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Judging the Past in Unified Germany

Over the past decade, no modern democracy has taken more aggressive steps to come to terms with a legacy of dictatorship than has the Federal Republic of Germany with the crimes and injustices of communist East Germany. In this book, A. James McAdams provides a comprehensive and engaging examination of the four most prominent instances of this policy: criminal trials for the killings at the Berlin Wall, the disqualification of administrative personnel for secret police ties, parliamentary truth-telling commissions, and the restitution of private property. On the basis of extensive research and interviews in Bonn and Berlin over the 1990s, McAdams gives new insight into the difficulties faced by German politicians, judges, bureaucrats, and public officials in their attempt to pass judgment on the affairs of another state. He argues provocatively that the success of their policies must be measured in terms of their ability to use East German history to justify their actions.

A. James McAdams is Professor and Chair of Government and International Studies at the University of Notre Dame. He is the author of *East Germany and Detente* and *Germany Divided: From the Wall to Reunification*, coauthor of *Rebirth: A Political History of Europe Since World War II*, and editor of *Transitional Justice and the Rule of Law in New Democracies*. In 1997, he was awarded the DAAD Prize for Distinguished Scholarship in German Studies.

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For Jackie and Erin

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Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.

—Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*

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2. Erich Honecker leaves the Chilean Embassy in Moscow
3. Joachim Gauck shows Richard von Weizsäcker the Stasi files
4. German citizens tour the headquarters of the secret police
5. Rainer Eppelmann leads Bundestag hearings on the SED dictatorship
6. Rival ownership claims were made on the Guggenheim villa in Potsdam
7. Dignitaries arrive in Berlin on the tenth anniversary of the Wall's fall
8. Joachim Gauck praises the eastern contribution to German democracy

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Preface

The issue of retrospective justice has become one of the most compelling controversies of our time. In the 1980s and 1990s, dictatorial regimes throughout the world were suddenly replaced by an assortment of new democracies. Among many difficult choices before them, these governments were faced with one particularly nagging question: What steps should they take, if any, to come to terms with the crimes and abuses of their predecessors? These governments' responses to this challenge soon resulted in a proliferation of scholarly books and articles on the merits of seeking to redress these injustices. Some commentators argued persuasively that the new democratic regimes had an obligation to the victims of dictatorship to settle accounts with their oppressors and, to the extent possible, to repair their wrongs. Conversely, critics warned with equal passion and conviction that these policies would undermine democratic values and institutions. In their view, newly formed democracies would be better advised to steer away from their burdensome past and to concentrate instead on healing rifts and divisions among their citizens.

In contrast to these arguments, both of which I find plausible, I adopt a different approach in this book. Rather than weighing in on the morality of one or the other position, I take the pursuit of some form of retrospective justice as a given – a set of policies already instituted by a government – and seek to articulate a means of evaluating its success or failure. How should we know – for that matter, how should policymakers know – when governments are doing the right thing in acting on a record of dictatorship? As the reader will see, I provide an answer to these questions based upon the way political actors and administrative officials use history to justify their decisions.

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As someone who has been interested in the politics of East and West Germany for some time, I did not need convincing that unified Germany's response to this challenge would be intriguing. But I also had two specific reasons for launching into the project. First, I had a hunch that the timing for this study would be propitious. Although many accounts have been written since 1990 of the FRG's reckoning with the legacy of East German communism, I believe we are now in a much better position to analyze the effectiveness of these policies. I never had any doubt that Germany's handling of the topic of retrospective justice would be ambitious and controversial. But now that the scope and impact of its policies have been fully exposed over the past decade, we can offer reasoned conjectures about which of its approaches worked best and which did not.

Second, in writing this book, I wanted to satisfy my curiosity. Throughout the 1980s, I traveled regularly to East Berlin to conduct archival research and interviews on relations between the two German states. In the process, I developed a wide array of professional contacts with East German government and party officials. Thus when the Wall fell in 1989, I found myself repeatedly asking what I should think of these individuals' behavior under the communist regime. By what standard should some, or perhaps all, of them be held to account for their government's abuses? Or was the East German experience so different from, or even incommensurable with, that of the liberal West that these offenses would be best passed over in silence?

The reader will readily detect from my sources that I have followed an eclectic approach in seeking answers to these questions. From the beginning, I wanted to piece together the policies that were actually implemented by the Federal Republic over the 1990s because these developments were not always clearly spelled out in the secondary literature on retrospective justice. To this end, I sought to read broadly in the legal commentaries, legislation, judicial decisions, administrative reports, parliamentary debates, and national and local news accounts that were relevant to the topic. Yet the whole story could not be revealed through published sources alone. When I wanted to understand major statutes better (some of which, such as the Property statute, are ferociously complicated), to reconstruct the motivations of decision makers or to gain insights into the hidden issues behind the public controversies, I relied heavily on interviews with both well-known policymakers in Bonn and Berlin and their equally well-informed administrative

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assistants and advisers behind the scenes. In all cases, I sought to cross-check my written and oral sources to ensure accuracy.

In the process of conducting this research, I have incurred many debts. For my chapter on criminal prosecutions, I am grateful to both the Justice Senator's office and the Public Prosecutor's office (II) in Berlin for providing me with many of the unpublished court decisions on the Wall trials. For my chapter on the uses of the Stasi files, I am indebted to the Federal Authority for the Records of the Stasi (BStU) in Berlin and to its director, Joachim Gauck, for many insights. Several of the BStU's current or former employees – David Gill, Klaus Richter, Gerd-Dieter Hirsch, Herbert Ziehm, Michael Zabel, and Siegfried Suckut – steered me through the thicket of the Stasi Records law and helped to clarify the process of administrative screening. For my chapter on the Bundestag's Enquete commission, I am grateful to the body's chair, Rainer Eppelmann, its chief of staff, Marlies Jansen, and many other staff members who answered innumerable questions about the ins and outs of the parliamentary inquiry. During my visits to Bonn, the German Society for Foreign Affairs kindly provided me with an office and made available its magnificent library, as it has done so many times in the past. Finally, back in Berlin, the Federal Office for the Settlement of Open Property Questions opened its doors widely to facilitate my research on the Property statute. Without the gracious assistance of its staff, especially Gabriela Körner and Birgit Schöneberg, I would never have been able to write the chapter on property restitution.

For this project, I have been fortunate to receive regular advice and encouragement from two eminent Germanists. My colleague Donald Kommers, a leading authority on the Federal Constitutional Court, has been an unfailing source of support, an intellectual light and inspiration. More recently, Peter Quint, who knows the constitutional aspects of German unification as well as anyone, has carefully critiqued all of my arguments and provided many invaluable insights.

Over the years this book was in gestation, I have benefited from the good counsel, expertise, and friendship of many scholars with interests in German affairs, human rights scholarship, and comparative politics. Many of them generously read all or parts of this book: Thomas Banchoff; Anthony Berardi; Jean and J. D. Bindenagel; Heinrich and Karin Bortfeldt; David Crawford; Gert-Joachim Glaeßner; Andrew Gould; Alexander Hahn; Helmut Hubel; Gerd and Ines Kaiser; Kevin

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Krause; Henry Krisch; Gregg Kvistad; Hans-Heinrich Mahnke; Scott Mainwaring; Garth Meintjes; Juan Méndez; John Miller; Wilson Miscamble, C.S.C.; Dirk Moses; Norman Naimark; Mark Roche; Brad Roth; Kim Scheppele; Jürgen Schnappertz; Gunnar Schuster; Paul Schwartz; Timothy Scully, C.S.C.; Wolfgang Seibel; Uwe and Inge Stehr; John Torpey; Richard Ullman; Andrzej Walicki; Wolfgang Wiemer; and José Zalaquett.

Over the course of this project, I have had four excellent research assistants, each of whom played an important role in the preparation of this book: Michael Williams, Andreas Feldmann, John Wingerter, and Joseph Foy. Judy Bartlett aided me in overcoming the inevitable computer glitches. Above all, Kathee Kiesselbach, my administrative assistant in the Department of Government and International Studies, continually made it possible for me to perform my duties as department chair while keeping my scholarly pursuits alive.

Along the way, several institutions helped to facilitate this project. I am especially indebted to the John D. and Catherine T. MacArthur Foundation, which awarded me a timely Research and Writing Grant in International Security to start the book in the first place. At Notre Dame, I am thankful for the continuing support of the Helen Kellogg Institute for International Studies and the Institute for Scholarship in the Liberal Arts.

I owe a special word of thanks to my editor, Lewis Bateman, who convinced me to publish this book with Cambridge University Press and has been a superb and unflagging source of guidance and encouragement throughout the publication process. My thanks also go out to all of the other members of the Cambridge team, including Alan Young, who have devoted so much attention to this book, as well as to John Joswick and Eleanor Umali who provided excellent copyediting. Finally, I thank the editors of the *Review of Politics* for allowing me to republish sections of Chapter 2, which originally appeared in that journal (58, no. 1 [1996]: 53–80).

My greatest debt of gratitude is to my family. My wife, Nancy, has always been a vital part of everything I do, including my scholarship. She knows what this book means. Throughout this long project, my daughters, Jackie and Erin, never gave up on me despite my many trips abroad to conduct research or, most recently, many late hours at the computer screen. I dedicate this book, with much love, to both of them.

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I could not have come this far without the guidance and support of the individuals and institutions mentioned above. Of course, any errors in this book are mine alone. I am also mindful that, in choosing to write about the subject of retrospective justice, I have put myself on contentious ground. Opinions on the topic are as diverse and as deeply felt as on any contemporary issue of public policy. I hope this study will add new fuel to the debate, both about the German experience in particular and about the relationship between justice, historical interpretation, and democratic prospects in general.

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Note

Anyone writing about German unification immediately encounters the problem of what terminology to use for the different Germanys and different German citizens before and after October 3, 1990. In this book, I have adopted the following conventions. I refer to the two German states before unification, the Federal Republic of Germany and the German Democratic Republic, as West Germany and East Germany. I refer to the people who lived in those states as West Germans and East Germans, respectively. However, after unification, I speak of eastern Germany and western Germany, and when contrasting the citizens of the two parts of the nation, I speak of western Germans (or westerners) and eastern Germans (or easterners).

Additionally, to make my account more readable, I frequently refer to the two German governments before 1990 as Bonn and East Berlin. Also, I refer to the government of unified Germany as Bonn, for most of the political decisions relevant to my account took place in that city. Of course, I am aware that the Bundestag voted to make Berlin the federal capital in June 1991, but it was not until 1999 that the city became the country's fully functioning capital. For the years after 1999, I refer to Berlin as the German capital.

Finally, this study contains legal and political terminology with which some readers may not be familiar. For this reason, I have provided a brief description of the German court system (see appendix). I have also included a glossary of frequently used terms and abbreviations (see p. 223).