Uniting the German Nation: Law, Narrative, and Historicity

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uniting the German nation: law, narrative, and historicity

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law and renarrativizing Germany

One of the most significant Cold War legacies—only slowly and reluctantly acknowledged by the whole world—is a divided Germany, with two distinct nations and peoples. For reasons having to do with international competition and legitimacy, the two German states, following their origin in 1949, constructed differences in the dispositions of their populations. Yet they misrepresented (in the case of the East) or altogether denied (in the case of the West) these differences. The West German state insisted that it was the only legitimate state; and, although de jure division had been forced on the German nation since 1945, or so it claimed, the dual legal systems did not (and for political reasons could not) lead to an acknowledgment of de facto social distinctions, whatever they might be, that might have resulted in the intervening years. The East German state, unsure about its future, equivocated on the issue of single or dual states and nations until 1968, whereafter it insisted that the two German states had produced two societies; by 1974 it was even claiming its *Volk* was distinct from the people in the West.

When the Berlin Wall was suddenly opened in November 1989, the majority of citizens in the two states seemed to support the West German position. Thus, through the initial stages of political unification, most Germans were hesitant to admit the degree of separateness, the radical schism between East and West in individual dispositions and institutional structures, in rituals and everyday life. But by the time formal legal unity was achieved on 3 October 1990, the slogan *"Wir sind das Volk"* ("We are the people"), which in the fall of 1989 had evoked so much *Verbrüderung* (fraternal sentiment) in rallying the people to unite against the leadership, had become somewhat of an embarrassment. Unification is now increasingly seen less as a simple (and accomplished) legal fact of national self-determination than as an ongoing class struggle. Moreover, the perception of a distinct *Ossi* and *Wessi*[1] is now as taken for granted as was the prior assumption of a single *Volk*.

Unification of the nation involves suturing these two halves together, making real in the present the fantasy of a past unity, whether by the denial of difference, the annexation of one half by the other, or an incremental convergence of lifeworlds. That these nations do not precisely correspond to the images which the two postwar states sought to construct and

This article analyzes the use of narrative form in law, specifically with reference to conflicts over unification of the German nation. Since the end of the Cold War, local actors have been repositioned in disputes over property, historiography, and penalties for the East German political elite. A just adjudication of these disputes is problematic given that the actors appeal to several different legal registers, each with its own principles of legitimacy derived from peculiar historical circumstances, which are not taken into consideration in the unification process. [Germany, nation, narrative, law, historicity, classification]

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represent does not deny their distinctiveness. For belonging to a nation, or nationness, is after all more a set of practices than an official image or self-representation. Nationness is the product of a particular history, of local relationships in the context of a world geographically and politically dissected by, and imagined in terms of, discrete "nation-states." And while we must take seriously the fact that the peoples of a nation can and do reconstitute themselves over time, we must also recognize that contemporary peoples have done so during the Cold War, a period in which personal and political boundaries were assumed to be fixed rather than fluid, in which the self as a national within a territorially circumscribed state was perhaps the central feature of a system of identities involving duties, rights, and privileges. Hence a nation, though constantly changing, is a durable historical artifact neither reducible to nor inferable from personal opinions and attitudes or from official representations of the state.[2] The creation of the new German nation will remain a preoccupation of Germany well into the next century. And law[3] will remain, if not the only means, as has been the case to date, surely one of the most significant tools for forging this unity.

For people in the former German Democratic Republic (GDR), building the new nation involves the very difficult transitions, similar to those elsewhere in Eastern Europe, from plan to market and from a centralized, autocratic polity to a liberal, more democratic order.[4] Additionally, however, Germans in the East, along with those in the Federal Republic of Germany (FRG) to the West, former "model" antagonists in the Cold War, must now "agree"—in a situation marked by great power asymmetries—to the joint construction of a new narrative about the nation, its past, present, and future. This joint project, in which a presumption of formal equality before the law is at odds with the differential power relations that characterize all "informal" relations, is one of several factors that make the East German transition, in comparison with those in other former socialist countries, sui generis. It goes without saying that these transitions as well as the construction of a new nation are highly contested processes. Nowhere are the conflicts more heated than in the legal domain, where the outcomes will have ramifications extending over several generations, influencing both personal fates and international order.

In this article I will examine unification and the new national order through the lens of two areas of legal dispute and the positioning of actors in East and West regarding them. What I intend to illustrate is the way in which legal arguments rely for their legitimacy on competing (and often incompatible) legal registers, which in turn presuppose a specific ordering of the community as a single nation. Although legal scholars would probably refer to these registers as "legal codes," I will use "register" in order to stress the entire corpus of codes within any discrete period. Furthermore, this national order requires narrative form for its representation, which means that legal arguments within that order rely upon, and are legitimated by, a particular sequencing of national history.

Although nation-states tend to represent themselves as single nations with continuous histories, very few indeed are not composed of heterogeneous cultural groups with quite varied pasts. Hence local identities seem to be in intrinsic conflict with nationness: they tend to be based on an almost obsessive concern with temporal and spatial origins in a very particular past, whereas national identities are more universalistic, existing in "homogeneous, empty time," as Benedict Anderson (1983:30), following Walter Benjamin, has written. Yet nations, as imagined communities, also depend on the local: they generalize "the nation" from specific economic and social class histories while disparaging and erasing "competing" ones. Indeed, the mythology of a nation is created through the selection of one version of a particular local history over another. One necessary aspect of this process of selection is the temporal sequencing of the nation in a historical narrative.

In short, through an examination of conflicts over law and the sequencing of history, I hope to show that only by renarrativizing—and, in part, reperiodizing—German history can the German people create a united nation. This is not to say that I can predict final winners and

losers in the current struggle. But I would like to indicate some of the parameters in which legality and national legitimacy are being decided. Finally, I will use this analysis to reflect on the possibilities for a just adjudication of conflict and refiguration of the political field in the future Germany. Before examining contemporary legal disputes, let me address the historical sequences by which the German nation came (or purportedly came) to take its place alongside other nations in an international order of states. Thereby I hope to make clear how the legitimacy of present positions is linked to fixing the origin of a legal state in Germany.

periodizing the nation before the Cold War

All periodizations of the German nation depend on a date of origin of a *Rechtsstaat,* or legal state, a moment of binding legal norms that can be universalized beyond the local and temporal conditions of their origin and that are considered to have achieved legitimacy. I wish to stress that it is impossible to fix that date in a noncontroversial fashion. At least since the Treaty of Westphalia (signed in Osnabrück in 1648, ending the Thirty Years' War), when national triumphed over feudal order, the European world has been based on an image of coordinated states, each sovereign over a nation that will determine its "self" within its territorial sphere (see Falk 1985). The principles of this treaty replaced the medieval conception of order, which had been based on the image of a heterogeneous Christian community hierarchically organized under the leadership of the pope and the Holy Roman Empire. Under the Westphalian system, respect for the boundaries of states, each with its own nation and national capital, decentered the order and shifted the focus to legal concepts of territorial jurisdiction, sovereign equality, and nonintervention—concepts that, as we shall see, have been at the nerve center of legal disputes since unification. Notwithstanding the fact that Germany first achieved statehood in 1871, late by European standards, the tendency since Westphalia, following the system's logic, has been to give legal status to the increased exercise of authority on a national level—even when this "national level" is only an imaginative construct with no fixed territorial counterpart.

Historians are still not agreed about whether Germans thought of themselves as a nation before 1871 as, arguably, did the French and British (see Sheehan 1981). In one view, Germans were known within Europe for their independent, decentralized polities, for provinciality and regionally accented identities. Kant, for example, declared in his *Anthropology from a Pragmatic Point of View* (1974[1789]) that Germans were without national pride and lacked passionate attachment to their fatherland. The year 1871, when Bismarck authoritatively forged the deal uniting the various German principalities and *Länder* under the Prussian state, marks merely a political or state unity. Though Germany became a territorially circumscribed whole, a *Staatsnation,* Germans as a culturally delineated group, a *Kulturnation,* were spread out in many different states, lacking ethnographic uniformity and any sense that the state had to be coterminous with the nation (see Meinecke 1970[1908]). The Bismarckian state unity did not succeed in overcoming local differences to create a sense of nation. It did not create the necessary cultural condition for a nation: a sense of simultaneity, a group narrative "marked not by prefiguring and fulfillment, but by temporal coincidence" (Anderson 1983:30). Thus historians have been cautious in attributing "national consciousness," much less a "national self," to Germany before 1871 and indeed before 1945.[5]

Certainly, the German nation achieved some sort of unity at the start of World War I. But the loss in this disastrous and bloody war divided Germans even more among themselves, and it is safe to say that the anarchy of the Weimar period was not displaced by unifying tendencies until Hitler came to power in 1933. And it is probable that no pan-German social unity was reached under Hitler's rule until the late thirties, when the opposition was silenced and early war successes had begun to extend the power and privilege of the German Reich.

Historiography of the period *after* 1871 is extremely controversial because any explanation of the period 1871–1933 is implicitly or explicitly integrated in some fashion into a narrative about the German *Rechtsstaat* that also argues for continuity or discontinuity with, antecedents and consequences of, the Nazi period. The relation of the Nazi period to the rest of German history was the central subject of dispute in the well-publicized *Historikerstreit,* initiated by Jürgen Habermas on 12 July 1986 in response to a letter published the week before by the historian Ernst Nolte (see the letters and initial statements of position in Piper 1987; also see Evans 1989; Maier 1988). At issue was Nolte's contention that Stalin's gulags had been a model for Hitler's concentration camps. Were the camps to be understood as a peculiarly German response to a German problem or as part of an externally motivated sequence of events (defense against bolshevism)? Arguing that a chronological connection was not to be (mis)taken for a narrative sequence, Habermas maintained that Nolte's view would relativize German responsibility for the Holocaust. In the construction of historical or social scientific accounts, it is precisely the move from a temporal chronicling of events to a sequencing in narrative that makes events meaningful, forcing them to speak to one another as nonrandom parts of a whole. Nolte's juxtaposition of the German camps with the (prior) Soviet gulags sequenced events in a causal relationship to one another as part of a single global narrative of totalitarianism. It also, as Habermas pointed out, relativized German crimes.

The principle of narrative periodization is indeed crucial. Establishing this sort of historical continuity forms the basis for referencing the legality, the *Rechtsstaatlichkeit,* of any particular political system. As we shall see, it also forms the basis for referencing the legitimacy of various positions in the present. Countering the Habermasian view, Michael Stürmer (1986) responded that historians had overemphasized the Third Reich and had thus made it impossible to build a genuine sense of nationhood. Germans, he wrote, shared an "obsession with their guilt" manifested in an inability to decide where they stood in time and space. In any case, historiography of the period 1933–45 has had to address issues of morality, specifically degrees of culpability for the crimes committed in the name of the "German nation."[6]

It should be apparent from this summary and no doubt overdrawn history why the word "nation" has been such a contentious term since 1945. It was in this context that, after the founding of oppositional states in 1949, the GDR and FRG began constructing new nations. What is important to keep in mind is that no particular period can be drawn upon to mark the beginning of a German nation. If 1945, the date of the defeat of nazism, or 1949, the date of the founding of the West German state, is the "after" of the national narrative, what date is the "before"? Indeed, all dates before 1945 or 1949 are suspect.

How, then, does the choice of a date of origin for the German nation frame the legal parameters concerning legitimacy in the present? In order to answer this question, one must first review the official periodizations of the nation by the two states during the Cold War.

official periodization in the Cold War

During the Cold War the two states based their legality as states on a system of mirror-imaging: the periods and categories of one state were opposed, and often inverted, by the other (see Borneman 1992a, 1992b). Official historiography in East Germany, for example, categorized fascism as a child of capitalism whose emergence after the German defeat in 1918 resulted in the Nazi government some 15 years later. East Germany traced its legitimacy in part to the failed revolutions of 1848 and 1918–19. Note that this was both an economic and a political periodization, but not a cultural one. By claiming that fascism was a problem of capitalism, and not necessarily purely a product of German history, the GDR *universalized* and *abstracted* the Third Reich. Fascism became a universal problem of an abstract, nonlocal nature, attributable to a virulent form of capitalism and class conflict that could exist anywhere in the world. The

GDR insisted that the Russian occupation of 1945 marked an absolute break with this period and that the post-1949 state (because it was socialist) eliminated the conditions for fascism, which, it was maintained, still lived on in capitalist West Germany. Furthermore, the GDR's administration was characterized more by substantive than by formal justice, or, one might say, by a greater concern for justice than for legality. In general, the GDR prioritized results over procedures, flexibility over narrow legal interpretations, so that mitigating circumstances and experience were valued over strict constructions and logic.[7]

Official historiography in West Germany, on the other hand, dated the origin of fascism to 1933, when Hitler "took over power" (Germans dispute whether he took power, *Machtergreifung,* or was given power, *Machtübernahme;* the former is often preferred, as it relieves individual Germans of responsibility). The end of fascism was dated to the unconditional German surrender in 1945, which was followed by West Germany's "integration into the West [*Westintegration*]." Because it made fascism coterminous with a particular political event, the Third Reich, this periodization led to an *internalization* of 1933–45 in that nazism had to be explained as a German problem, albeit one no longer relevant given the new Western political organization.

The West German state never, in fact, totally distanced itself from the Hitler state, but instead claimed to be part of a continuous German history. It retained the services of major figures from the Reich for the construction of the postwar economic and political system. Moreover, given the FRG's stress on formal law—generally supported by the policies of the United States and Great Britain (cf. Bower 1981; Dotterweich 1979; Niethammer 1988; Tent 1982)—with its essential concentration on procedural rules and the "letter of the law," prosecution of crimes committed during the Nazi period was extremely difficult. Often sufficient evidence was not available to warrant prosecution under a strict interpretation of the rules. Consequently, for the first 20 years of the republic no great stigma was attached to having a Nazi background. At the same time, however, by giving fascism a narrowly political periodization, West Germany not only internalized the problem, forcing at least a political reckoning with it, but also relieved itself of accounting for it in economic and cultural terms.

We might represent these official oppositions in categories and periods as follows:

Cold War strategies for representing the German nation

	GDR (East Germany)	FRG (West Germany)
Nazi/Fascist period	1918–45	1933–45
Narrative strategy	universalize and abstract	internalize and particularize
Historiography	universal history	local history
Legal strategy	substantive justice	formal justice

Note, then, the point at which we can begin to examine current proposals for and uses of reperiodization. With the integration of East German territory, now called the Five New Provinces, into the Federal Republic, *internalization* and *particularization* take precedence over universalization and abstraction. Put another way, the reperiodization is framed by local history and formal justice rather than universal history and a substantive justice based on universal moral claims. But given that local histories have been radically different in the two Germanys since 1945, the question remains as to which narrative voice is considered authoritative and when the story begins.

the new German order

Because political unification was accomplished by means of Article 23 of the West German *Grundgesetz,* or Basic Law of 1949, West German law has become the legal register with final

authority (and legitimacy) in settling disputes. Indeed, West and East Germany are often opposed to each other as a *Rechtsstaat* and an *Unrechtsstaat*. In the months immediately after the opening of the Wall, Germans generally assumed that the nation would be united according to Article 146, which would have meant a slow process of negotiation between the two Germanys, with consideration of proposals from both sides, followed by citizen ratification and eventually complete unification. According to Article 23, which was aggressively pushed by Chancellor Helmut Kohl of the Christian Democratic Party (CDU), the GDR had to reorganize itself into the old *Länder* from 1945, and then by means of a single parliamentary vote and signing of the unification treaty, accede to the Federal Republic. Thus the entire corpus of law and structure from the Federal Republic was taken over by the former citizens of the former GDR—a quick *Westintegration*. In 1990 East Germans voted three times, each election interpreted as a theatrical legitimation of steps already taken toward unification.

In light of these events marking a seamless governmental unity, each the outcome of a great deal of political maneuvering, it seems strange to reflect that it all began with a revolution. In contrast to the other revolutions of 1989, the Autumn Revolution in East Germany brought about a loss of national sovereignty (and dissolution of the state), rather than its attainment, and the *immediate* importation of a capitalist economic system that explicitly promised to create and accentuate class differences. The liberal legal order (along with the ideology of the market), of course, helped make this transition both attractive and possible, for, while representing itself as a superior order of justice, it masks the way it creates and reinforces class differences by nature of the inequities that are part and parcel of its private and public law. One might also argue that West Germany in effect bought—and, arguably, is still buying—the Soviet Union's prize World War II booty, that is, the East German territory, for a sum of DM15–DM16 billion (approximately \$9–\$11 billion).[8] Moreover, although the revolution was initially fought in the name of national sovereignty, often expressed as the desire to create a better socialism, its raison d'être changed the day the Berlin Wall came down. When personally confronted with the overwhelming superiority of West German wealth, East Germans literally lost their orientation. In March 1990 they voted to dissolve their state in return for a promise of West German administration and wealth. The driving force behind the revolutionary transformation became what Habermas (1990a:32) has appropriately called *"DM-Nationalismus."*

One is tempted to overestimate the importance of revolutions and elections in processes of social transformation. Indeed, the 1989 revolution in the GDR and the elections that followed did not, and could not, generate the democratic and entrepreneurial practices that were supposed to substantiate the new rhetoric of a united nation. Nor, given the fact that only those in the East participated, could the revolution serve for long as a symbol of unity. Both events were prominent displays and partial screens for power reconfigurations occurring elsewhere. They did, however, have an immediate consequence—a shift in the locus of control. Nothing symbolizes this shift better than the change of residents in the Normannenstrasse in Berlin-Lichtenberg. From 1871 to 1945, the center of German political power, the space where power-makers moved, was near the Kaiser-Wilhelm Strasse in the heart of the old Berlin. During the war, many of the old buildings there were destroyed, and the Russians and Americans, who divided the street in half, were determined not to let the area become a center of power again. In East Germany, the center slowly shifted to the forces of State Security, or Stasi, with its headquarters on the Normannenstrasse, an innocuous side-street several kilometers from the city center. By the 3 October 1990 election, which completed dissolution of the East German state, the building was occupied by the West German Finanzamt, the Ministry of Finance. In short, we have witnessed a change of regulatory type: from a regime ruled by an authoritarian political order for its own purposes to one ruled by law and motivated by a monetary order. Discipline is now more the domain of economic regulatory agents than of the police.

The process called national unification has entailed a complete resignification of buildings, places, occupations, and people in the former GDR. This re-placing of power has in turn necessitated the creation of a new classification scheme that will obtain for both parts of Germany, one based on law and legality and capable of legitimating the new rules of conduct. According to this new scheme, West Germany is the *Rechtsstaat,* and, following the logic of the Cold War's mirror-imaging pattern, East Germany is now classified as an *Unrechtsstaat.* Law plays a crucial role in constituting and consecrating this new order by determining the rules of standing (Who can narrate?), the issues that are contestable (What is narratable?), and the particular legal register with legitimate authority (When does the narrative sequence begin?). This link between law and narrative has recently come under study from many different perspectives (for example, from critical legal studies, see Unger 1983; from a conservative judicial position, see Posner 1988; from feminist jurisprudence, see MacKinnon 1983; from literary criticism, see the essays in Bhabha 1990). For the purpose of this article, the connection has not been stated more succinctly since Hegel, in discussing the relation between *Geschehen* and *Geschichte* (what he distinguished as "events" and the "narration of events," terms quite comparable in meaning to "story" and "discourse"), observed that "the narration of history and historical deeds and events appear at the same time." What "give[s] shape to an originally formless impulse," according to Hegel, is the state, "which first presents subject matter that is not only appropriate for the prose of history but creates it together with itself" (1953[1837]:75–76).

In interpreting this passage, Hayden White notes that a "political mode of human community made a specifically historical mode of inquiry possible, and the political nature of this mode of community . . . necessitated a narrative mode for its representation" (1984:5). The advent of the state did indeed open the space for a narrative about history, enabling a national identity, a form of meaning peculiar and necessary to the contemporary nation-state. Yet before a national voicing or articulation—the molding of experiences, utterances, and events into meaningful form—can begin, there must be agreement on the narrator, the narratable, and the moment at which a narrative sequence begins. Likewise, legal argument and adjudication proceed only through such a narrativization: determining standing, permissible evidence, and the relevant register of rules for making "facts" comprehensible. Thereafter, various jurists, in interaction with actual disputants, begin from a particular historical standpoint to organize facts into temporally sequenced clauses with beginnings, middles, and ends. The ultimate register, or the whole, to which both individuals and states appeal is national law, or in extraordinary cases, the law of the international community—law, despite its universal intent, written by people with specific interests in mind at a particular moment in time. Thus law, nation, and narrative all presuppose one another—indeed, are made meaningful by one another—as conceptual and heuristic devices for the creation of legitimate order (see Borneman 1992b:36–57, 74–118).

Though the tendency since Westphalia has been to grant legal status to the increased exercise of authority on a national level, this nation-state order is not, nor ever has been, coherent, stable, or generative of all local processes and macrophenomena. Liisa Malkki has made this point forcefully in her study of Hutu refugees, where she writes: "refugee-ness, exile, and displacement—as also de-territorialized, stateless nation-ness and historicity—are rendered systematically invisible" to this order (1989:36; also see 1992). At issue here is not whether national and international law constitute classificatory orders but whether, as part of a world order, the new territorially distinct German state enables certain forms of "national" voicing or agency while turning a deaf ear to others.

current debates

Among the current debates over narrativization in law, two are perhaps most revealing of the tensions involved in unification: first, the debate over property expropriated from Jews in

1937–38; and second, the debate over penalties for the East German political elite. Scholars often assume that a nation is defined in the area of "constitutional law," which, in accord with Liberal political theory, is seen as being about abstract principles, analytically distinct from the practices involved in defining "public" (statutory) and "private" (contract and tort) law. The assumption that these domains are in some sense hermetically sealed bodies of law works invidiously to obscure the fact that the three domains articulate with one another, indeed depend on and cross-reference one another to establish legitimate order. Hence I have purposely taken single examples, property and criminal law, from the putatively separate domains of private and public law to illustrate how practices articulate with constitutional law in defining the nation.[9]

who owns formerly Jewish property? First I ask how the periodization of the Third Reich enters into present conflicts over the redistribution of property, focusing on a case about the status of expropriated Jewish property. The more general question posed by this example concerns the nature of appeals to constitutionality in territorial or property disputes since reunification. In making territorial claims in the former GDR, disputants appeal to at least six alternative legal registers. Each of these registers, except for the unification treaty, has its own narrative periodization.

Periodizations for claims on East German territory

1933–45	Third Reich law
1945–49	Soviet (occupation) law
1949–89	GDR law
1933–89	Third Reich law followed by GDR law
1949–future	FRG law *(Grundgesetz)*

The periodization 1933–45 (which marks the internalizing strategy of the Federal Republic) would seem to nullify as illegal the expropriations of Jewish property in 1937–38, as well as all other economic-legal transactions in this period. It has not done so, however. Following World War II, official policy in West Germany favored state reparations to victims over the return of property (Niethammer 1988).[10] There is, indeed, much evidence to the effect that after 1945 many, if not most, former Nazis in West Berlin and West Germany retained their expropriated property, perhaps largely because most Jews had been annihilated. However, those Jews who did survive often found it impossible to prove that their property had been illegally expropriated. The Third Reich did have a high regard for the appearance of legality and took great care to reconcile its economic and cultural actions with legal ordinances, many of which were merely sharpened versions of Weimar law. In sum, the decision to pay reparations rather than to return property—a policy that also entailed paying large sums to Israel—signaled both a sense of governmental (as opposed to individual) responsibility for injustices of the period and an assumption of a certain continuity with the Nazi period. Moreover, the same continuity could be found in the West German state bureaucracy, which survived postwar reorganization relatively unscathed and ultimately intact (Friedrich 1985). Furthermore, nearly all Nazi judges continued in their functions in West Germany after the war (Müller 1987). Thus, for the most part, property transactions made during the Third Reich were respected after the war.

The situation in the former GDR is quite different, for three reasons. First, official policy favors the return of property over reparations, resulting in millions of legal claims by West Germans on East German property. The major justification for this policy has been that the government was unsure, given the suspected costs of unity, that it could afford to pay reparations. Second, the disputed property is solely in the East, and the potential beneficiaries of a redistribution are nearly all West Germans or former East Germans who have resettled in the West. (Claims by Jews are minuscule in number, though Jews are involved in disputes over some very prominent

properties.) Third, most of the cases are being decided by West German judges, who, unlike those in office during West German denazification after the war, have little personal stake in the cases at hand. (Most of the 1000 East German judges and 800 state prosecutors have been dismissed, although some are being retrained and rehired at lower levels.)

After 1945, Soviet administrators in East Germany expropriated the property not only of all high-ranking Nazi officials who had benefited from the Third Reich but also of many Nazi sympathizers and anti-Communists. The Soviets also enacted a land reform in 1946, which was approved by popular referendum, and they turned large tracts of land as well as numerous buildings into collective and state property. After 1949, the GDR even sold legal title of some of this property to its citizens, provided there were no ownership claims justifiable under its law. However, the GDR did not consider land "private property"; thus citizens often bought or built houses on land that they held in trust but did not own. As it turns out, much of this land was last "owned" by West German citizens.

Let us turn to a concrete example. What happens to property, owned by a German Jew who has since become an American, that was expropriated by a Nazi officer in 1937 and thereafter held in trust by the Soviet state and the GDR before being sold several times to private parties? To which date and based on whose claim should one return?

An American Jewish professor, an acquaintance of mine, is the legal heir of a family from which part of Potsdammer Platz (in the center of Berlin) was expropriated in 1937. The real estate on this land was destroyed during the war. Yet several of the houses on the property are now rental units lived in not by beneficiaries of the Nazi expropriation but by former refugees (including one Spanish civil war veteran, as well as one German Jew who grew up in the United States but returned in 1951 with her father, who was being hunted by Joseph McCarthy). These and other current residents on this land had also lost property during the war.

If one recognizes my Jewish acquaintance's legal claims to the land, dating back to 1937, then what of the legal transactions that occurred after 1945? These postwar legal transactions began under Soviet occupation between 1945 and 1949: as victors of the war, the Soviets disposed of German property according to their own legal prescriptions, which at that time were considered legitimate by international law—and which appeared to be recognized by the unification treaty of August 1990. After 1949 the GDR presented itself as a legal state; it obtained membership in the United Nations in 1973, and by 1983 it had official diplomatic relations with the 132 other states in the international community, with whom it made contracts recognized by international law. Should one recognize the legal claims of individuals acting in accordance with Soviet ordinances from 1946 to 1949 and with GDR law between 1949 and 1989, then the American professor's claims would have to be balanced against others.

Even if the professor gives up his claims, it is unclear to whom the expropriated property belongs and what should be done with the apartment buildings on it, since state property held by the GDR is being sold, or given away, by the Treuhand, the parapublic trust set up to "privatize" the economy. Cases of this sort abound, since millions of property owners left the GDR before 1989, either forcibly or under circumstances in which their property was extorted from them.[11] A total of 2.69 million such *Übersiedler* were registered by West Germany as *Flüchtlinge* (refugees) from 1949 to 1961, with approximately another 220,000 through 1989 (Borneman 1992b; Bundesministerium 1985). Corporate groups and individuals have filed 2.7 million applications for the restitution of assets or the return of property they left behind. As of June 1992, only 8.4 percent of the applications made by private individuals had been processed, and only 4.9 percent had been resolved (Steiner, Ratner, and Hofmann 1992). For the *Übersiedler,* the property protections guaranteed by the West German state in its pre-1989 form are optimal. And herein enters a third actor, the most powerful of the group: the West German state.

The position of the West German state is complicated by the fact that the constitution on which it bases its legality, the *Grundgesetz,* or Basic Law of 1949, was written as a provisional document (see Seifert 1989; Strauch 1985). Its provisional nature was explicitly acknowledged in the preamble by the authors of the document, who wrote that its function was "to give a new order to political life for a transitional period." They even included a clause that says, "The entire German *Volk* are called upon to achieve in free self-determination the unity and freedom of Germany" (Basic Law 1986[1949]:13). This meant that the constitution was to be renegotiated after an eventual German unification—an event that seemed quite unlikely during the Cold War.

In the intervening years the *Grundgesetz* has become somewhat of a holy document for the West Germans, a mark of stability and symbol of a successful social charter. Thus, many prominent Germans have appealed to *Verfassungspatriotismus,* "constitutional patriotism," as both the basic glue that holds the Federal Republic together and the major advance of the Federal Republic over past German sociopolitical formations. Moreover, the *Grundgesetz* is considered the final appeal in questions of right and wrong, so that the fate reserved for the most despicable of all criminals in the Federal Republic is to be labeled a *Verfassungsfeind* (enemy of the constitution). In the early fifties the government labeled *verfassungsfeindlich* any person who sympathized with East Germany by belonging to the Democratic Women of Germany (Demokratische Frauen Deutschlands [DFD], an East German mass organization initially set up to politicize and inform women and to propagate antifascist values) or the Free German Youth (Freie Deutsche Jugend [FDJ], also an East German mass organization, set up to politicize youth)—organizations that had no West German counterparts for these basically disenfranchised groups. By the mid-fifties members of the Communist Party of Germany (Kommunistische Partei Deutschlands [KPD]) were also enemies of the constitution, as were protesters of West German rearmament in the late fifties. Student protesters became targets in the late sixties, followed by terrorists in the seventies and pro-environmental groups in the eighties.[12] Set up to infiltrate, harass, and even gather evidence against members of these groups were an office for the protection of the constitution, the *Verfassungsschutz,* and a constitutional police, the *Verfassungspolizei* (see Borneman 1992b; Schöll 1985).

Paradoxically, then, a cult of the constitution in the Federal Republic is based on a sacred document or founding charter that is explicitly provisional. Current judges find themselves deciding cases about East German territory by appeal either to a set of laws now considered part of an illegal system or to foreign law that was not meant to apply to the cases at hand, that in fact was supposed to be renegotiated and rewritten upon unification of the *Volk.* At least according to one reading, the application of West German property law to these cases is a direct violation of the principle of legality, the principle on which the current legitimacy of the *Grundgesetz* rests. Moreover, the Basic Law of 1949 lacks popular legitimacy in that it has never been ratified by the West German people. Largely because politicians distrusted the people and forms of direct democracy after the war, but also because the Federal Republic considered itself a provisional state, the Basic Law was never submitted to popular referendum. Therefore, a range of people on the left ask: how can we be *Verfassungspatrioten* when the document is not "by the people"?

More authoritarian-minded people counter the argument about a need for popular legitimation by referring to their mistrust of referendums and plebiscites, based on German experience during the Weimar period, when such popular measures were guaranteed by the constitution but were used to destabilize the government. The West German left and members of the East German civil rights movement reject this argument in turn, appealing to the legacy of the Autumn Revolution of 1989, the first successful democratic revolution on German soil.

Ulrich Preuss, a West German constitutional law expert, insists that the revolutionary slogan *"Wir sind das Volk,"* from the October 1989 demonstrations in Leipzig, must lead to a

reinterpretation of the word *Volk*, which in German connotes oneness and homogeneity. By contrast, when Americans begin their constitution with "We, the people," they mean a heterogeneous group that freely comes together. This English-language meaning corresponds to a secondary connotation of *Volk* in German. The East German Round Table, which functioned during the interim Modrow regime, from December 1989 through 14 March 1990, put this secondary connotation in their proposal for a new constitution. Article 42 of the Round Table's formulation states, "Bearers of the authority of the state are the *Volk*," a phraseology that encourages conceptualizing a pluralistic, heterogeneous *Volk* (cited in Preuss 1990a; see Thaysen 1990). Participants in the Round Table reinforced their reading of *Volk* by placing this phrase in the section on social rights, not in the section entitled "Principles and Organs of the State." Furthermore, in other sections they often used the word *Bürger* (citizen) instead of *Volk*, to emphasize the individual as opposed to a unitary community. By contrast, Article 20 of the *Grundgesetz*, which takes its formulation from the Weimar Constitution, offers a statist definition: "All state authority emanates from the people" (Basic Law 1986 [1949]:23). Put this Hegelian way, it ties the people to the state; they have no political opinions independent of their ability to express them through the state (see Preuss 1990a:77–79, 1990b:62–63).

The suggestions from the Round Table, while having no legal authority, nonetheless have entered the debate about whether to revise the *Grundgesetz*. Given unification, West Germany, too, must reorder itself. For example, in the unification treaty with the GDR, signed before the 3 October 1990 elections, it had to reformulate, to reword, and to reperiodize its relationship to the past, specifically the Nazi past.[13] A statement of 12 April 1990, issued by the first meeting of the first freely elected GDR parliament, could have set the tone for the phraseology in the unification treaty. In that statement, the GDR declared its responsibility for the unique degradation, persecution, and murder of the Jews. Yet in the unification treaty five months later, rather than making a statement to the effect that the Nazi period was unique, the preamble stated: "[I]t should be remembered that the united Germany holds to the continuity of its history, to which also belong in this century the consequences of both wars and the NS [Nazi] dictatorship as well as the unlawful communist regime in the GDR" (cited in Preuss 1990a:77). By categorizing the history of the GDR with that of the Nazi dictatorship, both being examples of the category *Unrechtsstaat*, this statement specifically delegitimated any appeals to a separate history of the GDR that might now be drawn upon for the refiguration of Germany; instead, it effectively elevated postwar West German law to the status of sole possible reference system. At work was a strategy of internalization and *Westintegration* along with a narrow political periodization.

Given these circumstances, what do we make of the American Jewish professor's claim to his expropriated property? If the Nazi regime and the GDR alike were illegal, then there can be only one periodization of history in the Eastern territory and that is 1933–89, seen as a period of continuous illegality—excepting the four years of Soviet administration, 1945–49. The West German periodization of 1949–89 is the single (positive) historical aberration, a period of legality that now must be built upon. Under these terms, the Jewish professor may be able to recover his property, but those Germans who lived under East German law for 40 years have no rights since they never officially enjoyed legality. Their history is beside the point because it was experienced under an illegal state—except in the event that they themselves are subject to criminal prosecution. Ostensibly to pay for World War II crimes (meaning the illegal expropriation of property), the citizens of East Germany are being asked to yield their property. Actually, they are paying the price of losing the Cold War (being on the Eastern side after 1945).

penalties for the former East German political elite? A second area of dispute concerns prosecutable crimes of the East German political elite, part of the domain of crime now called *Regierungskriminalität*. In the unification treaty, both states agreed that criminal activity that had occurred in the GDR would be prosecuted under GDR criminal law. Easier said than done.

West German lawyers are unfamiliar with GDR criminal law, much of which was written in unpublished politburo ordinances and directives. Despite the agreement reached in the unification treaty, West German prosecutors have not restricted themselves to a narrative standpoint based on GDR law but rather have drawn from various legal registers and historical traditions: international law, East German law (when specified by the treaty), the unification treaty itself, and West German law:

Legal registers invoked in the prosecution of the East German elite

1648	Treaty of Westphalia	international law
1907	Hague Convention	
1946	Nuremberg trials and U.N. convention	
1949–89	GDR law	
1949–future	FRG law	
1990	Unification treaty	

First as to international law. Article 2 of the Treaty of Westphalia, supposedly still valid today, demands "forgetting and an amnesty" on both sides after a war. Even Hitler respected this treaty provision after his annexation of Austria and the Sudetenland. Countering this particular international law is the precedent set by the unique proceedings of the Nuremberg trials in 1946, when Nazi judicial, political, and military leaders were tried for "crimes against humanity" on the basis of laws that had not existed at the time of the crimes. The Nuremberg precedent would allow some post-1949 West German law to be applied to East Germans.

Competing historical traditions and references have confused and frustrated the post–Cold War prosecution of the East German elite. For example, prosecutors have been unable to find direct evidence linking Erich Mielke, once the feared and ruthless head of Stasi, to the well-known acts of persecution and torture carried out by men and women following his orders. Thus he was initially charged with the relatively minor crime of wiretapping, in defiance of Paragraph 202 of GDR criminal law. Yet there are so many exceptions to this law that it is unlikely a court will uphold the charge. And even though West German law also makes wiretapping illegal, its exceptions mirror those in GDR law: the act is legal when done under a court order or by the West German *Verfassungsschutz* (Office of Constitutional Protection). These two justifications, frequently invoked in the West, are also available to Mielke. A second charge against Mielke was subsequently added: he was charged with the 1932 murder of a policeman.

Another member of the elite, Markus Wolf, the former head of foreign espionage and the model for Ian Fleming's James Bond, hid in Moscow from October 1990 to September 1991 rather than return to a likely arrest in the new Germany. After being denied political asylum in Austria, he surrendered to German border guards on 24 September 1991 and is now charged with spying on the West German state, an act obviously legal in the East, illegal in the West. Furthermore, according to the Hague Convention of 1907 (a law still valid today), if one state is taken over by another a spy must be handled as a prisoner of war, with no responsibility for his former spy activity. Wolf might argue that the Hague ordinance should be applied to the annexation of the East by the West. Yet according to West German law, the East German state never legally existed; hence, it is maintained, the category "prisoner of war" is inapplicable because the Cold War was never a war between two German states.

Perhaps the most complicated case involves the prosecution of former head of state and party Erich Honecker, the man who ordered the building of the Berlin Wall, an act that in itself is no prosecutable crime, but who also, as secretary of the national defense board in the GDR, first issued the *Schiessbefehl,* the order to shoot anyone trying to cross the German-German border.[14]

In the 28 years of the *Schiessbefehl,* from 20 September 1961 through November 1989, 78 people died at the Wall, 123 at other border crossings. The West Germans even established an office in Salzgitter to document each and every death on the German-German border. Because of this "order to shoot," the West German justice system wanted to prosecute Honecker.

The first problem encountered by the prosecution was that shooting someone on the border was not a crime in East Germany; rather, it was a "heroic act" demanded by Paragraph 27 of the "Border Law" passed on 1 May 1982. It could have been a crime according to GDR law only if it had been "antisocial" or had "endangered society." Clearly, Honecker's motive was to preserve his society. Moreover, this society and state was recognized as sovereign by the United Nations and thus as free to regulate its internal affairs without "foreign" interference. Without the construction of the Wall and its acceptance by the rest of the world, the East German state could not have survived. And according to the unification treaty, Honecker would have to be tried under GDR law.

West German prosecutors first searched for a document Honecker had signed that would indicate he had personally taken responsibility for having people shot "fleeing the republic," as officials in the GDR called this crime. They found an order he had signed on 3 May 1974 that stated: "As before, in the case of an attempted border crossing we must use our weapons without hesitation; and we are to praise the comrades who successfully use their weapons for this purpose" (cited in Augstein 1990). For this order prosecutors wanted to try him on charges of *Totschlag* (manslaughter), which carries a milder penalty than *Mord* (murder). But this distinction is found only in West, not in East, German law. In order to try Honecker for manslaughter, they would have had to rely on the terminology of Paragraph 212 of FRG law. Yet the unification treaty obliges prosecution under GDR law, Paragraph 112.2.2, which concerns killing for the purpose of propagating "fear and terror" among the populace. This melange of East German law with the vernacular of West German law would hardly have stood up in a court.[15]

State prosecutors also relied on appeals to two other sources: to the 1966 U.N. international law on civil and political rights, signed by the GDR and effective there as of 1976, which states that every person is free to leave any country, including his or her own; and to the notion of "basic human rights," what the Salzgitter office calls *Übergeordnete Grundsätze* (superior basic principles), in reference, I suspect, to the Nuremberg precedent. After being denied refuge in the Chilean embassy in Moscow—the Federal Republic pressured Russia to send him back for trial—Honecker arrived in Germany only to discover that he had terminal cancer. On 14 January 1993, charges were dropped after a Berlin court ruled that, because of his advanced cancer and presumably limited life expectancy, further imprisonment would infringe on his human rights. The same day, the 80-year-old Honecker was issued a German passport; he left that evening for Chile to rejoin his daughter, who had lived there for many years, and his wife.

positioning West German political parties Thus far I have shown how the redistribution of property and the prosecution of the political elite in the former GDR necessarily rely on a particular (and contested) periodization and categorization of German history. The refiguring of the Five New Provinces, currently taking place under the guise of processes referred to as "privatization" of property[16] and "democratization" of power, presupposes rules similar to those in a court of law that determine standing, permissible evidence, and the authoritative legal register. Reliance on any specific legal register carries with it a historiographical account establishing its authority, based on a unique periodization of German history.

Positions in West Germany vary as to legality and legitimacy, as indicated in the discussion above, and not all positions carry equal weight. Among the most important are those of the political parties. Moreover, political scientists within the Federal Republic often call their system a "party democracy," a parliamentary system in which power (the ability to define the rules) is

distributed through political parties (Kaack 1985; Oberreuter 1985). Indeed, throughout the unification process, West German political parties have been key in structuring the discourse on privatization and democratization, stipulating the conditions of standing and the origins of national legality and legitimacy, or, in other words, deciding when a legitimate story can begin and who can tell it.

It goes without saying that the four major West German political parties each represent different interests within the population. More important for our purposes is how they base their claims to legitimate political power on a strategic periodizing of legality and the nation. For the first 18 months of transition (February 1990–July 1991), their competing schemes, which, it should be stressed, are strategic and thus subject to change, are summarized below:

Political party historiography and periodizing of the nation

Christian Democrats (Christlich Demokratische Union [CDU])	1933–89, GDR; 1933–45, 1949–future, West Germany
Social Democrats (Sozialdemokratische Partei Deutschlands [SPD])	1945–89
Free Democrats (Freie Demokratische Partei [FDP])	none (depends on the individual case)
Greens (Die Grünen Partei)	1933–89

Helmut Kohl's ruling CDU, along with its Bavarian sister party, the Christian Social Union (Christlich-Soziale Union [CSU]), has a dual preferred periodization. The Nazi period, 1933–45, is seen as a closed historical period for West Germany, ending with the Allied occupation in 1945–49 and followed by a definitive political reorganization in 1949. What happened thereafter in the GDR was a continuation of the illegality begun by the Nazis; hence 1933–89 was a period of illegality in East Germany. For West Germany, however, 1949 marked a beginning—meaning the *Grundgesetz* dating from that year of origin must be retained. Furthermore, the CDU wants to transplant this paradigm into the former GDR and carry it into the future in the united Germany. Under this conservative and basically nostalgic interpretation, the new German nation stands for all those things already accomplished in West Germany since 1949—a narrative ordered around *Verfassungspatriotismus, Wohlstand, Leistung,* and *Westintegration,* or constitutionality, prosperity, achievement, and integration into the West—symbolized above all by yearly vacations abroad and powerful automobiles. If profit and achievement are what count historically, then the East, in this new configuration, can be evaluated and restructured according to these tried and tested West German principles. Responsibility for the outcome resulting from the application of these principles—to a society and situation alien to them—is thereby shifted from the social to the individual level. If an individual or company in the GDR fails, it is because of failures to achieve according to West German standards of efficiency and profitability. Political criteria are thus never explicit (often denied altogether), and social contexts are downplayed; individual responsibility is highlighted, and authoritative (supposedly impartial or "national") West German leadership is asserted.

The SPD equivocates about any periodization of the nation. It is split between an older faction, rallied around Willy Brandt, and a younger one, whose standard-bearer in the last election was Oskar Lafontaine. Brandt was the first West German politician in 1989 to appeal to a united nation, quipping even before the Wall came down, "What belongs together will grow together." That the East and West belong together is something only his generation takes for granted. When Lafontaine, nearly 30 years younger, was asked during the summer of 1990 what he thought about the German nation, he responded, "Ask Helmut Kohl." By refusing to assign a positive role to national unity, he essentially left the mapping of national terrain to the German right wing. Behind the SPD's present difficulty in periodizing the nation lurk some conflicts specific

to the history of the labor party in Germany. Given that much of the SPD's authority rests on achievements having to do with worker rights and protections and the expansion of social services, it shares with the now-disgraced East German socialists a name and certain goals. Now that much East German history is being rewritten from an official CDU slant—the CDU controls the government in four of the five East Provinces—the West German SPD finds itself having to seek a new base for legitimacy in the united country. Torn between *Weltbürgertum* (cosmopolitanism) and traditional leftist appeals to regionalism, Lafontaine called for a new social and environmental vision anchored in recent West German history; this basically postwar (West German) story found no hearing in the East. But most important, he was silent on the major issue of the moment: narrativizing the new German nation.

The FDP, under the leadership of Hans-Dietrich Genscher and Otto Graf von Lambsdorff, represents the *grossbürgerliche* (haute bourgeois) tradition in Germany, with many lawyers and would-be entrepreneurs in its ranks. FDP policies enshrine liberalism: free markets, open borders, and individualist conceptions of law and freedom. These liberal principles are assumed universal, free of context; and justice is considered timeless—one need only find the correct procedures. Hence the FDP insists on an open periodization, giving the (impartial) courts much leeway in deciding each conflict on its own merits. Of course, what many members hope, as the joke goes in Berlin, is to get back their villas, country homes, and other property lost in the series of expropriations beginning in 1945. Thus, in their view, even Soviet expropriations might under certain circumstances be called into question.

The Greens prefer to see 1933 as the start of the nation, thereby stressing continuity between the postwar Germanys and the Nazi regime. They insist that only a new constitution that takes into account both the legacy of nazism and the democratic revolution of 1989 can provide the base for legitimacy in a new, unified Germany. Hence they prefer a single 1933–89 period, which would view both Germanys as provisional and enable a new start. Antje Vollmer (1990), one of the leaders of the Greens, set forth a sentiment shared by many of her cohort in a recent article in *Die Zeit*. The new legitimacy, she wrote, should be derived from a moral claim of continuity with the *European* tradition that is "human rights-oriented, without fatherland, emancipated, and pacifist." She also harked back to a German tradition tied to the "defeat of the antifascist resistance," in contrast to what she described as the memory of her parents' generation (mainly CDU and FDP members), who are moved by "the sadness or shame of the defeat of the entire German nation." Her authority was based not on explicit appeals to what had been lost or achieved but on a vision of a morally just future society, one in which morality would be tied not to anything specific to the last 40 years (in fact, the entire postwar history is ignored) but directly to the injustices of the Nazi past.

positioning the East Germans One may find it odd that up to this point I have cited no East Germans. The conflict is, after all, about the redistribution of land, apartments, businesses, and jobs that they now control. They are the people who fought the revolution that made unification possible, and therefore it might be expected that they would be most active in the renarrativization of their history. But here we face one of the paradoxes of the East German revolution. Their history is being rewritten and their lives are being restructured by West Germans, much as the history and lives of Southerners were reshaped during the post–Civil War period in the United States, when carpetbaggers, bootleggers, judicial administrators, and politicians from the North went South to do business with those willing to do their bidding. The very asymmetry built into the relations between the two Germanys during the Cold War seems in fact to have precluded any possible initial equality in unification.

Very schematically, let me list some of the preferred periodizations that I heard in December 1990 (these are the earliest dates concerning legality and legitimacy that people referred to in discussing their own history). Farmers prefer to see 1946 as the start of postwar Germany, for

in that year the Soviets enacted significant land reform. Pensioners, former members of Stasi, and academics, among others, would prefer 1949, the year of the founding of the GDR, which would entail at least a selective recognition of its entire corpus of law in the interim. All mothers want the protections extended to them in legal reforms in 1950 and 1955. Single mothers—they number over 34 percent of all first-time mothers, 49 percent of those in East Berlin—would generally prefer to keep the special benefits enacted in the eighties, which have enabled them to separate the role of mother from that of wife. In fact, most other East Germans of my acquaintance would prefer selectively appropriating their own histories without specifying a single date. Many also favor 1989, the year of the revolution and the formation of the Round Table as a democratic forum.

Strikingly, these East German dates, like certain periodizations of history before the opening of the Wall, do not form a syntagmatic chain. Rather, they form highly idiosyncratic sequences based on personalized events and experiences. Each person or group has a unique story to tell, with no collective narrative that people agree to draw upon (for a more complete description, see Borneman 1992a). The state's techniques of social control did indeed isolate and divide. The result, as I've argued elsewhere, was a monolithic state but a nonexistent community (Borneman 1991). People now have the difficult task of weaving their intensely private desires and stories into a communal history independent of the (illegitimate) state that up to 1990 had given them a common reference and form. Taken together, their multiplicity of dates, a seeming chaos in periodization, are not linked by any socially legitimate story. The dates each constitute a paradigm with no agreed upon before and after, with no syntagmatic chain and no metonymic device to bring them into narrative form. No single narrative standpoint with authority can order their claims into a story with a before and an after that might serve as the basis for a legal claim to property, a job, or a business.

Former GDR citizens do have a date that most would agree they could use: 4 November 1989, the date of the million-member demonstration in East Berlin that broke the will of their regime, the date that all Germans, East and West, regard as periodizing the Autumn Revolution and forcing the resignation of Honecker, the date that marked a celebration of collective conscience but at the same time an end to the authoritarian state. It was both a beginning and an end. After the demonstration, East Germans created the Round Table, which then made suggestions for a new constitution with, of course, an eye to the expected new pan-German constitution. But for Chancellor Helmut Kohl, 1989 was the middle of a plot that began in 1949, the future of which he is the architect. He ignored these suggestions, claiming that the GDR was an illegal state and that, therefore, legal transactions made before the East Germans signed the unification treaty and were integrated into the Federal Republic lacked the stamp of *Rechtsstaatlichkeit.*

refiguration of the political field in Germany

Finally, we might ask if, from my analytic perspective, this material speaks to possibilities for a just adjudication of conflict and a refiguration of the political field in the future Germany. I have left us at a point similar to the one Claude Lévi-Strauss makes in *The Savage Mind,* where he argues that historical sequencing is arbitrary, for it does not contain its own principle of intelligibility. Historical periods, he writes, "make up a discontinuous set. In a system of this type, alleged historical continuity is secured only by dint of fraudulent outlines"(1966:261). In short, chronology alone cannot produce narrative sequence. Along similar lines, I have demonstrated that in order to be legitimate, historical experience must appeal to a particular legal register, but that there are competing registers with different historical sequences and consequences.

If we accept Lévi-Strauss's descriptive claim, that narrative standpoint and periodization are historically arbitrary, must we also agree to his normative critique, that the goal of gaining historical consciousness, of understanding sequence and diachrony, is attained only by fraudulent means? If we accept his normative critique and reject historical consciousness, reject the goal of understanding sequence and diachrony as a human truth toward which we strive, then we must, as does Lévi-Strauss, search for a specifically human truth outside history. This conclusion has been attacked most vigorously (and effectively, I feel) by poststructuralist work, especially that done by scholars in subaltern studies. Indeed, there is no analytical scheme outside history to which we can resort in arbitrating between competing claims of periodization in the refiguration of East Germany. Yet work in subaltern studies has not, to my knowledge, pointed to means whereby, with the breakdown of master narratives of the West and in the West, competing claims can be adjudicated. Rather than submit to a radical relativism, I would like to ask if it might be possible to use history and consciousness—in other words, historicity—to arbitrate the present redistribution of power in Germany.[17]

Let me point to an answer by way of review. I began with the observation that a nation creates its legitimating mythology by selecting and foregrounding one version of a particular group history—whether that history be based on ethnicity, gender, class, region, language, race, or religion. I then looked at one aspect of this process of nation building, conflicts over the legal periodization of the narrative about the legitimate nation, and found that local histories, which are many and varied, seem to be intrinsically at odds with a single narrative standpoint from which a continuous history of the nation might be told. Yet the state, in constituting itself as a system of legality and legitimacy, must precisely represent itself as capable of applying a transnarrative standard that rises above local histories without ignoring them. How a transnarrative standard will ultimately be employed to foster a more nearly complete unification in the new German state remains a matter of speculation. Even during the last nine months, as I have been writing (and rewriting) this article, several decisions on substantive legal issues have been reversed. Nonetheless, at this time we might speculate about the possibility of bringing East German histories into the new German nation without their being annexed at the cultural and experiential levels as they have been at the political and economic ones.

In referencing their experiences, East Germans have, to my knowledge, limited themselves to two plots (in the narrative sense, as the principle of interconnectedness or design that makes narrative possible [see Brooks 1984:3–36]). The first form in which they bring their own experiences and incorporate their own histories into the new unity is a plot of totalitarianism. In this story, periodized 1933–89 and favored most by the right wing, local differentiation is ignored. Degrees of complicity, acquiescence, and resistance are subsumed under the frame "totalitarian system," and local agency is generally denied. People who support this plot also favor keeping Stasi records secret. Thus Lothar de Maizère of the CDU, who led the ruling coalition in the East after the first free election, from March through December 1990, and who ultimately took his leave from elective office once it was revealed that he had been an unofficial Stasi employee, maintained that opening up Stasi records to facilitate a public discussion of the past had to be avoided, for it would lead to civil war and murder in the East. Residents of the former GDR often use the totalitarian plot to describe their lives in order to avoid having to deal with their own histories, not realizing that this plot, while excusing their past, also denies them future agency.

Moreover, the new national history will most likely inscribe the political-economic asymmetries between East and West—asymmetries that have only been exacerbated by unity—into the new spatial and temporal order. Indeed, the word that Germans most often use in referring to unification is not *Auflösung* (dissolution), but the ambiguous and arcane verb *abwickeln*. Appropriately used in the passive voice (thus avoiding the attribution of agency), *abwickeln* means to bring to completion, to unwind or unreel. Thus imaged like an antiquated clock whose

internal coils have sprung, the GDR *wird abgewickelt,* is being unwound, detotalized, set back to a prior time, specifically to 1932.

The second plot often cited by GDR citizens is dispossession, which again draws parallels with the notion of resistance in subaltern studies. While both the dispossessed and the resister ultimately think of themselves as victims of dominant powers, their two emplotments differ in a significant respect. Dispossession transforms the simple act of resistance—contentious and local, at that—into a supralocal, possibly even national, legal claim. In the story of dispossession, much as in the totalitarian plot, East Germans lament their history of voicelessness but they then extend it to the present period of colonization by the West Germans. Troping one's life in terms of dispossession would also link the majority of people in the former GDR with a sizable minority in West Germany who also employ this plot, and could thus refigure German political space.[18] However, neither plot allows a nonlinear reinscription of local histories, with periods of being spoken for and complicity alternating with periods of speaking out, resistance, and agency. Very few lives in any system are marked by total complicity or acquiescence, but at the same time, very few people can claim a pure history of resistance or dispossession. Indeed, what must be kept in mind is that Cold War complicity went both ways—East to West and West to East. The two German states and their peoples constructed themselves in a symbiotic relationship involving complicitous reciprocity, as in the degrading shipping of (West German) garbage to underequipped and polluting (East German) dumps, the exploitative and cheap production of goods in the East for West German consumers, and the infamous exchange of (East German) people for (West German) money (see Borneman 1992b).

In order to reclaim some kind of agency, Germans must begin with local histories and an open airing of the past, including a discussion of the terms of the Cold War and of the unification treaty ending it. If unification is to be more than annexation, it must entail a process of discursive will formation that builds on such principles as equality of participation, respect for difference, and protection of minority rights. To date, we have witnessed the opposite tendency. Those who have declared the political-economic complex called East Germany a failure have simultaneously invalidated 40 years of East German historical experience. Let us ask what it might mean to acknowledge and grant validity to individual historical experience, necessarily also including the alternative legal registers that contextualized and referenced this experience, so as to enable one to take it into account in adjudicating disputes.

To be sure, any outcome of this renarrativizing of the German nation will not transcend but rather result from struggles within the constraints of a particular political-economic gestalt. Owing to the absence of a common history and to the asymmetry structuring East-West relations, all interaction in the present Germany partakes of distorted communication. The rules for adjudicating current conflict are not grounded—and here we must turn to Habermas (1970:92) again—"in the intersubjectivity of the mutual understanding of intentions and secured by the general recognition of obligations." For the social and material conditions under which Germans could effectively create shared meanings and a public sphere are only now, with unity, at hand. Indeed, generalizable norms and transnarrative standards are neither empirical entities waiting to be discovered by vigilant ethnographers nor the arbitrary postulates of ethicists and jurists; rather, they are both made and found in human practice and political dialogue.

An understanding of the conditions that might make "justice" possible in the new Germany is essential to its construction. Habermas' ideal speech situation, often attacked by poststructuralist thinkers as merely another Kantian a priori with no application to existing social agents, actually makes possible the imaging of the postmodernist end: respect for alternative experiences and noninstrumental, normative standards. For Habermas, universal guarantees or norms are a precondition for the recognition and affirmation of particularity. These universalistic structural conditions, while injecting an objective moment into the historical situation, do not

themselves provide a transcendent perspective; they are not reducible to merely technical means of achieving ends; instead, they are arrived at in concrete situations and practices—as in the settling of disputes about property and crime discussed in this essay. Moreover, their validity is tied to the construction of situations free of coercion and domination. Under a discursively constituted structural situation, it would be more likely that alternative voices would be given a hearing and thus that conflicting claims would be justly adjudicated.

In arguing for such a communicative ethics, Habermas (1990b:47) writes: "Justice conceived in postconventional terms can converge with solidarity as its reverse side only when solidarity has been transformed in the light of a general discursive will formation." This process presupposes a desire to reach understanding—which is what the politics of nation building purports to effect—rather than one to maximize self-interest and power. Of course, the conflicts I have described here can only be characterized by the latter. Competing legal narratives are being judged in terms of their logical consistency and conformance to a set of formal structural requirements. Those in power are, in general, applying a paradigmatic rule—a single national legal register—ignoring the sociohistorical context of the actions being judged. I argue instead for a vantage that considers the disjunctive historicity of the litigants: that is, an account of the extent to which in their reconstruction they affirm a perspective by situating meaning in time and space (see Borneman 1994). One can situate meaning in time and space only by constructing a kind of discourse as a "reflexive form of understanding-oriented action" (Habermas 1990b:48).[19]

Simply put, any procedure to achieve national unity must not exclude a priori the voices of specific actors understood in their various historical contexts. With this in mind, the new German nation, discursively constituted, would seek to redistribute power through rather than despite history. That would mean not only beginning with history but finding a perspective situated within it, one of proximity rather than distance, from which to understand and assess cultural truth. Though some may argue that any historical perspective is fraudulent because it achieves coherence by using the devices of fiction, I would maintain, following Hayden White (1987), that narrative, in law as in other domains, is precisely the only means available to bring facts into meaningful form. Moreover, in the process of renarrativizing the German nation, an acknowledgment of the historicity of experience and the multiple perspectives that result therefrom, far from impeding a just resolution of legal claims, would be the only means by which justice—and unity—might be achieved.

notes

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1. *Ossi* and *Wessi* (Eastie and Westie) were terms used colloquially, and primarily by younger people, in both Germanys before November 1989, but they are used much more frequently and have become more pejorative since then. They function to simplify identities and loyalties by reducing the other to place of origin and rank (West being superior to East).

2. For an operational definition of "nation" see my book *Belonging in the Two Berlins:*

> Everyday relationships and interaction routines that are unique to a particular group form the basis for feeling *zu Hause,* at home, in one place and not in another. To feel at home is to be among kin. This *zu Hause*-identity is created only when an individual experiences a particular set of lifecourse meanings

enabling him or her to belong to a group demarcated from other groups. Over time such everyday relationships become the criteria for national identifications, for a sense of nationness. [1992b:31]

I reserve this concept of "nation" for the historically conditioned pattern of belonging specific to the contemporary world order of nation-states, as does Gellner (1983). Moreover, while not every nation has a state (the Kurds, the Palestinians, and the Macedonians, for example, do not), neither does every state have a nation (consider Kuwait, the former Yugoslavia and Soviet Union, India and, arguably, Canada). Yet most people in the contemporary world imagine themselves as belonging to a nation that will eventually find its Hegelian fulfillment in a sovereign state. (For a fascinating study of statelessness producing nationness, see Malkki 1989 and 1992.) Both states and nations are constructed objects that attempt to shape each other.

3. Unless the term is qualified otherwise, by "law" I mean not merely constitutional law but also what is commonly referred to as public and private law. These distinctions are explained in the section entitled "Current Debates."

4. The ongoing transitions from state socialism in Eastern Europe and the former Soviet Union are tremendously varied processes, with quite different cultural logics at work in each country. David Stark and Laszlo Bruszt (1990) have begun a comparative sociology of the transition, analyzing the Polish and Hungarian cases. They perceptively single out the different bases of legitimacy in the two cases: "legal-relational principles of election" in Hungary and functional "representational claims" in Poland. At issue is whether institutionalized forces within a framework of legitimate discourse (as in Hungary) are more likely to facilitate democracy than less formal practices of discursive will formation (as in Poland). In a more detailed analysis of Hungary, Bruszt and Stark (1991:40) argue that the rapid institutionalization of forces in fact redefined the "new rules of the political game . . . as party politics." This redefinition, they argue, favored "elites within the old ruling order." By comparison with Poland, Hungary narrowed the political spectrum of representable voices. In East Germany a process similar to that in Hungary was set in motion by the premature adoption of legal-rational principles of election. When the elections arrived in March 1990, they served as a substitute for (rather than facilitating) the process they were supposed to embody, namely, democratic discursive will formation.

5. Those historians inclined to argue, as I do, that there was a *lack* of nationness prior to the Nazi state maintain that German political backwardness (Germany was often portrayed as an "underdeveloped nation") went hand-in-hand with both a strong state and authoritarian structures in the family, economic life, and education (Dahrendorf 1967; Plessner 1959; Wehler 1973). Those countering this perspective (for example, Blackbourn and Eley 1984; Suval 1985) argue that despite social fragmentation, a "permeating nationalist ideology" (Suval 1985:137) organized around the educated and prosperous Protestant burgher class *(Bürgertum)* and articulated through electoral participation served as a basis for national identity. These two positions need not be seen as opposed, for they often describe two different levels of reality (family structure and electoral politics, for instance) that presuppose alternative conceptions of what "the nation" means. I assume an experiential and interactive rather than a formal institutional and essentialist definition (see the beginning of this article and Borneman 1992b).

6. A more comprehensive, tape-recorded version of Stürmer's article, initially presented at a colloquium, appears in Dieter Kramer's *"Die Diskussion der 'Römerberg-Gespräche* 1986'"(1987).

7. I want to stress that I am using the terms "formal" and "substantive" justice in an ideal-typical sense and not to indicate empirical opposites. Neither jural level can function alone. The very idea of substantive justice under an authoritarian regime avoids the question of who has the ultimate power and authority to use discretion about procedure. But a concentration on procedure, without a concern for its historical nature and cultural efficacy, is equally misplaced.

8. On 15 July 1990, West German Chancellor Helmut Kohl himself traveled to the Caucasus region of the Soviet Union and, in a meeting with Mikhail Gorbachev, offered economic aid (as well as a promise not to station atomic weapons or foreign troops on East German territory) in return for the withdrawal of all Soviet troops from East Germany within three to four years.

9. I thank Elizabeth Boggs for help in clarifying this point. This is not to deny the insight to be gained from separate analyses of constitutional law (on American constitutional law, see Post 1990), but merely to point out that such law is of limited utility unless brought into articulation with public and private law.

10. I do not mean to imply that paying monetary damages rather than returning property to victims was necessarily the wrong legal (ergo political) remedy; I wish merely to point to the principles that underlie such a policy. In legal doctrine, land is often considered a unique good, contracts for which require "specific performance." Unlike other goods, land cannot be replaced. Thus, paying monetary damages for the illegal expropriation of land would be a lesser way of addressing competing claims, since land is not fungible in the same sense as are industrial commodities and services.

11. After the building of the Wall, GDR citizens who had written *Ausreiseanträge* (requests to leave) would commonly be confronted with a choice of either signing away their property or being denied permission to leave. Under these circumstances, countless people signed away their property.

12. Despite their refusal to turn to violent tactics, people involved in the West German peace movement of the late eighties have been declared enemies of the constitution and sent to prison for blocking the stationing of atomic weapons and the transport of locally produced poison gas (see Bittorf 1990).

13. For a critique of the conditions of the unification treaty, see Hans-Peter Schneider's *"Alle Staatsgewalt geht dem Volk* aus" (1990). The ironic title of the article is taken from his conclusion: all the power of the state is taken from the people.

14. Much of this account is taken from *"Det wird brenzlich"* (Der Spiegel 1990).

15. The prosecution of most members of the political and bureaucratic elite remains stymied as of this writing, but many of the East German border guards who killed people fleeing to the West are currently being tried for murder, and several have already been convicted, though most have been subsequently released on probation. While those "on the top" are proving difficult to convict of anything, those "on the bottom" can be found guilty of specific acts. However, the mid-level functionaries seem to be the most difficult to try, still more to convict; it is likely that most will go free without having to stand trial.

16. See Stark's (1990) article on privatization in Hungary, in which he questions the assumption that privatization will yield free markets, arguing instead that existent networks will redistribute property to "clans" and not result in "marketization." Also see the critical review of analytical approaches to the study of socialism in the introductory essay by Victor Nee and Stark (1989:1–32).

17. Lévi-Strauss himself vacillates curiously on this theoretical question. On the one hand, he collapses Sartre's historicality with his goal of historicity—and rejects them both: "This truth [of the dialectical] is a matter of context, and if we *place ourselves outside it—as the man of science is bound to do*—what appeared as an experienced truth first becomes confused and finally disappears altogether" (1966:254; emphasis added). Truth for us scientists, then, is to be found outside context, in an ahistorical structuralism. While Lévi-Strauss criticizes Sartre for being "tormented by [a desire for] transcendence," a desire to transcend history through historicality, he himself seeks to transcend history through a science of structures. Then, as if turning against himself, Lévi-Strauss concludes, "For man will have gained all he can reasonably hope for if, on the sole condition of bowing to this contingent law [regarding the limits of knowledge], he succeeds in determining his form of conduct and in placing all else in the realm of the intelligible" (1966:255–256). What is he arguing for here if not historical consciousness?

18. A new institutional alliance between the Greens, some Social Democrats in West Germany, and the majority of East Germans would radically refigure political space in Germany as a whole. Yet at this time I would hardly bet on such an alignment. Of all the West German political parties, the Greens, tied to a set of injustices having to do more with World War II and its consequences than with the present, seem to have had the most difficulty in making overtures to East Germans and in adjusting to unification.

19. This is not the place, nor do I have the competence, to reconcile the Habermasian and poststructuralist perspectives, but I do think a reconciliation necessary if we are to imagine justice, if we are to find a historically self-conscious, transnarrative standard by which to reach an understanding and judge between competing claims. And by transnarrative standard I do not mean to imply a "procedure" or technical means of distinguishing right from wrong. Though formal and substantive justice may be opposite ideal types, as sets of historical practices they presuppose each other. Here I can only suggest how the Habermasian and poststructuralist positions, often assumed antithetical, might begin an articulation. Also see the work of Seyla Benhabib (1990:28), who argues that "universal respect" and "egalitarian reciprocity" are essential conditions for a "historically self-conscious universalism."

My defense of Habermas' theoretical framework should not be understood as agreement with his political position on the question of unity. In his essays on national identity and *Verfassungspatriotismus,* Habermas does not, in my opinion, remain true to the framework developed in his theoretical writings. Specifically, he argues against two types of national identity—an economic or prosperity-based belonging and an "ethnic, historical, cultural" *Volk*—and for an identification with the abstract "principles and institutions of [the] constitution" (1990c:179–205). Further, he perceives this kind of postnational identity as a fulfillment of Enlightenment ideals. The model for constitutional patriotism is the United States, specifically as presented in Gabriel Almond and Sidney Verba's *The Civic Culture* (1963), a comparative study of American and German attitudes toward democracy. Almond and Verba conclude that Americans are more democratic because of their abstract, noncontingent loyalty to the idea of the constitution, whereas German loyalty to democracy is equivocal, contingent on specific contexts and practices. In adopting this framework (that America could save Germany was a common assumption of postwar intellectuals on both sides of the Atlantic), Habermas divorces cultural practices and historical experience from political identity. According to the civic culture model, discursive will formation would be at most a matter of debating constitutionality, instead of discussing precisely those factors that Habermas rejects as the basis of national identity (prosperity, ethnicity, history). In fact, if we acknowledge the significance of culture in its anthropological sense, then any discussion of identity—sexual, ethnic, national, or whatever—must be situated within rather than outside culture and history.

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