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Introduction

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Looking back over the last two decades of the twentieth century, one would be hard pressed to find a state that took more varied steps to come to terms with a legacy of authoritarian rule than the Federal Republic of Germany (FRG) in the wake of national unification. This is no inconsequential statement. With the toppling of an unprecedented number of dictatorships over these years and a wave of audacious new experiments in democracy, the twin themes of truth telling and retrospective justice acquired worldwide prominence. Moreover, by the 1990s, the United Nations and much of the international community had embraced aggressive measures (e.g., ad hoc tribunals on ex-Yugoslavia and Rwanda, an International Criminal Court) in the hope of creating a universal system of rights protection.

This claim about the FRG's distinctiveness is also not intended to diminish in any way the German people's efforts since 1945 to face up to their historical responsibility for the crimes of National Socialism and the Holocaust. At the beginning of the twenty-first century, this process of confrontation and atonement still seems unfulfilled. What distinguishes unified Germany's handling of the more modest human rights abuses and offenses of the former German Democratic Republic (GDR) is simply that the FRG's leaders launched into the task with a breadth of approaches and an almost religious devotion to thoroughness that was unmatched by any other country at the time.

Until the early 1990s, only a handful of new democracies had actually succeeded in bringing any of their former dictators or major rights violators to trial—most notably Greece in 1974–75, Argentina in 1985, and Bolivia in 1986–93. When given the choice, most transitional governments had opted to spare themselves the risks and controversies
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of criminal proceedings. In contrast, these sanctions were to play a major part in the FRG's reckoning with the record of communist rule in East Germany. By the end of the decade, public prosecutors had reviewed over 62,000 possible cases of GDR-era injustice and issued more than 1,000 indictments for a wide variety of criminal offenses.

Provocatively, the courts were asked to consider for prosecution not only the most glaring crimes from the years the SED (Socialist Unity Party) was in power, such as the shooting of would-be escapees at the Berlin Wall and the kidnapping and murder of political opponents by the Ministry of State Security (MfS) or Stasi, but also a host of lesser offenses. These included crimes – judicial corruption, espionage, mail tampering, athletic doping, and electoral fraud – that would probably have received little or no attention in most other settings.

In addition, German lawmakers were among a handful of democratic leaders in the early 1990s (the postcommunist government of Czechoslovakia was another prominent example) to use noncriminal sanctions to prevent persons who were directly implicated in the old regime's abuses from assuming positions of responsibility in the new political order. In accordance with this policy, the German Unification treaty of August 31, 1990, provided for the dismissal of any officials or administrators who had collaborated with the Stasi or could be linked to human rights violations in the GDR if their actions were sufficiently serious to make them “appear unsuitable,” in the treaty's parsimonious language, for continued public service. Also, though in a much looser fashion, German administrative law allowed for the review of hundreds of thousands of other civil servants – teachers, police officers, judges, and prosecutors – whose loyalty to the FRG's “basic democratic order” might have been compromised by their affiliation with the East German state.

As in other transitional settings, commentators hastened to point to the inevitable limitations upon the uses of positive law in redressing wrongdoing and correcting past mistakes. Yet even these constraints do not appear to have presented serious obstacles to policymakers. Evidently, what some persons who had suffered under the former SED dictatorship wanted most from their new leaders was not retribution or even revenge. Rather, they desired a kind of moral affirmation that, they hoped, would come from knowing more about what had transpired under the communist regime and what lessons might still be learned from the experience.
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In this case, the Federal Republic followed the example of many non-European democracies in the 1980s and 1990s – Chile, Argentina, El Salvador, and South Africa – by using an assortment of strategies for raising popular awareness about the petty crimes and personal betrayals, sordid incidents and misfortunes, misguided policies, and errors in judgment that had long been obscured behind the protective facade of the Wall. Notably, in spring 1992, the Bundestag formed a special investigative body, or Enquete commission, to meet these demands and charged it with the task of formulating a comprehensive judgment on the “history and consequences of the SED dictatorship in Germany.” Concurrently, the parliament enacted innovative legislation to provide citizens in both parts of the country with access to the millions of files and personal dossiers that had been compiled on their lives by the East German secret police. Also, state and local authorities oversaw a panoply of initiatives throughout the decade (open forums on the Stasi, televised confrontations between perpetrators and victims, museum exhibits, scholarly conferences, memorials, and the like) that were meant to fill in the remaining gaps in public understanding about the GDR and to ease the region’s transition to democracy.

Finally, in several noteworthy respects, the FRG was unequaled in the steps it was willing to take to repair the SED’s injustices and, as daunting as the task may have seemed, to set aright the balance sheet of Germany’s postwar history. Some of the FRG’s policies were fairly uncontroversial. Beginning in spring 1990, East Germany’s last transitional government, under Prime Minister Lothar de Maizière, and then its federal successor, under Chancellor Helmut Kohl, lost little time in overturning the convictions of hundreds of persons who had been wrongly convicted of political crimes under the old order. In 1992 and 1994, the Bundestag passed comprehensive legislation to rehabilitate the victims and provide them with monetary compensation for their losses. 7

In other ways, however, the FRG’s leaders took corrective measures that other governments would have barely considered imaginable in the early stages of democratization. In particular, this ambition was evidenced by their readiness to confront the thorny issue of property ownership in eastern Germany. 8 Well before October 3, 1990, the formal date of unification, a massive trust agency, the Treuhandanstalt, had begun the immense task of dividing up and privatizing thousands of industrial enterprises and businesses that had previously been centralized
under the commanding heights of the socialist state. Still, this undertaking paled in comparison with the Kohl government’s meticulous efforts over the same period – at times, meticulous to a fault – to redress decades of unresolved claims to private property ownership in the East. In the ensuing years, German claims offices and administrative courts found themselves in the unenviable position of having to determine whether literally millions of homes and apartments, parcels of land, and country gardens should remain in the hands of people who had occupied them for years and even decades under the socialist system or should instead be returned to their original owners.

With the benefit of hindsight, one can see that much of Bonn’s aggressiveness on all of these fronts is explainable in terms of the unusual circumstances that attended the fall of East German communism in 1989–90. Unlike the more fragile Latin American democracies, the equally precarious transition in South Africa, or most postcommunist experiments in eastern Europe, such as Poland and Hungary, it clearly mattered for the German search for justice that the GDR’s demise had been both swift and complete. To say the least, there were no disgruntled military officers waiting in the wings of the federal chancery in Bonn for the first excuse to stage a coup d’état. Nor did the Kohl government ever have to worry that its police forces might conspire to subvert the Basic Law (Grundgesetz). Consequently, German policymakers possessed an unusual – though not unlimited – degree of leeway in deciding whether one or another form of retrospective justice made sense in the context of a common national future.9

Adding to the FRG’s comparatively greater zeal in addressing these questions, some lawmakers were motivated by uneasy memories about the handling of an only marginally more distant period in German history – National Socialism.10 Had either of the two German states managed to deal with the crimes of the Nazi era in a convincing manner in the aftermath of World War II, it is possible that the comparisons that were to arise in the early 1990s between Hitler’s despotism and the “second German dictatorship” (that of the SED) would have been more muted. As commentators were soon to observe, however, the deficit in both states’ actions was sufficiently glaring that one could not have passed over the subject of East German injustice without simultaneously bringing “another past, the Nazi past, into view once again.”11

Certainly, many Germans in the West believed their first chancellor, Konrad Adenauer, had done less than needed to consolidate the
country's break with Nazism. At a formative time in the Federal Republic's history, his government had been reluctant to embrace the example of the allied tribunals at Nuremberg. German courts were slow to prosecute Nazi war criminals, and for years thereafter – in the estimation of many critics – not nearly enough was done to bring the enormity of the Hitler regime's crimes to the forefront of public consciousness. Further aggravating the situation, even during the glory years of German democracy in the 1950s, some former National Socialist officials, including several of Adenauer's closest advisers, were allowed to retain high-level judicial, diplomatic, and administrative posts. Two decades later, the Federal Republic would pay a heavy social price for these policies when a generation of young people rebelled against their parents' omissions.

Notwithstanding the shortcomings in the West German Vergangenheitsbewältigung (policy of overcoming the Nazi past), observers could find even more evidence that the SED's leaders in East Berlin had been negligent on this issue to the point of irresponsibility. To be sure, in the first years after the war, the eastern zone's Soviet military occupiers tried and imprisoned proportionately more Nazi offenders than the West (even while they terrorized tens of thousands of other Germans who had fought against Hitler yet potentially threatened Moscow's control over the region). For a brief period, the newly founded GDR followed this example. In the so-called Waldheim trials of April–June 1950, its government handed down over 4,000 convictions for a variety of loosely defined offenses that varied from membership in the NSDAP (Nazi party) to service in the Wehrmacht.

However, this commitment to prosecutions was basically abandoned in subsequent years. By adopting the view that the German communists had already suffered the consequences of Hitler's tyranny in the 1930s, the SED proved willing to absolve its citizens, including many National Socialists and sympathizers, of any further need to wrestle with the implications of the Nazi period. In return for this largess, the East German people were only expected to align themselves with the party's putatively antifascist traditions. As a result, by the time German unity was restored, commentators could contend that few of the GDR's citizens had developed even the most rudimentary vocabulary for conceptualizing their nation's involvement in the atrocities of National Socialism.

In this light, it makes sense to think that as long as the political will was present in Bonn and Berlin, conditions were ideal for Germany's
leaders to take the kinds of sweeping measures that they exhibited with respect to the GDR. In fact, this impetus was provided on two major fronts from the first moment discussions were under way about the prospect of national unification.

On the eastern side of the inter-German border, the impetus was expressed passionately and vociferously by the handful of oppositionists and dissident intellectuals who played a key role in the GDR's waning days in setting the moral and political agendas for their part of Germany. As participants in the improvised Roundtable discussions with the dying SED leadership from December 1989 onward and then as deputies to the first freely elected East German parliament, the Volkskammer, after March 1990, these activists perceived in the GDR's record a rare second chance for the German people. East Germany's citizens could make up for the limitations of the postwar era by finally examining their most deeply held convictions about the nation's role in the tragedies of the twentieth century. The activist writer Jürgen Fuchs captured this sentiment, cautioning an interviewer in 1992 that "if we do not solve this problem in a definite way, it will haunt us as Nazism did. We did not denazify ourselves, and this weighed on us for years."16

Correspondingly, on the western side of the national divide, leading politicians and opinion makers in the governing Christian Democratic–Free Democratic coalition and in the major opposition parties needed little convincing about the importance of weighing these voices into their plans for a united Germany. This was a matter of basic political credibility. If the GDR's citizens were ever to feel truly a part of the national project, they reasoned, it was vital that the FRG appear committed to accounting for the SED's actions and prepared to provide the victims with political and legal vehicles for redressing their grievances.17

Nevertheless, despite the energy and massive expenditure of resources the Federal Republic ultimately devoted to this challenge, it is telling that slightly more than a decade after the fall of the communist system, participants and observers alike remain sharply divided over the wisdom and efficacy of Bonn's reckoning with the GDR. In fact, among the complex sentiments still haunting unified Germany, commentators on both sides of the controversy continue to feel – albeit for markedly different reasons – that the public officials who responded to this charge did more to pit easterners and westerners against each other than to reconcile them to a life together under a shared political roof.
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On the one side, an array of observers, from constitutional theorists and politicians to former SED notables and professional pundits, have taken the federal government to task for ostensibly abandoning the moral and legal restraints of the Rechtsstaat (constitutional state) in seeking to come to terms with the GDR record. For the harshest of these critics, measures like criminal trials, civil service screening, and property restitution have seemed like nothing more than cynical manifestations of “victor’s justice” in the capitalist West’s long-standing battle with East Berlin. However, these were by no means the only onlookers who failed to be persuaded by the FRG’s policies. Even among those willing to give German decision makers credit for intending to do the right thing, many remain convinced that the net effect of these measures was to slow progress toward national unity by undermining public confidence in the fairness and impartiality of Germany’s ruling institutions. One prominent legal theorist has made the point succinctly: “What has happened, has happened. Our previous mistakes in attempting to overcome the communist past can no longer be repaired. But they can be stopped.”

On the other side, an opposing group of critics composed of the former dissidents who numbered among the SED’s few vocal opponents in the GDR’s later years and outspoken western conservatives has faulted the FRG for exactly the opposite failing. Supposedly, Bonn was not doing enough to overcome the memory of dictatorship in the East. According to this view, the most convincing way for policymakers to have won the hearts and minds of the eastern population would have been to have made retrospective justice a priority in the region’s incorporation into the Federal Republic. Yet, despite the measures taken, many could easily think of instances when the Kohl government had seemed more attentive to legal niceties, formal rules of procedure and due process, than to the substantive goal of redressing past ills. As a consequence, these participants were prone to conclude that their interests had been relegated to a second-place status on the national agenda. “We expected justice,” activist Bärbel Bohley intoned, in perhaps the most often cited complaint about the rigidity of her new country’s legal system, “but we got the Rechtsstaat instead.”

Because of the rancor and bad feelings separating these two groups, it cannot be surprising that in this situation – as in other difficult settings, such as Chile’s transition to civilian rule or South Africa’s break with apartheid – the issue of who is right or wrong in the debate
over the merits of retrospective justice often seems like a toss-up between equally defensible moral platforms. The advocates of retribution, disqualification, and related forms of corrective action seem, quite properly, to speak out for the neglected rights of the victims and the wronged. Conversely, the opponents of these measures appear to be on equally strong footing in their determination to safeguard the rights of the accused from arbitrary punishment and to maintain the rudiments of political stability.

Still, as morally unassailable as both positions appear, it would be a mistake to imagine, as commentators sometimes do, that the two sides have shared no common ground at all or that they have been unable to reach reasoned compromises. To the contrary, when one looks closely at these disputes, it is rare for either side to view the challenge of coming to grips with past dictatorships in all-or-nothing terms.

For their part, even the most vociferous proponents of aggressive measures on the GDR’s wrongs have generally not gone as far as to insist that their demands be effected at any price or under any circumstances. In calmer moments, most would probably agree that generating a healthy degree of respect for the neutrality of the rule of law in eastern Germany is a vital goal. In fact, however much they may align themselves with the sentiment that “justice be done,” these critics would not want their new leaders to fall prey to the same sort of capricious behavior that previously brought them into conflict with the SED. The cost to German democracy would be too high.  

By the same token, those observers who have found the most to fault in Bonn’s initiatives have rarely been so callous as to maintain that persons who suffered significant harm or indignities under the SED should receive no form of acknowledgment or compensation for the wrongs done to them. Most would readily concede that material and symbolic gestures can be useful vehicles for introducing the human casualties of dictatorship to democracy. Hence, they have been positively disposed toward activities (e.g., public forums on the SED’s abuses, the payment of compensation to the victims) that appear to have the best chance of healing hurts and injuries and fostering a spirit of forgiveness and reconciliation among Germany’s citizens. From case to case, notably, most have also been inclined to support some kind of sanctions in instances of egregious wrongdoing. High-ranking former secret police officials, it seems, should not be allowed to fill top civil service positions, and true criminals should be punished for their offenses.
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Nonetheless, although the two sides may not be quite as polarized over the morality of these issues as is often assumed, they do seem frequently at loggerheads over one issue that has proved much more difficult for them to set aside. This has been the matter of the FRG's competence to sit in judgment on the GDR's affairs. All of its political and economic advantages aside, was a liberal-democratic polity like the Federal Republic really in the position to make responsible judgments about decisions that were reached or events that transpired under conditions far different from those in contemporary western Germany? Or, from the skeptics' perspective, was the gap between the two countries' experiences not so great that Bonn would have been better advised to have focused its attention on future tasks and to have passed over the GDR's offenses in silence?

At first blush, the interpretative challenge behind these questions may not appear to be such an integral part of a state's decision to redress injustice, but this challenge is implicitly at the heart of nearly every controversy over the FRG's attempt to come to grips with the record of a second dictatorship in German history. All along, the advocates and the critics of retrospective justice have been able to agree on one point. If policymakers were to apply their moral and legal categories in a credible fashion to the GDR, these standards would have to make sense in the light of the circumstances in which people had once lived and behaved under SED rule.

That this problem could be framed in empirical terms at all was potentially good news for anyone who wanted to evaluate whether the Federal Republic was doing the right thing in taking such steps. By engaging the East German record directly, Bonn would have the opportunity to defend its right to pass judgment. Yet even to get to this point one would need to confront some fundamental ambiguities about the kind of state the GDR had been and the extent to which anyone who lived through the communist experience could realistically have acted differently.

Interpreting the East German Past

Let us begin by putting the GDR into context. The communist states of the past century were not just any type of authoritarian government, but, more like their fascist contemporaries than their defenders would ever admit, they aimed to gain and maintain complete control
over their subject populations. In their most horrific guises, during Josef Stalin’s “second revolution” of the 1930s and the internal party purges in East Europe of the late 1940s and early 1950s, the worst of these regimes accomplished their objectives by terrorizing their citizens into submission and crushing any signs of opposition to their authority. Even in the 1960s and 1970s, after most of the Soviet bloc had moved away from the excesses and extremes of high Stalinism, their leaders still held fast to the overriding goal of dominating the societies below them.

Writing about his native Czechoslovakia in 1978 in terms that could easily have been applied to the GDR, the dissident playwright Václav Havel called attention to the numbing impersonality of late communist rule and the degree to which “life in such a state [was] thoroughly permeated by a dense network of regulations, proclamations, directives, norms, orders and rules.” Under these conditions, Havel argued, it was hard to speak about a realm of personal autonomy apart from the dictatorial state. In his estimation, most people in these countries had been “reduced to little more than tiny cogs in an enormous mechanism and their significance [had been] limited to their function in this mechanism.”

Assessments such as Havel’s of the communist era would be of no more than academic interest were it not the case that these states’ liberal–democratic successors have then been at a loss to know how or even whether they can bring conventional notions of responsibility to bear upon these regimes. For example, a widely shared precept of liberal accountability holds that if a democratic polity is to avoid the trap of judging its members by an amorphous standard of collective guilt, its leaders must demonstrate that the crimes and abuses in question can be linked to the behavior of specific persons. That is, guilt must be individualizable. Yet under conditions of absolute despotism, skeptics wonder, who can say that persons suspected of participating in injustice have really been able to stand up to their superiors or to avoid being swept up, like so many people around them, in their government’s campaigns to dominate society?

In a like vein, defenders of liberal democracy will insist that people’s actions be judged according to knowable and publicly recognizable standards. In line with a well-established principle of western jurisprudence, they contend that no one should be held responsible for violating laws or other social mores that were not in effect at the time.