes the orders of the mighty. My own research into the legal history of one East German town shows a subtle process of mutual influence and accommodation between the law's functionaries and its addressees (Markovits 1999b:333). Under the weight of a parental legal system,[48] citizens' behavior and convictions changed. But the intended impact of the law changed, too. The German historian Alf Lüdke uses the expression "*Eigen-Sinn*" to describe the mixture of adaptation and resilience by which unimportant people leave their mark on state affairs (1993; 1998): a term that perhaps is best translated as "having a head of one's own" and that plays on the fact that in German the word means both "willfulness" and "obstinacy." There is no room for *Eigen-Sinn* in the "institutional" scholarship encouraged by our collective memories of Socialism. That may be one of the reasons why the objects of this scholarship, today, so often have difficulties recognizing their own past in Western descriptions of it.

The second type of scholarship that takes its cues from the ways and means by which we recollect the past could be called "victims' stories." "Victims' stories" use individual examples of Socialist injustice as points of departure and foundations for more general analyses of why and how the system violated basic human rights (Fricke 1996; Vollnhals 1998). Timothy Garton Ash's

[48] The term was coined by Berman (1963:282).

(1999) *The File* is a typical "victim's story": a condemnation of the Stasi based on the author's own encounter with it. Victims' stories are encouraged and facilitated by the rules on access to the historical materials that are the subject of this article: Victims themselves have unrestricted access to their own file; they or their heirs can consent to other people's investigations of their suffering; studies of exemplary miscarriages of justice are possible even without consent because anonymizations of single files, even if bulky, are feasible and not unduly costly, and eased access rules for records involving notables means that a victim's story is unlikely to be blocked because of privacy concerns for the officials who participated in it. Most victims' stories, in one way or the other, involve the Stasi.

It is not easy to write a tightly reasoned and intellectually perceptive victim's story. The genre mixes analysis with emotions, and the emotions often win. Ideally, a persuasive victim's story would use the fate of its protagonist to exemplify the features of the system that could make that fate happen. Since even countries governed by the rule of law cannot avoid all miscarriages of justice, an analytically successful victim's story would have to convince us that its hero's sufferings were not accidental but systemic, and it would have to show us not only how and why the system produced injustice in the case at hand but why it would inevitably cause similar injustices in many other cases. The author of a victim's story thus has to treat his hero as a didactic means rather than an end.

Most authors, either themselves the heroes of their stories or emotionally close to them, cannot bring themselves to do so, and so their empathy makes them lose sight of the complexity of the surrounding issues. Even as knowledgeable and perceptive an author as Timothy Garton Ash is too much taken with the protagonist of his *File* to spend much intellectual energy away from him. And so, instead of an analysis of the truly bewildering and complex phenomenon of the Stasi, *The File* gives us the self-important story of one victim pleading for our sympathy and approval. Ash even adds a little sex to his account to keep us interested. Some victim's stories are deeply moving. But even those do not explain a lot.

There is another difficulty with victims' stories. To have explanatory power, they must get their victims right, that is, they must pick victims who exemplify the faults and perversions of a political system that led to their victimization in the first place. Most Western victims' stories center on dissidents and people imprisoned or shot for trying to "flee the Republic."

Dissidents and fugitives were indeed systemic products of a state that allowed its citizens neither to disagree with it nor to leave the country. From a Western perspective, these victims' stories can do double duty: expose Socialism and extol the rule of

law. Dissidents and fugitives make ideal heroes because they suffered for embracing the very values that Socialism trampled under foot and that the rule of law holds out as shiny promises. Fugitives even risked their lives to exchange Socialist confinement with Capitalist freedom. Not only writers tell their stories: The German Parliament, by passing a Rehabilitation Statute that automatically entitles all defendants convicted of opposing the government or of trying to flee the country to have their verdicts quashed (Strafrechtliches Rehabilitierungsgesetz 1992) added its voice to the many other voices currently describing and condemning the Socialist past.

The trouble is that many of these stories did not exactly happen the way they are now told. We like to think of those East Germans braving the risks of an illegal border crossing as heroes and martyrs of freedom. They were. But to most, freedom seems to have meant opportunity and adventure rather than the blessings of a law-bound state. Most were reckless young men, too young to believe in their own mortality, and without the responsibilities and discipline that tie more solid people to their jobs and families. Most ran away from something: an unpleasant job; too strict parents or supervisors; trouble of one sort or another, and often, the boredom of a colorless and regimented life. But we mis-describe these victims if we now enlist them as martyrs of the *Rechtsstaat* (Markovits 1997b:864, 869).[49]

More importantly, by focusing on the victimhood of fugitives, we lose sight of another, larger but far less attractive group of victims who also defined Socialism but whose suffering cannot serve to bolster Capitalist feelings of superiority: East German citizens convicted of "a-social" and work-shy behavior. As in other Socialist countries, truancy could be a felony in the GDR.[50] Most convicted truants had fallen afoul of the law in other ways as well: Many were alcoholics and vagrants, had not paid their bills, or had committed petty theft. But it was their work evasion that in

[49] My characterization applies to those fugitives who tried to escape from the GDR by physically overcoming the obstacles along the border (fences, Wall, "death strip," etc.), were caught, and subsequently were convicted of "attempted flight of the Republic" (Strafgesetzbuch 1968: § 213). The typical profile of these *Grenzbrecher* (literally, "border crashers") was different from that of more successful fugitives who fled the GDR by not returning from an officially sanctioned visit to the West, a variation of Section 213 Criminal Code called "illegal non-return." When, in the 1980s, the regime became more lenient about granting travel visas to the Federal Republic, incidents of "non-return" began to rise and the offense of "flight of the republic" gentrified: Offenders who got out with the help of visas tended to be older, were more likely to be middle-class, and no longer were almost exclusively male. They also, by definition, were safely in the West when they committed their offense and therefore could not be arrested. To them, the "Rehabilitation Statute" usually does not apply. The "martyrs" of the Wall enshrined in our public memory were almost always "border crashers."

[50] Strafgesetzbuch 1968: § 249 sanctioned those who "infringed upon the public order by avoiding regular work." By prosecuting truants and social misfits, the GDR, despite its anti-Fascist protestations, followed in the footsteps of Nazi Germany that also stigmatized and persecuted "work-shy" and "a-social" behavior (Ayass 1995).

East Germany turned living on the rough into a major crime. "*Asoziale*"—or "*Assis*" in the rude vernacular of East German daily life—made up the largest prison population in the GDR.[51] Their initial penalties ranked with the average penalties of fugitives: one to two years in prison.[52] But their high rate of recidivism meant that most Assis spent far longer behind bars than fugitives or people convicted of "resisting state authority."[53] These were truly political victims of a system that could not tolerate defiance of its pedagogic urges. Assis resisted all attempts to make them work. By their very lifestyle, they gave the lie to Socialist claims of being able to educate the "new man." Thus, the state punished them and hid them away—first in workhouses, later in prisons. But none of the storytellers who today commemorate the victims of Socialism have taken up their tale. The Rehabilitation Law does not include Assis in its list of defendants entitled to automatic vindication (Strafrechtliches Rehabilitierungsgesetz 1992: § 1; Markovits 1997b:861). In a time bent on uncovering Socialist injustices, people convicted of truancy have remained largely invisible. Why?

Because our collective memory devices block our recollection of their plight. Most Assis were too down-and-out to deserve surveillance by the Stasi: Their cases were adjudicated by the regular courts, and their files, accordingly, today are not held by the Gauck Authority but remain on the shelves of courthouses,

[51] In 1988, *Asoziale* made up 24.5% of the East German prison population-two and a half times more than those convicted of "border crimes" and by far the largest subgroup of prison inmates in the GDR (Luther & Weis 1990: 291).

[52] § 249 of the East German Criminal Code that penalized "a-social behavior" underwent frequent changes: Absenteeism and sloth were difficult to combat under Socialism, and GDR authorities seem to have experimented to find what they considered the most effective mixture of repression and reeducation. Under the 1968 Criminal Code, Assis almost always received indeterminate sentences of *Arbeitserziehung* (education through work), which in practice amounted to one to two years of forced labor in special "work commandos." In 1977, forced labor was replaced by prison sentences of up to two years, the same penalty the Criminal Code provided in its § 213 for those attempting "to flee the Republic" (Strafgesetzbuch 1968: § 249; Strafgesetzbuch 1977: § 249).

[53] My own research project, investigating the activities of one East German trial court, reveals the extraordinary harsh treatment of *Asoziale.* In 1979, out of a total of 322 criminal cases handled by my court in that year, 34.5% dealt with "a-social behavior," 5.6% with "border violations," and 2.5% with one of the various offenses against the state (primarily "resisting state authority" and "defamation" of public officials or state symbols). The average penalty for *Asoziale* in that year was 21 months in prison, the average sentence for "border violations," 16 months in prison, and the average sentence for offenses against the state, 8 months in prison. These relations are not significantly changed if I take those cases into account that as "political crimes" were not adjudicated by the local trial court but in the regional capital under the auspices of the Stasi. In 1979, only three offenders from my town were prosecuted in the regional capital, with one of them apprently harmless enough to have his case referred back to the local trial court. These data suggest that the more significant "political" cases in the GDR were not those that Westerners usually think of as "political"—namely, cases involving the prosecution of dissidents or fugitives attempting to cross the border—but the morally far more ambiguous, more widespread, and in many ways, more typically repressive prosecution of people unwilling (or incapable) of adjusting to Socialist demands for labor discipline and for conformity to the collective.

where they are out of sight to most researchers. It seems that central government and Party authorities issued only a few pronouncements on Asozialen policies and that the Federal Archives, therefore, offer little information on them. Assis were not notables leaving records to which researchers today might have preferential access. Today, they are as unlikely as ever to tell their own victim's story. Shall I quote Brecht (1979:84) again?

"Some in light and some in darkness
That's the kind of world we mean.
Those you see are in the light part.
Those in darkness don't get seen."

Nor is there any reason why we should want to remember Assis. They make unattractive heroes. While Capitalism no longer places its bums and vagrants into prison,[54] it does not like them either. To take up their cause will not enhance the reputation of a system that itself preaches industry and self-reliance. From the post-Socialist perspective, dissidents and fugitives are useful victims. They allow us to describe the GDR as a political system that repressed the most elementary human rights: a nice, clear-cut, unambiguously condemnatory image. The picture that emerges from East Germany's treatment of its Asoziale is far more complex. The GDR put truants into prison, but not before collectives had undertaken extraordinary efforts to integrate them into the work process. Assis were fired only as a last resort. They were given housing and healthcare (Markovits 1997b:873). Toward the end of the GDR, punitive sanctions of "a-social" lifestyles softened and were increasingly replaced by efforts to resocialize hardcore truants in flexible and sheltered work collectives, the so-called "special brigades" (Kliche 1989:291; Krause 1989:160). In fact, in the 1980s, East German official policies towards Assis became far more differentiated and rule-bound[55] than popular attitudes toward "shirkers."[56] After 40 years of collective life, most

[54] Until 1959, the West German Criminal Code contained a provison that punished beggars, loiterers, and those "refusing to take up work" with forced labor in workhouses "for as long as necessary," which for recidivists could mean up to four years' detention (Strafgesetzbuch 1871: §§ 361 para. 4, 5 & 7, 42d, 42f).

[55] Since 1977, the East German Supreme Court no longer published its decisions in book form but distributed a duplicated selection of cases "for internal use only" to lower courts. The large number of Asozialen cases in this collection suggests that the Court found the correction and guidance of lower courts in this area of the law particularly necessary. Of the 20 Asozialen decisions contained in the Court's selection between 1977 and 1989, 18 cases came out in favor of the defendant. In most of these cases, the Court faulted the lower court decision that it overruled for the imprecise and overbroad application of § 249 Criminal Code and insisted that trial courts more carefully determine the exact length of the timespan a defendant did not work, investigate whether, perhaps, he did other, temporary work that might count in his favor, establish why and how a defendant's non-work, as the code required, "infringed upon the public order," and examine his motives.

[56] The common condemnation of Asoziale is evident in the often highly derogatory comments of colleagues who participated, as so-called "social representatives," in a defendant's trial or who, after the trial, were asked to comment on his behavior and his sen-

upright citizens in the GDR unceremoniously rejected those not willing to pull their load. But what are we to make of the widespread contempt for "parasites" in Socialist societies? Might the East German people have been complicitous in some of the regime's repressions? Was the regime capable of learning; even of modest self-reform? These are confusing questions. Clearly, our collective image of the GDR as a ruthless enemy of freedom and justice is far more self-affirming than unsettling investigations into its social policies would be.

One final warning about victims' stories. They may not only mis-describe what happened in the past but may also shift attention away from things that are still happening in the present. The work of the Gauck Authority can illuminate this point. To judge by the Statute on Stasi Files and by the Gauck Authority's own self-presentation, the primary justification for the Agency's existence is to "facilitate individual access to personal data which the State Security has stored regarding him, so that he can clarify what influence the (Stasi) has had on his personal destiny" (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 1 para. 1, no. 1). It is not often that you find such ringing words as "destiny" (*Schicksal*) in a piece of federal legislation. Its use reflects the extraordinary moral significance attributed to the opening of the Stasi Files: the hope that through knowledge and self-reflection, the victims of a barbarous regime will finally be able to make their peace with their own past.

The Gauck Authority's biannual reports stress its guiding role in many victims' painful journeys to self-discovery. The Agency's working style is solicitous and caring: Those who want to see "their" file are gingerly prepared for any shocking surprises it might contain;[57] they are told to come alone (since the presence of even friends or relatives during their exposure to the file might violate their privacy),[58] and Agency representatives are ready to calm and support those shaken by discoveries of their

tence in meetings at an Assis' place of work. "Too lenient," was the usual verdict of the work collective.

[57] Before applicants are given access to their files, the Gauck employees who have assembled them and who know their contents prepare the applicants for what they are about to read in so-called *"Vorgespräche"* (preliminary conversations) (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:18).

[58] Until 1996, applicants had to view their file alone (or could authorize their attorney to do so) but were not allowed to bring a person of their confidence along to help them face their past. The Third Amendment to the Stasi Records Act introduced exceptions to this rule: Frail or helpless people now may be accompanied by someone to assist them. Even so, the choice whether to bring help along or not is not the applicant's: The Gauck Authority can reject a request to bring a helpmate if it is not convinced of the applicant's genuine need for assistance. The restrictions are meant to protect applicants' privacy even against their own intentions: presumably, the Gauck Authority knows better (Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen D.D.R. 1992: § 12 para. 1, no. 2; Drittes Gesetz zur Änderung des Stasi-Unterlagen-Gesetzes 1996; Schmidt 1997:106).

betrayal.[59] The 1999 Gauck report proudly describes the "open and trusting atmosphere" (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:19) in which Stasi victims are confronted with their past and informs us, almost with an undertone of satisfaction, that 30% of a sample of applicants polled for their reactions declared that they would never be able to fully put behind them their encounter with the Stasi (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:16).

I have viewed my own (banal and sketchy) file and found what I imagine must be the experience of a confessional. A bare room in the Gauck Agency's headquarters in Berlin, furnished with only a table and some chairs; on the table "The File," ready to reveal its secrets; an anxious applicant feeling embarrassed about her own excitement; and, as Father Confessor, the employee of the Gauck Authority who researched and assembled the file and who knows more about you than a friend: tactful, soothing, forgiving, ready to explain and to assuage. No wonder that the popular imagination has been so fascinated with the revelations of the Gauck Authority. They mix some of our deepest apprehensions: those of the Couch and of the torture chamber. This is the stuff that nightmares are made of, and the Gauck Agency, controlling and administering the resolution of these scary dreams, plays the role of national analyst and counselor.[60]

[59] In the reading rooms of the Gauck Archive, "employees stand at the ready to assist with the interpretation of the files and to help with . . . psychological problems" (Schmidt 1997:106). One Gauck employee told me that, on occasion, she had taken applicants for walks to calm their feelings.

[60] Maybe it is not surprising that the Gauck Authority, as the sole keeper and administrator of the Stasi files, also shares some of the attributes and habits of the organization whose corrupt estate it has inherited. Maybe the Stasi poison is still strong enough to affect those who touch it, even years after the collapse of Socialism. Maybe, like an old couple, judge and judged, vanquisher and vanquished, have come to resemble each other. In any case, there are some striking similarities between Stasi and Gauck Authority procedures. Both deal with secrets and with skeletons: the one, exploiting their existence in people's closets, the other bringing them out into the light. Both process and pass on highly dubious information: lies, innuendos, exaggerations, defamations, hearsay (in fact, courts in the Federal Republic repeatedly have declared Stasi information to be too unreliable to count as evidence ( *infra* n68). Both had or have a highly personal working style: the Stasi through personal surveillance and betrayal, the Gauck Authority through its pastoral solicitude for Stasi victims, whose confrontation with their past the Agency carefully manages and controls. Neither the Stasi nor the Gauck Authority provided or provides for hearings in which the subject of some information can or could contest its truthfulness. (Under Gauck rules, someone disputing that he has collaborated with the Stasi can only attach a counterstatement to the file that is passed on to the authorities. He can, at a later stage, go to court against decisions based on Stasi Archive evidence). As the Stasi was, the Gauck Authority is not bound by the rules of ordinary data protection (see Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR 1991: § 43: "The regulations of this Act shall take precedence over provisions of other acts regarding the admissibility of communicating personal data. (With a few exceptions) the Federal Data Protection Act shall not be applicable. . . . ") It seems no accident that the Gauck Authority is the only post-Socialist federal agency that in its work still makes use of the infamous GDR "personal identification number" (*Personenkennzahl,* or PKZ). The idea of a personal ID number for every citizen has alway been anathema to German data protection, and the Unification Treaty, accordingly, called for the abolition of the PKZ. The

So far, I have described the popular image of the Agency. The numbers published by the Agency itself tell an additional story. Since its creation in 1991, the Gauck Authority has received 1,590,151 applications (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:105) by a total of about 1,060,000 citizens[61] requesting to see "their" file, of whom roughly 350,000 applicants turned out to actually have one.[62] During the same period, the Agency responded to 2,614,049 inquiries by, primarily, public employers (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:11) engaged in the vetting of current or prospective employees for their contamination by the Stasi,[63] whether as fulltime or as "unofficial collaborators" (also known as "IM" or "*inoffizielle Mitarbeiter*"). That means that roughly two-thirds of the Agency's efforts are spent not on helping the victims of Socialism exorcise ghosts of the past but on the very present task of cleansing East Germany's public service of former Stasi collaborators.

The first—East German—Stasi Records Act, passed by the People's Chamber one month prior to reunification, had anticipated a more lenient and cooperative purge: Except for security clearances, Stasi records were to be used for vetting purposes only if there was "demonstrated political need" and if the subject of the vetting consented (Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit 1990: § 9 para. 2, no. 3). The all-German post-reunification Stasi Records Act of December 1991 expanded permissible vettings to all public employees from the federal to the municipal level and replaced the consent requirement (except for new applicants) by a mere requirement of notice to the person investigated (Gesetz über die Unterlagen des Staatssicherheitsdienstes 1991: § 21 para. 1, no. 6). Since all public administrations in the five new East German states made it a rule to investigate all of their employees,[64] such notice seemed barely necessary. To be a public servant in East Germany means

Gauck Authority, by special legislation, was allowed to continue its use through the year 2005 (Drittes Gesetz zur Änderung des Stasi-Unterlagen-Gesetzes 1996: § 2), supposedly to facilitate the deciphering of Stasi cover names. And, like the Stasi, the Gauck Authority perceives the world in Manichaean terms of light and darkness, replacing the Stasi's dichotomy of friend and foe with that of victim and perpetrator.

[61] About one-third of the incoming applications are resubmissions or elaborations by previous applicants (Engelmann 1999:5).

[62] About one-third of all applicants have a file (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:11).

[63] The vetting is authorized by Gesetz über die Unterlagen des Staatssicherheitsdienstes 1992: 20 para. 1, no.6.

[64] Initially, all five East German *Länder* practiced the so-called *Regelanfrage* (automatic inquiry) and applied to the Gauck Authority for information on every public servant's possible involvement with the Stasi. In April 1995, the State of Brandenburg decided to discontinue the practice and to limit inquiries to cases involving high-level jobs or concrete suspicions (Mitteilungen aus den neuen Bundesländern 1995:641). In February 1999, the State of Mecklenburg-Vorpommern followed suit. Since the new rules apply

to be "*gaucked.*" Under the Unification Treaty, those public servants found to have collaborated with the Stasi may be fired if their continued employment seems "unconscionable" ("*unzumutbar*") (Einigungsvertrag 1990:Appendix I, Chap. XIX/A, para. III, no. 1; para. 5, no. 4; Stapelfeld 1995:186).[65] Gauck data also may be used by public pension funds to curtail pensions of insured who collaborated with the Stasi.[66] Private firms, who are entitled to request information from Stasi files concerning their managerial staff, only rarely make use of that privilege.[67]

Despite the widespread use of Gauck files by the state to cleanse East Germany's public service of all traces of the Stasi, the practice, by itself, has not led to a significant turnover of staff.

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only to future hires, their impact seems to have been negligible (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:32).

[65] East German government policies that condition public employment on the truthful response to questions regarding an applicant's Party and Stasi contacts have been upheld by the Federal Constitutional Court (Bundesverfassungsgericht 1997:480). Some critics have suggested that the thorough examination of all public employees for Stasi contacts has at least in part been motivated by the need to reduce East Germany's hugely inflated public service (Kutscha 1995:284). With 14% of its citizens employed in some administrative function, the GDR's public service, adjusted for size of population, was twice as large as that of the Federal Republic (Henneberger 1994:135). However, dismissal because of Stasi connections is only one of several grounds for dismissal that now apply to public servants of the former GDR and has, in practice, played only a minor quantitative role. Other grounds for dismissal, such as an agency's closure or reduction in size or an applicant's lack of professional qualifications, had far greater impact.

[66] In GDR days, fulltime Stasi employees, like many other East German professionals, were enrolled in a preferential state insurance system that upon retirement guaranteed them higher-than-average pensions benefits. After reunification, the Federal Parliament passed several statutes drastically capping the pension rights of those former GDR state employees whose jobs had placed them "in close proximity to the government." One of the groups whose pension claims were thus severely curtailed were the members of the former State Security. Stasi pensions also are affected by the rule that periods of employment during which an employee had maintained links to State Security (whether fulltime or part-time as a so-called "informal collaborator") do not count as "periods of employment" for purposes such as seniority, vacation time, bonuses, and the like (Hantel 1998:67). Restrictions such as these made it important for employers and pension funds to know whether an insured, in GDR times, had contacts with the Stasi. Hence the roughly 560,000 requests for information submitted to the Gauck Authority in pension matters (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:105).

In four decisions, all of April 28, 1999, the Federal Constituitonal Court struck down most of the restrictions affecting former GDR public servants "in close proximity to the government" and some of the restrictions affecting former Stasi employees as violations of the Constitution's protection of property rights (Bundesverfassungsgericht 1999a, b, c, d; Will 1999:337). The Gauck Authority does not view the decisions as a significant brake on its activities: "Independent of the decisions of the Constitutional Court, the Agency will have to supply social insurance carriers with . . . the necessary information concerning pension-matters" (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:36).

[67] In the Gauck Agency's third reporting period (presumably from June 1995 to June 1997), it received only 3,600 inquiries from private employers into the possible Stasi contacts of their employees (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1997:37). No separate data are provided for the fourth reporting period.

On average, 5%[68] to 6% (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1997:25) of the vetted were shown to have had some involvement with the Secret Police,[69] but only in about half the cases were those involvements sufficiently weighty to warrant a person's dismissal.[70] As in the area of criminal law, where German prosecutors currently are investigating as many Socialist "government crimes" as they can lay their hands on,[71] the rate of return of post-Socialist purification efforts or, as it is also called, the "quota of entanglement" ("*Verstrickungsquote*") has been quite modest. As in the case of criminal prosecutions, the courts have curtailed the inquisitorial enthusiasm of the vetters by insisting that only meaningful corruption under Socialism, whether through Stasi contacts or through the criminal misuse of power, should now, in retrospect, be punished by the rule of law.[72]

But for our purposes, rates of conviction or "entanglement" are not all that matters. The huge number of cases in which accusations are raised against East Germans suggesting their possible corruption under Socialism—2 million requests for information from the Gauck Authority, 73,000 investigations for potential "government crimes"—help to define our view of the former GDR, even if, in the long run, most of the accusations are not substantiated. These investigations spread contempt for Socialism, suspicion of its public servants, unadulterated blame for all those who became caught in the spider web of the Secret Police. They describe the GDR as Stasi-country. They put East Germans in their place. The Gauck Authority, conceived in the heady last days of the GDR as a means of East German self-liberation, today

[68] My estimate is based on the results of a total of 155,082 inquiries submitted by eleven public employers described in the Gauck Agency's fourth bi-annual report (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:34).

[69] West German estimates originally had been much higher. Thus, in an interview in 1991, the Federal Minister of Justice, Klaus Kinkel, claimed that probably 25% to 30% of the East German population had been informers for the Stasi (Hillermeier 1995:141).

[70] My calculation is based on the Agency's own partial data (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1999:34) and on the Agency's estimate of dismissals in its third bi-annual report, according to which 1% to 3% of all employees who were vetted were dismissed (Der Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes 1997:25).

[71] As of October 1, 1997, West German prosecutors had investigated more than 73,000 cases of suspected "government crimes" committed by former GDR officials. Of these investigations, only 770 produced enough evidence of criminal (as distinct from political) wrongdoings to allow a case to be brought to trial. Of the 770 prosecutions, so far only 174 (or 0.25% of all investigations) resulted in convictions, most of them with probation (Markovits 1999a:189, 215).

[72] Civil and labor courts in particular have often been suspicious of the credibility of Stasi files and have rejected claims that evidence presented by an expert from the Gauck Authority could count as "proof" (Oberlandesgericht Hamburg 1995:37 (expert opinion by a representative of the Gauck Authority is not evidence); Verwaltungsgericht Berlin 1993:2548 (an expert from the Gauck Authority cannot authoritatively determine whether a person was in fact an "informal collaborator"); Landesarbeitsgericht Berlin 1992:331 (Stasi files cannot serve as prima facie evidence of a person's involvement with the Stasi); Lansnicker & Schwirtzek 1994:162).

is well ensconced in a political landscape dominated by the West German winners: not only as an instrument of self-discovery, but also as an apparatus of memory control.[73]

## IV.

My essay has described a recollection process in which the past is whittled down until it fits into a handy image most flattering to those who rule the present. Have I told you anything you did not know? We all assume that history is written by the winners. And yet, regardless of our cynical acceptance of that fact, we find it difficult to disbelieve the winners' stories. I myself, writing this article, felt compelled to let you know throughout the text that I, too, am convinced of the evils of Socialism. How could I not? We share the same cultural habits and beliefs, the same rhetoric, the same collective memory. By showing how some of these memories were produced, I have tried to throw some sand into the well-oiled mechanisms of our public recollection process: a handful of doubt; a measure of disbelief. I shall be pleased

[73] In choosing memories, those who have the choice will likely pick that memory that suits them best. Sometimes this choice will mean that one kind of memory is used to cancel out another. Given Germany's multilayered and traumatic history, this is particularly likely to happen in cases in which somebody's past under the Nazis conflicts (or is thought to conflict) with his past under Socialism. Here are two examples: Under East German law, officially "acknowledged" victims of the Third Reich and "fighters against Fascism" could receive not inconsiderable "honorary pensions" from the state. After some haggling, the German post-reunification government decided to continue these payments (on a more modest scale) but to exclude those former recipients of "honorary pensions" who had violated "principles of humanity or the rule of law" (Entschädigungsrentengesetz 1992: § 5). Under the new rule, two well-known members of the SED Politburo both lost their "honorary pensions" because of their support for and possible participation in decisions sanctioning the shootings at the Berlin Wall. Both men had been Communists since their youth, both were active opponents of Hitler, and both had been compliant servants of the SED. One of the men, Hermann Axen, who was Jewish, during the Nazi years had spent a total of eight years in prison and a concentration camp. The other, Kurt Hager, had fought in the Spanish Civil War and later had worked as a journalist in England.

To the men themselves, their Communist and anti-Nazi lives probably were not in conflict; indeed, they may have thought of their own histories as logical progressions along a consistent path. Even somebody opposed to Communism, if asked to draw a balance sheet of these two lives, might have proceeded by weighing good and bad, with courage, suffering, and opposition under Hitler placed in one scale of justice and complicity with a repressive political system in the other. Such a procedure might have led to different results in both men's cases. Because eight years' suffering in Fascist prisons might have outweighed his taking part in Socialist repressions, Hermann Axen might have retained his pension. Kurt Hager's relatively safe war years in England, on the other hand, might have weighed less than his later support of a totalitarian regime, with the result that he would have lost his pension.

Such close attention to the good and bad he did would have respected the life of each man as a connected whole. But this is not what happened. Without investigating the triumphs and failures of either life, the Federal Social Court ruled that both men, through their involvement in an inhuman political system, had forfeited their right to what now, more modestly, is called a "compensatory pension." Both men's "bad" past had wiped out the "good," or rather, the "good past" was no longer visible behind the remembered image of Socialism as an "evil past" (Bundessozialgericht 1997:609; Bundessozialgericht 1998:109; see also Epstein 1999:1).

if the obstruction does its job. Most of the winners' accusations may be true. But if we want to understand the past we also must look for the unremembered stories.

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