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Judging as Crime: A Transatlantic Perspective on Criminalizing Excesses of Judicial Discretion†

Drawing on over a century and a half of Germany's experience with a statute that criminalizes (mis)judging, this Article seeks to substantiate that criminal penalties for judges were largely ineffectual, and that courts proved ill-suited to police themselves even with a judiciary-specific criminal statute in place.

To reach this conclusion, this post hoc longitudinal study examines German statutory foundations for the crime of "law bending" (Rechtsbeugung), related legal history, and jurisprudence during three distinct periods: (1) the codification of Rechtsbeugung in 1851 through the end of World War II; (2) Rechtsbeugung jurisprudence in postwar Germany, particularly as related to Nazi-era judicial actions; and (3) Rechtsbeugung legislative changes and jurisprudence leading up to and following Germany's reunification.

The German experience with Rechtsbeugung provides a cautionary tale of judges' unwillingness to hold other judges criminally responsible, even for the worst of judicial transgressions, such as those committed by judges in Nazi Germany. Following German reunification, the court was less lenient in cases of East German judges. In this context, the court came to renounce its postwar Rechtsbeugung jurisprudence in clear and decisive terms, and affirmed convictions of East German judges. Yet, German high court jurisprudence remains elusive to this day.

INTRODUCTION

> [A] group of jurists doing injustice is much more dangerous and worse than a pack of thieves from whom one may protect oneself . . . the rascals who cloak themselves in the coat

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of justice to carry out their vicious passions, from those no human may find protection, those are worse than the thieves of the world.

—Frederic the Great, King of Prussia[1]

Indignation for unfettered judicial power, whether actual or perceived, is no relict belonging to monarchs of the Enlightenment. Even in states that incorporated Baron de Montesquieu's concept of separate branches of government,[2] including an independent judiciary, efforts to constrain or steer the judiciary are a recurring phenomenon.[3] This Article, drawing on over a century and a half of Germany's experience with a statute that criminalizes (mis)judging, seeks to inform that debate by substantiating that criminal penalties for judges were largely ineffectual, and that courts proved fundamentally ill-suited to police themselves even with a judiciary-specific criminal statute in place.[4]

To reach this conclusion, this post hoc longitudinal study—one that is long overdue, particularly in English-language literature[5]—examines German statutory foundations for the crime of "law bending" (*Rechtsbeugung*), related legal history, and jurisprudence during three distinct periods: (i) the codification of *Rechtsbeugung* in 1851 through the end of World War II; (ii) *Rechtsbeugung* jurisprudence in postwar Germany, particularly as related to Nazi-era judicial actions; and

1. Hans Dollinger, Preussen: Eine Kulturgeschichte 148–49 (1980) (translated by author) (quoting from a December 11, 1779 speech by Frederic the Great to the judges of Prussia's appellate court (*Kammergericht*), in which the King expressed his support for equality before the law).

2. Baron de Montesquieu, Spirit of the Laws 152 (Thomas Nugent trans., 2016) (1823) (writing in 1748 that "there is no liberty, if the judiciary power be not separate from the legislative and executive").

3. For example, in the United States, in another moment of crisis with "a rather extraordinary lack of confidence in many of our governmental institutions, including the judiciary," there were "pending before the Congress well over two dozen measures designed to place new restrictions on federal judges." Sam J. Ervin Jr., *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108, 122 (1970).

4. *See generally* Markus Dubber & Tatjana Hörnle, Criminal Law: A Comparative Approach 639 (2014) (explaining that what makes *Rechtsbeugung* appealing from a comparative perspective is its status as "a crime of official misconduct as such" because "[i]t is one thing to deny judges absolute immunity from general crimes committed during their tenure; it is another to create a crime specifically directed at the exercise of their judicial function").

5. For a recent overview of German scholarship on *Rechtsbeugung*, please refer to Martin Uebele, *§ 339 Rechtsbeugung*, *in* 5 Münchener Kommentar zum Strafgesetzbuch 2293, 2293–94 (Roland Hefendehl & Olaf Hohmann eds., 2d ed. 2014). Notably, over the past two decades, there have been at least three doctoral dissertations on aspects of *Rechtsbeugung*. *See* Roland Kern, Die Rechtsbeugung durch Verletzung formellen Rechts (2010); Christiane Freund, Rechtsbeugung durch Verletzung übergestlichen Rechts (2006); Volker Käsewieter, Der Begriff der Rechtsbeugung im deutschen Strafrecht (1999). There has been some general coverage in English-language scholarship as well. *See, e.g.*, Hans Petter Graver, Judges Against Justice: On Judges When the Rule of Law Is Under Attack (2014).

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(iii) *Rechtsbeugung* legislative changes and jurisprudence leading up to and following Germany's reunification.

The early period shows that for close to a century, *Rechtsbeugung* was so infrequently invoked in German courts that, despite a low intent threshold, convictions were virtually unheard of, and that the statute's effect—whether as a deterrent against misjudging or as a chill on otherwise legitimate judging—appears to have been minimal to nonexistent. After World War II, however, *Rechtsbeugung* became the principal tool through which Federal Republic of Germany (FRG) prosecutors sought to hold accountable Nazi-era judges for certain decisions—all of them death sentences. Yet, whereas on its face the statute could have promoted accountability, German courts ultimately failed to convict a single Nazi-era judge of *Rechtsbeugung*. The final period analyzed—German jurisprudence after reunification—establishes that new circumstances gave rise to at least marginally different results when it came to *Rechtsbeugung* convictions of former German Democratic Republic (GDR) judges. Undeniably, *Rechtsbeugung* thus led to a measure of accountability during this period. Still, to this day and as shown below, the doctrine's contours remain unclear and arguably at odds with the statutory language.

I. Origins of Criminal Liability for *Rechtsbeugung*

Legal sanctions for judicial misconduct date back to antiquity[6] but appeared in German law as early as the Middle Ages.[7] Evidence of the linguistic origins of the specific term *Rechtsbeugung* can be found in Martin Luther's translation of the Old Testament[8] and in Friedrich Schiller's Wilhelm Tell.[9] Although sometimes translated as "perverting the course of justice,"[10] the term literally translates to "bending the law" or "bending justice."[11] In 1826, Paul Johann Anselm von Feuerbach, the so-called founder of modern German criminal law,[12] was the first to describe the crime as one in which a judge bends the law "in a legal dispute, through judicial inaction . . . or unlawful action, to the advantage or detriment of a person."[13]

A. Early Codification

Then the 1851 version of Prussian Penal Code section 314, titled abuse of office (*Amtsmissbrauch*),[14] stated, *inter alia*, that: "A public

6. Lothar Kuhlen, *StGB § 339 Rechtsbeugung*, *in* Strafgesetzbuch 2188, 2193 ¶ 1 (Urs Kindhäuser et al. eds., 5th ed. 2017).
7. Käsewieter, *supra* note 5, at 9–10.
8. *Id.* at 9–10.
9. *See id.* at 5–18.
10. *Cf.* Strafgesetzbuch [StGB] [Penal Code] § 339, www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p3234.
11. Dubber & Hörnle, *supra* note 4, at 638.
12. Nigel Foster, German Legal System and Laws 27 (4th ed. 2010).
13. Käsewieter, *supra* note 5, at 14 (translated by author).
14. Dubber & Hörnle, *supra* note 4, at 639.

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official, who in conducting or deciding a legal dispute intentionally commits an injustice to the advantage or detriment of a person, is to be punished with up to five years imprisonment."[15] Section 314 was criticized for not limiting its reach to officials "acting against their conviction," but Justice Minister von Savigny insisted that the statute's intent requirement addressed this concern.[16] Following the unification of Germany in 1871, the Reich Penal Code section 336, published the same year, replaced Prussian Penal Code section 314's "commits an injustice" with "bends the law."[17] As the legislative record suggests, however, this change was merely editorial, not meant to affect the definition of the crime itself.[18]

Through the end of World War I, the official collection of decisions by the Reichsgericht, the supreme civil and criminal court of the German Reich, contained only two cases involving *Rechtsbeugung*[19]: a final conviction for disregarding a statute of limitations,[20] and a reversal of a conviction for punishing with twenty-four hours imprisonment someone who had disobeyed police orders.[21] Of note in light of later jurisprudence, the Reichsgericht on both occasions found that mere negligence (*Fahrlässigkeit*[22]) in the administration of justice might result in criminal liability for judges (albeit not *Rechtsbeugung*

15. Käsewieter, *supra* note 5, at 16 (translated by author).

16. Kuhlen, *supra* note 6, ¶ 1 (translated by author).

17. *Cf.* 1 Das Strafgesetzbuch, Sammlung der Änderungsgesetze und Neubekanntmachungen 75 (Thomas Vormbaum & Jürgen Welp eds., 1999) (also adding "or an arbitrator" after "public official") [hereinafter Das Strafgesetzbuch]. *See also id.* at 184 (showing that an 1876 penal code reform resulted in no change to section 336).

18. *Id.* at 17–18. *See also* Manfred Seebode, *Rechtsbeugung und Rechtsbruch*, Juristische Rundschau, Jan. 1994, at 1, 3–4.

19. Reichsgericht [RG] [Reich Court of Justice] Apr. 19, 1894, 25 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 276 (1894); RG July 12, 1894, 26 RGSt 56 (1894).

20. 25 RGSt 276 (1894). *See also* Käsewieter, *supra* note 5, at 21–22.

21. 26 RGSt 56 (1894). *See also* Käsewieter, *supra* note 5, at 21–22.

22. While the author made every effort to ensure internal consistency and precision in translating German legal terminology, no concise translation of criminal intent (*Vorsatz*) terminology from German into English could properly convey the meaning of these terms without fulsome explication. A comparative discussion, on the other hand, would easily exceed the scope and purpose of this Article. To orient the reader, it should be noted that:

> [The] codified text of German criminal law, the Code of 1871 (as amended since) . . . contained no definition of intent[], following the example of its predecessor, the Prussian Code of 1851. All attempts to have a definition of intent[] added to the Code have failed, the legislator preferring to leave the question to the [c]ourts and scholars.

Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 Oxford J. Legal Stud. 99, 100 (2004). Intent in German criminal law has been divided into (i) "direct" intent or *dolus directus* (*Absicht*), which is present where the outcome was the perpetrator's aim or objective; (ii) a lower variant of direct intent (*direkter Vorsatz* or *Wissentlichkeit*), where the perpetrator knew of the inevitable consequences of his actions; and (iii) conditional intent, or *dolus eventualis* (*bedingter Vorsatz*), which "is constituted by knowledge of a possible (as distinct from inevitable) outcome of one's actions combined with a positive mental or emotional disposition towards it . . . ." *Id.* at 101. A final variant of intent in German criminal law is *bewußte Fahrlässigkeit*, i.e., "conscious" or "advertent" negligence. *Id.*

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itself).[23] While a leading contemporaneous treatise chastised a judge's actions in one of those cases as "nearly outrageous debauchery in the execution of judicial duties,"[24] the treatise accused the Reichsgericht of contravening the scope of judicial criminal liability by holding them accountable under another Penal Code provision with a lower intent threshold.[25]

B. Rechtsbeugung in the Weimar Republic

The Weimar Republic Penal Code retained the statutory language.[26] But as before, cases involving *Rechtsbeugung* remained exceedingly rare.[27] The legislative report accompanying the 1919 enactment of the Code concurred and explained:

> Cases of *Rechtsbeugung* are unknown in German legal practice. The particularly severe threat of punishment [up to five years imprisonment] . . . finds its origin not in a practical need but in a necessity to stress, even in the penal code, that the impeccable administration of justice ranks among the foremost public values.[28]

Indeed, the Reichsgericht in the Weimar Republic only addressed *Rechtsbeugung* involving judges twice.[29] In one of these cases, a lower court had acquitted a judge for proffering a defense to farmers who, in the immediate aftermath of World War I, had failed to register weapons with the authorities.[30] The judge had claimed *sua sponte* (and apparently without evidentiary basis) that the farmers had tried to register the weapons with the local legislative council, unaware that such registration was legally insufficient.[31] Following an acquittal due to the judge's doubts as to the guilt of the farmers, the Reichsgericht reversed the lower court, reasoning that a judge may be guilty of *Rechtsbeugung* merely for altering the proceedings in any way, irrespective of whether this change resulted in prejudice to the defendant.[32] This expansive reading of *Rechtsbeugung* was criticized, understandably, for exposing judges to criminal prosecution for any procedural ruling, however inconsequential.[33]

23. *See* RG June 21, 1889, 19 RGSt 342, 346 (1889); RG Oct. 12, 1880, 2 RGSt 329 (1880).

24. 2 Karl Binding, Lehrbuch des Gemeinen Deutschen Strafrechts 563 n.3 (1905) (translated by author) (commenting on RG June 21, 1889, 19 RGSt).

25. *Id.* at 563 ("The negligent violation of specific judicial dut[ies] shall remain unpunished, and the negligently imposed [sentence] shall be punished?").

26. *Cf.* Uebele, *supra* note 5, at 2296.

27. *See* Käsewieter, *supra* note 5, at 22.

28. *Id*. at 23 (translated by author).

29. Ingo Müller, *Die Verwendung des Rechtsbeugungstatbestands zu politischen Zwecken*, 17 Kritische Justiz 119 (1984).

30. *See id.* at 119–20.

31. *Id.*

32. *Id.*

33. *Id.*

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C. Rechtsbeugung Under the Nazi Regime

After the Nazis came to power in 1933, the Weimar Constitution remained in place on paper but "was used perversely to subvert its own principles" by means of the February 1933 emergency decrees that abrogated all civil rights.[34] While the statutory language of *Rechtsbeugung* remained identical, the penal code and sentencing laws in particular underwent massive changes. To name an example, section 2 of the German Penal Code now required punishment for "persons who commit an act that has been declared punishable by the Penal Code, *or* that deserves to be punished according to the spirit of a rule of criminal law and healthy folk sentiment."[35] As early as the spring of 1933, the German Federation of Judges joined the Federation of National Socialist Jurists.[36] In October of 1933, ten thousand lawyers gathered before the Reichsgericht to swear their loyalty and obedience to Adolf Hitler, raising their right arm in the Nazi salute.[37]

Reportedly, not a single judge in Nazi Germany ever attempted to invalidate an enacted law, even though the Reichsgericht in the Weimar Republic—still the highest court in Nazi Germany and led since 1929 by the same president, Erwin Bumke—had recognized the "right and the duty of judges" to invalidate laws that failed to meet constitutional norms.[38] In a speech to the Reichstag in 1942, Hitler claimed for himself the right to alter judicial decisions and to remove judges, a power that the Reichstag confirmed in proclaiming Hitler "the supreme law lord as well as the supreme political and military leader."[39] Carl Schmitt, the "crown jurist of the Third Reich," claimed that "[l]aw is no longer an objective norm but a spontaneous emanation of the Führer's will."[40] With legal academia purged based on race and political convictions, it, too, became an instrument of Nazi ideology.[41]

34. *See* Herbert S. Okum et al., *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich*, 61 Brook. L. Rev. 1121, 1132 (1995) (symposium contribution by Fritz Stern).

35. Strafgesetzbuch [StGB] [Penal Code], Apr. 7, 1933, Reichsgesetzblatt [RGBl.] I 175, § 2 (emphasis added).

36. Matthew Lippman, *They Shoot Lawyers Don't They? Law in the Third Reich and the Global Threat to the Independence of the Judiciary*, 23 Cal. W. Int'l L.J. 257, 269 (1993).

37. *Id.* at 270.

38. *See* Diether Hoffmann, *Der Richter im Dritten Reich: Eine Betrachtung zu dem gleichnamigen Buch des Landgerichtspräsidenten i. R. Dr. Hubert Schorn*, 1960 Gewerkschaftliche Monatshefte 667, 671.

39. Lippman, *supra* note 36, at 270.

40. *Id.* at 271.

41. *See id.* at 278 ("Law faculty and students also were subjected to scrutiny. . . . [A]ll Jewish and political progressive instructors were expelled from law school faculties. As a result, 120 out of the 378 scholars holding academic positions were dismissed. The Nazi government took control of the appointment process and filled the vacant posts with young National Socialist faculty. Most continued to teach until the late 1960s (by 1939, fully two thirds of the faculty at German law schools had been appointed in or after 1933).").

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Despite this alignment of the judicial branch with Nazi objectives, not a single person was ever convicted of *Rechtsbeugung* during the Nazi dictatorship.[42] For example, as late as 1944, a Reichsgericht judge, who had failed to carry out a recommendation of the justice ministry in a pending case, was merely forced into retirement.[43] The regime, in other words, resorted to other means of exercising control, such as reappointments, and the justice ministry's infamous "judge letters" that commented on recent decisions.[44] When Nazi rulers disliked a judicial outcome, acquitted defendants were sent to concentration camps instead.[45]

D. Allied Justice After the War

Following Germany's defeat in 1945, "[t]he overriding goal of all three Western Allies was to cleanse the German judiciary of Nazi influences. Immediately after capitulation, German courts were closed, [some] Nazi laws repealed, special Nazi courts abolished, and the civil service purged."[46] In 1947, the International Military Tribunal in Nuremberg, in a follow-up trial to the Nuremberg Trial of the Major War Criminals,[47] brought charges against over a dozen Nazi judges, prosecutors, and justice ministry officials.[48] Some charges resulted in convictions.[49] Similarly, the High Court for the British Occupied Zone convicted some members of the Nazi judiciary.[50] The basis for these convictions, however, was not *Rechtsbeugung* but Allied Control Council Law No. 10, i.e., crimes against humanity, peace, and war crimes—none of which were part of the German Penal Code.[51]

42. *Cf.* Käsewieter, *supra* note 5, at 24.
43. Hoffmann, *supra* note 38, at 672.
44. Graver, *supra* note 5, at 39–42. *See also* Hoffmann, *supra* note 38, at 671–72.
45. *See* Hoffmann, *supra* note 38, at 672.
46. *Compare* Ruth Bettina Birn, *Book Reviews*, 12 J. Int'l Crim. Just. 639, 641 (2014), *and* Thomas Vormbaum & Michael Bohlander, A Modern History of German Criminal Law 211 (Margaret Hiley trans., Springer 2014) (detailing Nazi laws abolished by the Allied Control Council, such as the 1933 Enabling Act, discriminatory laws, and harsh sentencing laws), *and* Das Strafgesetzbuch, *supra* note 17, at 369–71 (containing another list of Nazi laws abolished effective February 1, 1946), *with* Roy Gordon, *The Eradication of Nazi Ideology and Terminology from the Current German Penal Cod*e, 17 Rutgers J.L. & Religion 182, 184 (2015) (pointing out that German Penal Code sections 211 (murder) and 212 (manslaughter) "were birthed from Nazi philosophy and remain in force, thus controlling the decisions of present day jurists").
47. Vormbaum & Bohlander, *supra* note 46, at 213–14.
48. *See* Manfred Görtemaker & Christoph Safferling, Die Rosenburg: Das Bundesministerium der Justiz und die Ns-Vergangenheit 44–51 (2d ed. 2013). *See also* Graver, *supra* note 5, at 130–32.
49. *See* Görtemaker & Safferling, *supra* note 48, at 44–51. *See also* Graver, *supra* note 5, at 130–32.
50. *See* Freund, *supra* note 5, at 120–25. *See also* Joachim Rückert, Abschiede vom Unrecht: Zur Rechtsgeschichte nach 1945, at 187 (2015) (noting that in the Soviet zone, the NKVD arrested thirty-eight of 110 remaining former Reichsgericht judges and incarcerated them).
51. *See* Görtemaker & Safferling, *supra* note 48, at 59–60.

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In sum, from the mid-nineteenth century through the demise of Nazi Germany, *Rechtsbeugung* remained a constant statutory creature. Nevertheless, judges were prosecuted for bending the law so rarely as to pose the question of what, if any, effect *Rechtsbeugung* may have had on judicial decisions. The Reichsgericht's rare pronouncements paint an incomplete picture of the crime's justification, the proper construction of the statutory language, and the all-important questions as to the proper scope of judicial criminal liability for the act of judging.

The mere fact that the crime remained on the books through successive forms of government—from constitutional monarchies, to a constitutional republic, to a dictatorship—suggests that the powers that be saw residual utility in criminalizing judging at least in the abstract. Conversely, the appetite of prosecutors to prosecute and of courts to convict jurists appears to have been all but nonexistent, undermining the crime's effectiveness as an actual check on aberrant judges. Not unlike the infrequent impeachment of Article III judges in the United States,[52] *Rechtsbeugung* for roughly a century lived a ghostlike existence in German criminal law through the end of World War II. Its effect and utility, apparently, were neutral.

II. *Rechtsbeugung* in Post-World War II West Germany

After the FRG's founding in 1949, the West German judiciary, though in significant part comprised of former Nazi judges or otherwise linked to the Nazi past,[53] could have confronted some of the injustices committed by the judicial branch in Nazi Germany. Yet, not a single career Nazi-era judge was convicted of *Rechtsbeugung* by FRG courts.[54]

What follows is an analysis of the FRG jurisprudential struggle to come to terms with its own past and to define *Rechtsbeugung* as a crime for which judges could actually be convicted. The jurisprudence of the Bundesgerichtshof (Federal Court of Justice, BGH), the FRG's high court for criminal and civil appeals and thus the successor to the Reichsgericht, is the primary focus here. First, however, some context is required.

A. *Setting the Stage: The Immediate Postwar Years*

The statute of limitations for violent Nazi crimes, at first set to begin on May 8, 1945, was subsequently reset to the 1949 founding of

52. *Cf.* Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, Brennan Ctr. for Just. (Mar. 23, 2018), www.brennancenter.org/blog/impeachment-and-removal-judges-explainer (noting that "[w]ith respect to federal judges, since 1803, the House of Representatives has impeached only 15 judges—an average of one every 14 years—and only 8 of those impeachments were followed by convictions in the Senate").

53. *See generally* Hubert Rottleuthner, Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945 (2010).

54. *See* Käsewieter, *supra* note 5, at 27. *Cf.* Rottleuthner, *supra* note 53, at 96 (for figures on East German prosecutions).

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the FRG, before later being eliminated altogether, at least for murder.[55] With this in mind, *Rechtsbeugung*'s five-year statute of limitations[56] was set to expire in 1954.

The FRG's constitution, the Grundgesetz (Basic Law), in Article 103(2)[57] included a prohibition against retroactive criminal laws (*nulla poena sine lega*)[58]—a principle that had been part of German law since the Reich's 1871 founding, but that had been effectively abolished under the Nazis.[59] Citing this principle as early as 1951, German courts ceased to apply Allied Control Council Law No. 10, which had supplied a basis for prosecuting German jurists in Nuremberg and in German courts under Allied control.[60] Characterized as "shameful occupiers' law" in the FRG, Law No. 10 was officially revoked in 1956.[61] This, as detailed below, resulted in courts applying the law applicable at the time—Nazi law—to Nazi crimes.[62] With *Rechtsbeugung*'s statutory language unchanged, the provision still read: "A public official or an arbitrator who in conducting or deciding a legal case is guilty of intentionally bending the law for the benefit or to the detriment of a party will be punished with imprisonment of one to five years."[63] Resorting to the law applicable at the time, of course, posed the fundamental question (hotly debated among German jurists and academia in the immediate years following World War II[64]) whether positive law—"essentially self-executing commands that reduce the judicial function to the application of legislative rules" applied through syllogistic judicial logic[65]—could and should be treated as the be-all-end-all of law.

Featuring prominently early in this debate was Gustav Radbruch, one of the foremost legal philosophers of the twentieth century, who

55. *See* Vormbaum & Bohlander, *supra* note 46, at 216 (also explaining that a "legislative error made" when passing the Introductory Act to the Law on Regulatory Offences (EGOWiG) of 1968 meant that the statute of limitation also applied to the offense of accessory to murder, but that it is unclear to this day whether the error was planted by Federal Ministry of Justice officials). *See also* Fritz Weinschenk, *The Murderers Among Them: German Justice and the Nazis*, 3 Hofstra L. & Pol'y Symposium 137, 144–46 (1999) (containing a succinct summary of FRG statute-of-limitation extensions affecting the prosecution of Nazi crimes).

56. *Cf.* Uebele, *supra* note 5, at 2323.

57. Grundgesetz [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBl.] I, art. 103(2).

58. Görtemaker & Safferling, *supra* note 48, at 60.

59. Helmuth Schulze-Fielitz, *Art. 103*, *in* 3 Horst Dreier, Grundgesetz Kommentar 769, 823 (3d ed. 2018).

60. Görtemaker & Safferling, *supra* note 48, at 59–60.

61. *Id.* at 60.

62. Vormbaum & Bohlander, *supra* note 46, at 218.

63. Uebele, *supra* note 5, at 2296 (translated by author). In addition, with conviction for *Rechtsbeugung*, judges lose their judicial appointments. *See* Deutsches Richtergesetz [DRiG] [German Judges' Law], BGBl. I, at 713, § 24(1).

64. *See* Michael Stolleis, *Hesitating to Look in the Mirror: German Jurisprudence After 1933 and After 1945*, at 21 (Univ. Chi. Fulton Lecture, Nov. 9, 2001), https://chicagounbound.uchicago.edu/fulton_lectures/6.

65. Dubber & Hörnle, *supra* note 4, at 639.

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had been minister of justice in the Weimar Republic, and who was the first German professor (tenured in Heidelberg) to be dismissed from his position after the Nazis came to power.[66] After the war and in what was characterized as an apology for legal positivism's role in Nazi injustice,[67] Radbruch articulated a limiting principle—called the "Radbruch formula"—that, at least arguably,[68] resorted to an element of natural law:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law[,] secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely flawed law, it lacks completely the very nature of law.[69]

This limiting principle was Radbruch's response to a notion of positivism that divorced law from morality, and that, in Nazi Germany, had afforded Nazi judges cover to treat law—including such vague, "teleological" statutory commands as "healthy folk sentiment"[70]—the same way German soldiers had treated orders: an order is an order, and a law is a law.[71]

As has been pointed out, such a narrow, textual notion of positivism, of course, neglected the significant role that "rule[s] of recognition" (rules that separate law from non-law) were supposed to play in positivist orthodoxy.[72] Nevertheless, broad consensus emerged after World War II that positivism was to be blamed for the perversion of justice in Nazi Germany.[73] Ironically, after the war,

66. Görtemaker & Safferling, *supra* note 48, at 21.

67. Müller, *supra* note 29, at 120.

68. *Cf.* Karl-Ludwig Kunz & Martino Mona, Rechtsphilosophie, Rechtstheorie, Rechtssoziologie 132 (2d ed. 2015).

69. Gustav Radbruch, *Statutory Lawlessnsess and Supra-Statutory Law*, 26 Oxford J. Legal Stud. 1, 7 (Bonnie Litschewski et al. trans., 2006) (1946) [hereinafter Radbruch, *Statutory Lawlenssness*]. *See also* Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 Süddeutsche Juristenzeitung 105, 107 (1946).

70. Okum et al., *supra* note 34, at 1144 (symposium contribution by David Luban).

71. *Id.* at 1141.

72. *Id.* at 1147.

73. *Id.* at 1143–47. *See also* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958) (endorsing Radbruch's positivism thesis in the debate with H.L.A. Hart). *Cf.* Stolleis, *supra* note 64, at 6 (adding that "[t]his broad consensus was rarely disturbed by dissonant voices crying that it was not 'legal positivism' that had been the main problem—but a dearth of courage and a general compliance on the part of the lawyers").

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the positivism thesis—the legal community's conviction that positivism shared in the blame—was promoted by none other than Carl Schmitt, who, as a chief legal ideologue in Nazi Germany, had railed against the strictures of what he termed "liberal legal thought's blindness as to the law"—an accusation that Schmitt used to defend ex post facto the executions, without trial, of *Sturmabteilung* (Nazi paramilitary) members in the Night of the Long Knives.[74] In other words, Schmitt, who once had castigated positivism as a hindrance to Nazi objectives, now blamed positivism for the attainment of those very objectives.

Meanwhile, Radbruch, speaking to *Rechtsbeugung* specifically, claimed that the crime required intent (*Vorsatz*[75]), and that *Rechtsbeugung* itself was a condition precedent to holding judges liable for homicide (later known as *Richterprivileg* or *Sperrwirkung*).[76] This notion of judicial privilege or immunity was an ad hoc invention without basis in German law during or prior to the Nazi period.[77] Radbruch, who passed away in 1949, had thereby built a golden bridge for acquitting Nazi judges.

B. Underlying Nazi-Era Judicial Atrocities: An Overview

The majority of cases concerning the Nazi judiciary, all of which reached the BGH between 1951 and 1970, arose out of court martial or war court proceedings that had occurred in the waning days and weeks of the Nazi reign, and whose summary nature rendered them glaringly suspect in terms of due process, even under Nazi law.

The first such appeal to the BGH concerned April 1945 court martial proceedings against six alleged co-conspirators of the July 20, 1944, failed attempt to assassinate Hitler by detonating his plane in flight. The six defendants, including Dietrich Bonhoeffer and Hans von Dohnányi, were convicted and sentenced to death at concentration

74. Carl Schmitt, *Der Führer schützt das Recht*, Deutsche Juristenzeitung 945, 947 (1934). *See generally* Stolleis, *supra* note 64, at 16 ("In a move unparalleled in legal history, this law, consisting of a single sentence, declared the 'measures' to be lawful acts of self-defense on the part of the state. When [Carl Schmitt] justified this law with such conviction as to make it sound inevitable, he was appealing to his readers to accept the unacceptable.").

75. *See generally supra* note 22.

76. Radbruch, *Statutory Lawlessness*, *supra* note 69, at 9 ("The culpability of judges for homicide presupposes the simultaneous determination that they have [committed the crime of law bending] since the innocent judge's decision can be an object of punishment only if he has violated the very principle that his independence was intended to serve, the principle of submission to the statute, that is, to the law. Objectively speaking, [law bending] exists where we can determine, in light of the basic principles we have developed, that the statute applied was not law at all, or that the degree of punishment imposed—say, the death sentence pronounced at the direction of the judge—made a mockery of any intention of doing justice."). Whereas *Richterprivileg* translates to "judges' privilege," *Sperrwirkung* describes the effect of "blocking" judges from liability. The terms are used interchangeably in the literature.

77. Vormbaum & Bohlander, *supra* note 46, at 220.

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camps Flossenbürg and Sachsenhausen with SS officer and Reich Main Security Office attorney Walter Huppenkothen acting as prosecutor and SS judge Otto Thorbeck presiding over the court martial.[78] Executions, with the defendants stripped naked, took place within hours or days of the convictions.[79]

Another appeal arose from court martial treason convictions of Düsseldorf police officer Jürgens and four city residents.[80] All five were executed for allegedly planning to turn over Düsseldorf to U.S. forces,[81] which captured the city within days of the execution. Yet another court martial, held in Karlstadt on March 28, 1945, resulted in the execution of a farmer who had been critical of Volkssturm (people's militia) actions.[82] Volkssturm company commanders Fernau and Michalsky had acted as lay prosecutor and presiding lay judge respectively.[83]

The final court martial case concerned inhabitants of Brettheim, a small village in southern Germany, who in April 1945 decided to surrender instead of fight the American forces who had already conquered large swaths of the region.[84] SS officer Gottschalk as presiding lay judge, another officer, and the village Nazi party leader sentenced yet another farmer to death.[85] When the party leader objected to the severity of the sentence and refused to sign it, another court martial, presided over by SS officer and lay judge Otto, sentenced the party leader along with the local mayor to death by hanging.[86]

Two other postwar appeals to the BGH arose from death sentences by war courts (*Kriegsgerichte*), whose presiding officials were all fully trained lawyers. On May 9, 1945, a war court convicted three German sailors to death for desertion, even as German forces had officially capitulated in that area on May 4.[87] Navy judge Holzwig presided over

78. Bundesgerichtshof [BGH] [Federal Court of Justice] June 19, 1956, Neue Zeitschrift für Strafrecht [NStZ] 485 (1996) (First Senate). As an appellate court, the BGH is divided into criminal and civil senates, i.e., what would be called panels elsewhere. *See Zuständigkeit der Strafsenate und der Ermittlungsrichter* [*Jurisdiction of the Criminal Law Senates and the Investigating Judges*], Bundesgerichtshof, www.bundesgerichtshof.de/DE/DasGericht/Geschaeftsverteilung/SachlicheZustaendigkeit/StrafsenateErmittlungsrichter/strafsenateErmittlungsrichter_node.html (last visited Oct. 27, 2021).

79. NStZ 485 (1996).

80. BGH Dec. 4, 1952, Jurion Rechtsprechung [JurionRS] 11,445, ¶ 5 (1952) (Third Senate).

81. *Id.* ¶¶ 5, 10.

82. BGH June 9, 1953, JurionRS 12,284, ¶¶ 6–7 (1953) (First Senate).

83. *Id.* ¶ 1.

84. *See* Müller, *supra* note 29, at 125.

85. *Id*. Another case involving a lay judge who had presided over a court martial, and who had pressed for the hanging of two soldiers half an hour after their sentences were read, resulted in the final acquittal of the judge. It is not detailed here as it is jurisprudentially analogous to the other cases. *See* BGH Nov. 29, 1957, Neue Juristische Wochenschrift [NJW] 392 (1958) (First Senate).

86. Müller, *supra* note 29, at 125. SS general Simon, the convening authority (*Gerichtsherr*), confirmed the sentences, and Gottschalk carried out the executions. *Id.*

87. BGH May 29, 1952, Monatsschrift für Deutsches Recht [MDR] 693 (1952) (Second Senate).

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the court.[88] The executions were carried out on May 10—two days after the full surrender of all German forces.[89]

In the second war court case, an inebriated navy sailor in Norway made statements to a military doctor on April 5, 1945, asserting that no "Nazi pig shall touch me" and that the defeat of German forces was imminent.[90] Citing the German Military Code and other Nazi law, a war court with navy judge Lüder presiding sentenced the sailor to immediate death by firing squad.[91]

The remaining cases were one-offs in that each arose from proceedings in a different type of court: an ordinary local court during the Nazi period, a postwar East German local court, and several special Nazi courts. The first case concerned a former judge of an ordinary local court.[92] Walter Müller, as president of the Cologne District Court from 1933 to 1945, interfered in special court proceedings on multiple occasions, asking judges for death sentences in pending cases by, for example, stating in a case against a Jewish merchant that "there's no room for discussion—the pate must be severed, that's what the Gauleiter [Nazi regional official] wants."[93] In another case concerning a special court's conviction, career associate judges Ferber and Hoffmann of the special court in Nuremberg[94] convicted the chairman of the Jewish Cultural Committee in Nuremberg, Leo Katzenberger, to death for alleged sexual intercourse with an "Aryan" woman who had rented a room from him.[95]

Finally, the BGH took up the case of a former judge on the Volksgerichtshof (People's Court)—an infamous Nazi organ that had been used for political show trials, resulting in an enormous number of death sentences.[96] Under presiding judge Roland Freisler, Hans-Joachim Rehse had put his name under at least 231 death sentences for such alleged offenses as listening to foreign radio stations.[97]

Thus, each of the appeals to the BGH concerned death sentences imposed by Nazi-era courts or other judicial organs. The

88. Müller, *supra* note 29, at 123–24.

89. *See id*.

90. BGH Dec. 12, 1952, JurionRS 11,464, ¶ 1 (1952) (Second Senate).

91. *Id.* ¶ 2.

92. *See* Rottleuthner, *supra* note 53, at 112.

93. Helmut Kramer, *Richter vor Gericht. Die juristische Aufarbeitung der Sondergerichtsbarkeit*, *in* 15 Justizministerium des Landes NRW, Juristische Zeitgeschichte Nordrhein-Westfalen 121, 128 (Helia-Verena Daubach ed., 2007) (translated by author).

94. Presiding panel judge Rothaug had been convicted in the Nuremberg judges' trial in 1947. *See* Rottleuthner, *supra* note 53, at 108 n.33. *Rechtsbeugung*'s statute of limitations had lapsed, but the Nuremberg-Fürth District Court found Ferber and Hoffmann guilty of manslaughter. *Id.* at 108–11.

95. *Id*. at 108 n.33.

96. *See generally* H.W. Koch, In the Name of the Volk: Political Justice in Hitler's Germany (1997). Note that it was too late to charge Rehse with *Rechtsbeugung* due to the statute of limitations, and that he was charged with manslaughter instead.

97. Landgericht Berlin [District Court Berlin] July 3, 1967, Deutsche Richterzeitung [DRiZ] 390 (1967).

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victims ranged from German military conscripts, to German civilians, German officials, as well as religious and racial minorities. Equally diverse were the perpetrators who had acted according to, and at times in excess of, Nazi "law," ranging from untrained civilians and *Volkssturm* commanders serving as lay judges to fully trained career judges. As such, the cases that reached the BGH provided the court with diverse sets of facts that, without other impacts, would have provided ample opportunity for developing the court's *Rechtsbeugung* jurisprudence. Moreover, the severity of the sentences, the conduct of the proceedings, and the legal rationales for convictions should have made successful *Rechtsbeugung* prosecutions a foregone conclusion.

C. The BGH's Postwar Jurisprudence in Its Infancy

As will emerge below, the BGH's decisions concerning the Nazi judiciary were so contradictory, however, that any attempt to reconcile their essence into a homogenous—let alone just—whole is condemned to fail in light of significant, irreconcilable doctrinal tensions across decisions. Rather than a chronological tour de force through the court's decisions, the following analysis homes in on two particularly revealing aspects of the court's decisions: Nazi law's status as law and Nazi judicial organs' recognition as courts of law; and the BGH's creation of judicial immunity with the interrelated mens rea element of *Rechtsbeugung*.

As to the former, the BGH in 1951 pointed to a court martial's severe procedural shortcomings even under Nazi law,[98] and reasoned further that many Nazi procedural rules and orders could not be considered law "as they violated fundamental legal principles, which apply irrespective of state recognition."[99] While the BGH's reference to Radbruch remained implicit, the court was blunt with respect to Nazi law and policy: the mass murder of the disabled and "final solution of the Jewish question" could not constitute law (*Recht*[100]) merely by virtue of emanating from Hitler's will.[101] At face value, the court thus rejected a formalistic view of applicable law at the time, even if it did not go so far as to call into question or outright deny court martials' status as courts of law.[102] In another case, the BGH took care to parse the applicable law at the end of the war to reason that a war court

98. BGH Feb. 12, 1952, 2 BGHSt 173, 175 (First Senate).
99. *Id.* at 177 (translated by author).
100. The term *Recht* translates both to "law," i.e., "statutory law," and to "justice." *See, e.g.*, *Recht*, Langenscheidt, http://en.langenscheidt.com/german-english/recht (last visited Mar. 26, 2020).
101. 2 BGHSt 173, 177 (citing BGH Jan. 29, 1952, 2 BGHSt 234 (1952) (First Senate) (marked for publication at the time)).
102. Freund, *supra* note 5, at 128.

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had lacked any basis for issuing a death sentence under the German Military Penal Code.[103]

Moreover, as to another war court, the BGH noted that, even under applicable Nazi law, death sentences were limited to "severe or most severe cases," and that German law, even during the Nazi period and even under military law, contained an "unwritten" prohibition against "overly harsh and cruel punishment."[104] Similarly, the BGH cited an "unusual number of procedural and substantive errors"—such as lack of defense counsel; lack of opportunity to be heard; lack of a court reporter; lack of written reasoning in support of the conviction; and the unilateral pronouncement of the death sentence after the other panel members withheld their support.[105] Based on these errors, the BGH affirmed the lower court in denying a court martial the status of a proper legal proceeding.[106]

In its final decision concerning the Nazi judiciary, the BGH observed that the defendants in this "show trial" had gone above and beyond to sentence the Jewish defendant to death—a decision even the infamous Volksgericht president Roland Freisler had called "daring" under Nazi law, and about which the presiding Nazi district court judge himself had boasted that only one in a hundred judges would have had the requisite courage.[107] The BGH also found it legally suspect under Nazi law to consider race in the severity of the sentence and remarked that the "rude, spiteful, and cynical conduct of the proceedings was considered scandalous even among staunch National Socialists."[108]

On the other hand, the BGH discussed a court martial's convictions in terms of "then applicable law," which, as the BGH confirmed, had not been applied in error since "even in calm times experienced career judges commit procedural errors."[109] This, according to the BGH, negated the possibility of *Rechtsbeugung*, even if the proceedings had not complied "with every aspect" of procedural rules, and even if the "military situation of Düsseldorf was futile" and its collapse

103. BGH May 29, 1952, MDR 693, 694 (1952) (Second Senate). *See also* Michael Greven & Oliver von Wrochem, Der Krieg in der Nachkriegszeit: Der Zweite Weltkrieg in Politik und Gesellschaft der Bundesrepublik 61–62 (2013) (noting that the case had come up on appeal to the High Court for the British Occupied Zone on December 7, 1949, which had held that judges may commit crimes against humanity even if they do so unintentionally).

104. BGH Dec. 12, 1952, JurionRS 11,464, ¶ 12 (1952) (Second Senate) (translated by author).

105. BGH June 9, 1953, JurionRS 12,284, ¶¶ 18–19 (1953) (First Senate) (translated by author).

106. *See id.*

107. BGH July 21, 1970, NJW 571, 572–73 (1971) (First Senate).

108. *Id.* at 573 (translated by author).

109. BGH Dec. 4, 1952, JurionRS 11,445, ¶ 5 (1952) (Third Senate) (translated by author). The Wuppertal District Court had convicted the defendant, convening authority Brumshagen (not a trained lawyer), of crimes against humanity under Control Council Law No. 10, but had acquitted him of murder and manslaughter charges under German law. *Id.* ¶ 1.

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imminent.[110] Although the BGH paid lip service to Radbruch by referring to "violat[ing] fundamental legal principles, which apply irrespective of state recognition,"[111] the court made explicit its narrow view of what these may entail: the "widely recognized opinion—at least until the year 1945" that treason was a severe crime "worthy of the death penalty."[112] Employing another moralistic phrase, the BGH elsewhere characterized the applicable Nazi law at the time as "terror veiled in law"[113] only to leave intact the high bar for intent.[114]

Elsewhere the BGH reasoned that *in dubio pro reo* ("[when] in doubt, for the accused") meant that "procedural" defects—for example, that none of the defendants were represented by counsel and that the court martial lacked jurisdiction under Nazi law—were insufficient proof of a "sham trial."[115] What is more, in a further departure from earlier decisions,[116] the BGH no longer alluded to the Radbruch formula, stressing instead the (positive) law governing at the time, which, so the court, would need to be considered against the backdrop of any "state's right to self-affirmation."[117] Such rationalization culminated in the BGH's failure to address the questionable status of the Volksgerichtshof as a court of law.[118]

To summarize, despite language condemning Nazi law and the Nazi judiciary, particularly in the court's early *Rechtsbeugung* decisions, the BGH applied Nazi law to Nazi cases—tending to be exceedingly conciliatory in finding judicial pronouncements compliant with the same. The BGH likewise never found any Nazi judicial institution—whether the Volksgericht, court martials, or war courts—to lack the attributes of a court of law, even if individual proceedings

110. *Id.* ¶¶ 5, 10.

111. *Id.* ¶ 5. *Cf.* BGH Feb. 12, 1952, 2 BGHSt 173 (First Senate) (using identical wording).

112. JurionRS 11,445, ¶ 12 (translated by author).

113. The German Constitutional Court in a 1957 decision had called Nazi jurisprudence "terror jurisprudence" and "unlaw jurisprudence." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 19, 1957, 6 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 132, 183.

114. 16 Irene Sagel-Grande et al., Justiz und NS-Verbrechen: Sammlung deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945–1966, at 581–90 (1976).

115. *See* BGH June 19, 1956, NStZ 485, 489–90, 1996 (First Senate).

116. *Cf.* 2 BGHSt 173, 175; JurionRS 11,445, ¶ 5.

117. NStZ 485, 486. Notably, the Nuremberg Tribunal had employed similar reasoning when weighing whether use of the death penalty could be considered an instrument of terror:

> Every nation recognizes the absolute necessity of more stringent enforcement of the criminal law in times of great emergency. . . . In the face of a real and present danger, freedom of speech may be somewhat restricted even in America. Can we then say that in the throes of total war and in the presence of impending disaster those officials who enforced the savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?

3 Germany Military Tribunals, Trials of War Criminals Before the Nuremberg Military Tribunals: The Justice Case 1026 (1951).

118. Finding the Volksgerichtshof not to have been a court of law, of course, would have invalidated Rehse's judicial immunity; not doing so also meant that Volksgerichtshof decisions remained official judicial records. *Cf.* Hoffmann, *supra* note 38, at 673.

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were criticized as sham or show trials. Ultimately, the court failed to give effect to the kind of transcendent notion of law and justice that Radbruch had called for in his formula.

D. *Judicial Immunity and the Intent Element*

Beyond the BGH's questionable jurisprudence regarding Nazi law and Nazi courts, as early as 1952, the court derived from Basic Law Article 97(1)[119] judicial immunity as a defense to *Rechtsbeugung* charges. Prussian civil law, so the BGH, had protected judges from civil liability except when they had bent the law or otherwise committed a crime.[120] Judicial privilege, according to the BGH, was all the more necessary when judges were charged with a crime,[121] punishable by imprisonment. Hence, the BGH here followed Radbruch (as per usual without attribution) and turned the *crime* of bending the law into a limited *immunity*, a shield that would need to be breached in order to convict judges of crimes.[122]

If the privilege could have emanated from valid separation-of-powers underpinnings, the BGH's application thereof called into question the court's bona fides. Early on, the BGH held that two lay associate judges were not subject to *Rechtsbeugung* liability as they could not be considered "public officials" within the meaning of section 336,[123] while—confoundingly—affording them the protection of judicial privilege, derived from the very same statute.[124]

That tension aside for now, the BGH defined the contours of intent for both *Rechtsbeugung* and judicial immunity somewhat constructively. Starting from the proposition that unintentional acts could not constitute *Rechtsbeugung* since this would cause judges "to live in fear . . . of the consequences of unintended, albeit negligent, applications of law, which even the most conscientious judge may not be able to avoid,"[125] the court required a "conscious and willful" (*bewußte und gewollte*[126]) violation of procedural or substantive law.[127] This, according to the BGH, required proof that the defendants had recognized the mismatch between the underlying crime and the sentence imposed.[128] Without so stating, the BGH thereby overturned the Reichsgericht's expansive readings of *Rechtsbeugung* before and

119. GRUNDGESETZ [GG] [BASIC LAW] art. 97(1) ("Judges are independent and subject only to the law.").

120. *See* BGH May 29, 1952, MDR 693, 695 (1952) (Second Senate).

121. *Id.*

122. *See* ROTTLEUTHNER, *supra* note 53, at 99.

123. *See* MDR 693, 694 (1952).

124. *Id.* at 695. *See generally* ROTTLEUTHNER, *supra* note 53, at 113.

125. MDR 693, 695 (1952) (translated by author).

126. *See generally supra* note 22.

127. *Id. Cf.* BGH Dec. 12, 1952, JURIONRS 11,464, ¶¶ 6–7, 18 (1952) (Second Senate) (finding that *Rechtsbeugung* had to be "objectively contrary to law" due to procedural or substantive defects).

128. *See* MDR 693, 694 (1952).

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during the Weimar Republic: a judge who negligently ordered a defendant to serve a sentence (a violation of Reich Penal Code section 345) would now escape criminal liability whereas the Reichsgericht would have convicted him.[129]

As the BGH explained, *Rechtsbeugung* could occur and judicial privilege could be pierced, for instance, when a judge failed to consider intoxication as a defense or failed to considerer exculpatory testimony.[130] Further, to establish intent to bend the law—"not to serve it but to issue a terror judgment"—it would suffice that the proceedings had been "unthorough and hasty,"[131] almost a given for court martials and war courts in the final days and weeks of the war. In another early decision, the BGH affirmed a lower court that had limited section 336's mens rea element to requiring merely that the "higher ranking official [judge] knows and desires to bend the law" through his influence over a lower ranking judge.[132] Similarly, law bending could occur when a judge was led in his sentencing decision by any "considerations foreign to law, such as the desire to please a superior."[133] The BGH then added that judicial independence would not suffer so long as privilege could be pierced "by any kind of *intentional* act" (*vorsätzlich*, as in the statute), not just acts committed with direct intent (*unbedingtem Vorsatz*).[134] This intent requirement—above negligence but below direct intent—could be met where the person accused of bending the law figured that he was violating statutory law (*Gesetzesvorschriften*), and that he had wanted to bring about the killing through a death sentence.[135]

In other words, the BGH's early jurisprudence, while erecting the defense of judicial privilege, at least signaled that the court would probe the procedural regularity of proceedings. The BGH also made explicit that piercing judicial privilege did not require direct intent while leaving open the possibility that the crime of *Rechtsbeugung* shared this lower intent threshold. Thus, as of 1953, the BGH's *Rechtsbeugung* jurisprudence began to take shape.

Starting in 1956, however, the BGH's decisions took a turn for the worse. First, the court built on prior cases to reiterate that lay judges were protected by "judicial" privilege, this time citing Radbruch directly to buttress the validity of judicial privilege.[136] But the court, without

129. RG Oct. 12, 1880, 2 RGSt 329; RG June 21, 1889, 19 RGSt 342. *See also* Günter Spendel, *§ 339 Rechtsbeugung*, *in* Strafgesetzbuch, Leipziger Kommentar 54, 73–74 (Burkhard Jähnke et al. eds., 11th ed. 1999).

130. JurionRS 11,464, ¶¶ 9–11 (1952).

131. *Id.* ¶ 19 (translated by author).

132. BGH Dec. 16, 1952, JurionRS 11,543, ¶¶ 2, 7 (1952) (Second Senate) (translated by author).

133. *Id.* ¶ 7.

134. BGH June 9, 1953, JurionRS 12,284, ¶ 21 (1953) (First Senate). As for the inherent difficulty in translating intent terminology, please refer *supra* note 22.

135. *Id.* ¶ 20.

136. BGH Dec. 7, 1956, NJW 1158 (1959) (First Senate).

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citing authority in support, now referred to "prevailing opinion" (*herrschende Meinung*[137]) to assert that piercing privilege would require proof of direct intent (*bestimmter Vorsatz*), not conditional intent (*bedingter Vorsatz*) as before.[138] This meant that the same First Senate,[139] which in reliance on identical statutory language and a mere three years earlier had held privilege to be pierced by "any kind" of intent,[140] now—without addressing the change—ratcheted up the intent requirements for judicial privilege as well as *Rechtsbeugung*.

To be sure, this was not the final about-face. When an appeal reached the court that did not concern the Nazi judiciary but an East German judge who had fled to West Berlin ten years after he convicted eighteen Jehovah's Witnesses to terms of imprisonment for espionage and other alleged crimes under the East German Constitution,[141] the BGH again weakened the intent threshold,[142] stating in plain terms: "[L]egal order requires every public official charged with adjudicating a legal matter—even those bound by orders—to act in accordance with law and justice, irrespective of countervailing instructions."[143] This, according to the BGH, meant that even judges independent de jure but constrained in their decisions de facto could be guilty of *Rechtsbeugung*.[144] The court added that even if the judge had lacked intent (without specifying which kind) to bend the law in his convictions, he could have bent the law in setting sentences that were "in kind or severity unbearable in relation to the seriousness of the crime or the culpability of the perpetrator."[145] After all, so the court, the defendant was a "fully qualified lawyer who may be expected to have a sense of whether there is an unbearable relation between the seriousness of a crime and the culpability of a perpetrator."[146]

Thus, the BGH for the first time conceded that trained lawyers, here a career judge, should be held to a higher standard, rather than stressing the sanctity of judicial independence[147] or the judicial burden to have to render judgment.[148] The judge was convicted of

137. *Herrschende Meinung* or *communis opinio doctorum* describes a legal position that is a "constant point of reference in the [relevant] discourse, which is regularly followed by relevant actors over other alternatives." Christian Djeffal, *Die Herrschende Meinung als Argument*, 5 Zeitschrift für das Juristische Studium 463, 466 (2013) (translated by author). *Herrschende Meinung* carries considerable persuasive authority in the German legal system though it is not binding. *Id.*

138. NJW 1158 (1959). Stated differently, the BGH shifted to requiring more than *dolus eventualis*. *See generally supra* note 22.

139. *See supra* note 78.

140. BGH June 9, 1953, JurionRS 12,284, ¶ 21 (1953) (First Senate).

141. Müller, *supra* note 29, at 127.

142. *Id*.

143. BGH Feb. 16, 1960, NJW 974 (1960) (Fifth Senate) (translated by author).

144. *Id*.

145. *Id.* (first citing NJW 1158 (1959); then citing BGH Feb. 12, 1952, 2 BGHSt 173 (1952) (First Senate)).

146. BGH Feb. 16, 1960, NJW 974, 975 (1960) (translated by author).

147. *See, e.g.*, 2 BGHSt 173 (1952).

148. *See, e.g.*, NJW 1158 (1959).

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Rechtsbeugung on remand,[149] rendering him, up to this point, the only legally trained judge whose *Rechtsbeugung* conviction would go into effect.[150]

Yet, when the BGH next addressed an appeal of a Nazi-era judge, it struck a more appeasing tone, finding a conviction of the former Volksgerichtshof judge to be "irreconcilable with the intent element of *Rechtsbeugung*,"[151] and lamenting the "difficult" task of establishing intent so many years after the alleged crime.[152] On remand, the Berlin District Court acquitted the judge, citing a "state's right, in times of external threats to control its population by means of harsh war legislation."[153] In sum, although the BGH's early years suggested that the court was willing to develop coherent intent doctrines for *Rechtsbeugung* and judicial privilege, later decisions created contradictions that ultimately left the court's jurisprudence in limbo.

E. Judicial Outcomes of Rechtsbeugung Prosecutions

The number of *Rechtsbeugung* charges, from the founding of the FRG to 1970, led to an unprecedented number of German criminal high court decisions on the subject. This, at the very least, meant that FRG prosecutors and judges on lower courts were to some extent willing to pursue and entertain *Rechtsbeugung* cases, where there was no established history of such charges over the roughly one hundred years of the crime's statutory existence. This is not to suggest that the number of charges, convictions, and sentences compared favorably to the role of the judiciary in Nazi Germany. However, at least some FRG prosecutors and jurists recognized that the Nazi judiciary's actions constituted an historical outlier that warranted breathing new life into prosecutions for law bending. The crime of *Rechtsbeugung*, though still somewhat elusive, had at last emerged from its ghostlike existence.

Second, despite the tensions and contradictions discussed above, the BGH developed some doctrinal contours of *Rechtsbeugung.* In effect, only career judges—military and civilian—were deemed to come within the ambit of criminal liability at all. The BGH also established judicial privilege, and, unlike criminal liability, found the privilege to provide a defense to career and lay judges alike.

149. EMMANUEL DROIT & SANDRINE KOTT, DIE OSTDEUTSCHE GESELLSCHAFT: EINE TRANSNATIONALE PERSPEKTIVE 242 (2010).

150. Müller had been convicted of Rechtsbeugung by the Cologne District Court, but the BGH reversed the conviction. *Cf.* BGH Dec. 16, 1952, JURIONRS 11,543, ¶ 2 (1952) (Second Senate).

151. BGH Apr. 30, 1968, NJW 1339 (1968) (Fifth Senate) (translated by author).

152. *Id.*

153. Müller, *supra* note 29, at 130 (translated by author). *See also* ROTTLEUTHNER, *supra* note 53, at 112.

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The ultimate results as to the Nazi-era judiciary, as should be obvious by now, were more sobering.[154] Not a single career judge was convicted of *Rechtsbeugung* or any other crime.[155] Indeed, not a single Volksgerichtshof judge or prosecutor would become subject to final conviction by an FRG court.[156] Only Michalsky (as presiding lay judge of a court martial) and Gottschalk (as associate judge of a court martial) were convicted for some of their actions—neither of them for *Rechtsbeugung* as the BGH had excluded lay judges from the statute's reach.[157] What is more, the Nazi judges who were prosecuted had all issued death sentences,[158] which set a high bar for future prosecutions, especially when compared with the more benign underlying facts in the case of GDR judge Oehme and pre-1933 Reichsgericht decisions.

F. Existing Attempts to Explain the BGH's Postwar Jurisprudence

The FRG's jurisprudence was chastised as crow justice (*Krähenjustiz*)—the idea that a judge would not pick out an eye of another judge.[159] Similarly, it was explained away as a mere function of political currents in the postwar FRG.[160] Another rationalization held that judges had remained in government service to prevent even worse results (a dubious contention in light of the horrific Nazi-era judicial record[161]), and similarly that judges had acted out of duress or fear of bodily harm (likewise rebutted by historical research).[162] A related narrative relied on the Nazi's antagonism toward the "most hated profession" (citing, e.g., Hitler's 1942 Reichstag speech) in order to cast lawyers as victims of the Third Reich.[163] "This self-image[, no matter how flawed,] took hold and remained dominant for two decades [after World War II]."[164]

154. *Cf. id.* at 95 (listing a handful of early cases in which lower courts convicted lay and career judges but which did not result in appeals to the BGH).

155. Huppenkothen, a prosecutor in court martials, was also convicted of crimes other than *Rechtsbeugung*.

156. Ironically, while the BGH referred to the decisions of the Volksgerichtshof as unlawful in the case of a woman who had denounced others on behalf of the Gestapo, this did not result in charges against Volksgerichtshof judges. ROTTLEUTHNER, *supra* note 53, at 114 (citing BGH June 28, 1956, NJW 1485 (1956) (Third Senate)).

157. *See generally* Andreas Eichmüller, *Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945*, 56 VIERTELJAHRESHEFT FÜR ZEITGESCHICHTE 621, 626 (2008) (showing, for example, that the end of prosecutions and convictions was part of a precipitous decline in overall Nazi-crimes prosecutions in the FRG starting in the early 1970s).

158. *See* ROTTLEUTHNER, *supra* note 53, at 96–97.

159. GÖRTEMAKER & SAFFERLING, *supra* note 48, at 25.

160. *Compare* Müller, *supra* note 29 (describing BGH jurisprudence on *Rechtsbeugung* as politicized), *with* Birn, *supra* note 46 (criticizing Müller's analysis as not "attempt[ing] a balanced presentation of facts, [and] see[ing] an unbroken continuity between the judiciary of the Nazi period and the post-war [German state], which supposedly ensured that Nazi crimes were whitewashed").

161. GÖRTEMAKER & SAFFERLING, *supra* note 48, at 25.

162. *See, e.g.*, Hoffmann, *supra* note 38, at 672.

163. Stolleis, *supra* note 64, at 2–3.

164. *Id.* at 3.

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Other German and some foreign legal treatises and journal articles became replete with critical commentary as early as the 1980s.[165] For example, one author pointed out that judicial privilege "was invented ad hoc after 1945. As far as can be seen [based on multiple comprehensive studies], the first it can be found is in [Radbruch's 1946] essay."[166] Regarding intent, German "courts after 1945 sought to limit § 336 . . . by 'construing' [the crime] so as to render it largely inapplicable."[167] And further:

> There certainly are good reasons for a judges' privilege; and there are also good reasons for why only a *dolus directus* corresponds to the offence of perverting the course of justice. It is striking, however, that the sum of both elements—in connection with a sensitive application of the principle *in dubio pro reo*, such as one might wish for in many other proceedings—then led to an acquittal of the Nazi judiciary . . . .[168]

The decision to apply Nazi law was described as "disastrous" in terms of legal and public policy as it was "simply inappropriate to use National Socialist law of all things as the basis for trying National Socialist mass murder."[169] And, indeed, in 2002, Günter Hirsch, then the president of the BGH, bemoaned that "[t]he consequences of the [Huppenkothen and Thorbeck] decision were devastating. Not a single [career] judge, . . . was convicted in the BRD for the thousands of judicial crimes committed in the Third Reich. Once the conviction of judge Rehse was reversed in 1968 . . . prosecutors discontinued their investigations against former [Nazi] judges."[170]

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165. Earlier critique is rarer. *Cf.* Hoffmann, *supra* note 38.

166. Vormbaum & Bohlander, *supra* note 46, at 220.

167. Spendel, *supra* note 129, at 7–8.

168. Vormbaum & Bohlander, *supra* note 46, at 221. *See also* Dubber & Hörnle, *supra* note 4, at 639 (citing BGH Dec. 7, 1956, 1 StR 56/56, 10 BGHSt 294, 298 (1956), to state that the BGH in this period "set a high threshold for the subjective state of mind of judges: it established the interpretation that bending the law . . . required direct intent[] (*dolus directus*), that is, a conscious or purposeful departure from the law in force at the time of the decision").

169. Vormbaum & Bohlander, *supra* note 46, at 228.

170. Günter Hirsch, BGH President, Speech at 100th Anniversary Celebration of Hans von Dohnányi (Mar. 8, 2002), www.bundesgerichtshof.de/DE/DasGericht/Praesidenten/Hirsch/HirschReden/rede08032002.html. *See also* Günther Gribbohm, *Nationalsozialismus und Strafrechtspraxis: Versuch einer Bilanz*, 1988 Neue Juristische Wochenschrift 2842, 2848 (likewise finding a deterrent effect in the BGH's jurisprudence). This was not the only time that a BGH president in a public comment expressed indignation with the court's earlier decisions. *See BGH-Präsidentin schämt sich für Richter aus den Fünfzigern*, Spiegel (Mar. 12, 2015), www.spiegel.de/panorama/justiz/sinti-und-roma-bgh-distanziert-sich-von-historischem-urteil-a-1023256.html (BGH President Bettina Limperg stating that she could only feel "shame" for a 1956 BGH decision that had found the 1940 relocation of Sinti and Roma not "racially motivated" but merely a "customary police preventive measure" to "combat the Gipsy plague" (citing BGH Jan. 7, 1956, JurionRS 13,580 (1956))).

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Such moral and legal indignation, however, only shed limited light on the BGH's troubled *Rechtsbeugung* jurisprudence. Taking a more empirical approach, German legal philosopher Hubert Rottleuthner in 2010 published a study on "continuities" in the German judiciary after 1945 in which he examined the composition of the BGH's criminal Senates that decided *Rechtsbeugung* cases between 1951 and 1970.[171] Rottleuthner found *inter alia* that at least twenty-six of thirty-six judges (72%) who served on relevant Senates in postwar Germany had worked as judges or prosecutors in Nazi Germany.[172]

In light of these figures, it is impossible to ignore the BGH's overall makeup as one explanation for the court's jurisprudence, especially when increasing the aperture to the court's handling of Nazi-era criminal liability generally.[173] Yet, even taking at face value Rottleuthner's biographical research, his attempt to correlate the makeup of individual Senates—each comprised of five judges and deciding by simple majority vote—with judicial outcomes falls flat.[174]

Incidentally, the sole case that fits squarely into Rottleuthner's thesis is the one case he discusses at length. In a 1970 BGH appeal,[175] the First Senate was made up of four judges whose entire career dated to the post-Nazi period,[176] and only one of whom had worked in the Nazi judiciary.[177] While the court reversed both convictions and remanded, it called the underlying Nazi judicial proceeding a "show trial,"[178] and the BGH's instructions to the lower court support Rottleuthner's conclusion that they "should have led to a conviction."[179] In other words, this case tracks Rottleuthner's thesis that panel majority composition dictated judicial outcomes.

But the cases Rottleuthner omits contradict his account. For example, in 1952, the First Senate (four out of five judges had worked

171. *See generally* ROTTLEUTHNER, *supra* note 53.

172. *Id.* at 107. *Cf.* Stolleis, *supra* note 64, at 8, 10 (describing parallel developments in post-World War II German legal academia as follows: "Almost all the colleagues driven into exile by National Socialism were missing. Many others had died or been murdered. With so few qualifying as professors during the Nazi era, there was no broad-based, politically untainted younger generation to take over the task of teaching and training. The core of the faculties that now began to regroup was still formed by the same professors who had taught at the universities from 1933 to 1945.").

173. *See, e.g.*, Thomas Fischer, *Oskar Gröning und die Beihilfe*, DIE ZEIT (July 21, 2015), www.zeit.de/gesellschaft/zeitgeschehen/2015-07/ns-verbrecher-beihilfe-taeter-strafrecht-justiz-fischer-im-recht (providing a concise history of the BGH's jurisprudence with respect to Nazi death and concentration camps). *See also* Eichmüller, *supra* note 157 (providing an overview of FRG prosecutions of Nazi crimes, including those committed by the judiciary).

174. *Cf.* ROTTLEUTHNER, *supra* note 53, at 107–11.

175. *See* BGH July 21, 1970, NJW 571 (1971) (First Senate).

176. Gerd Pfeiffer, Heinz Pikart, Albert Mösl, and Hans-Georg Strickert. *Cf.* ROTTLEUTHNER, *supra* note 53, at 107–11.

177. Joachim Loesdau. *Cf. id.* at 107–11.

178. NJW 571, 572–73 (1971).

179. ROTTLEUTHNER, *supra* note 53, at 108 (translated by author).

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in the Nazi judiciary or as prosecutors,[180] the remaining one as an attorney[181]) reversed the acquittal of Huppenkothen, questioning with blunt language Nazi law's status as law.[182] The same year, a similarly composed Second Senate[183] reversed the acquittal of navy judge Lüder, alluding to "unwritten" law to make out checks on Nazi law while also setting a low intent threshold.[184] In the final 1952 decision, the Second Senate, composed of at least four former judges and prosecutors in Nazi Germany,[185] issued another reversal that indicated yet again a low intent threshold for *Rechtsbeugung*.[186]

Even the 1953 decision in which the BGH affirmed lay judge Michasky's manslaughter conviction was issued by a First Senate made up of three judges who had worked as judges or lawyers for the Nazi state.[187] The second conviction (this time issued on final remand) of the Nazi lay judge Gottschalk also involved the First Senate whose share of members with Nazi-state careers here was even more concentrated (at least four out of five).[188] In remanding, the BGH condemned the applicable Nazi law as "terror veiled in law."[189] And likewise, the BGH's most notorious decisions—those involving Holzwig,[190] Brumshagen,[191] Huppenkothen and Thorbeck,[192] and Rehse[193]—came out of Senates no more and no less concentrated in terms of Nazi affiliation than the just-named decisions: each Senate included three to four judges for whom it could be established that they had worked for the Nazi state.[194] Rottleuthner's empirical approach, as should be apparent by now, does not support a strong correlation between the Nazi ties of BGH judges and judicial outcomes, at least not at the level of individual appeals.

180. Friedrich-Wilhelm Geier, Roderich Glanzmann, Ernst Mantel, and Hans Richter. *Cf. id.* at 107–11.

181. Heinrich Jagusch. *Id.* at 107–11.

182. BGH June 19, 1956, NStZ 485 (1996) (First Senate).

183. At least four (Wilhelm Dottereich, Dagobert Moericke, Karl Ortlieb, and Fritz Sauer) of five (Wolfhart Werner) had worked as judges or prosecutors in Nazi Germany.

184. *See* BGH Dec. 12, 1952, JurionRS 11,464, ¶ 12 (1952) (Second Senate).

185. Wilhelm Dottereich, Paul Ludwig, Karl Orlieb, Fritz Sauer, but not necessarily Wolfhart Werner based on Rottleuthner's data. *Cf.* Rottleuthner, *supra* note 53, at 107–11.

186. BGH Dec. 16, 1952, JurionRS 11,543 (1952) (Second Senate).

187. Roderich Glanzmann, Max Hörchner, and Ernst Mantel, but not Georg Heimann-Trosien, and Erich Schalscha, who as a Jewish attorney and notary had emigrated to the United Kingdom in 1936. *Cf.* Rottleuthner, *supra* note 53, at 107–11.

188. Hermann Hengsberger, Max Hörchner, Ernst Mantel, and Ludwig Peetz, but not necessarily Wolfhart Werner based on Rottleuthner's data. *Cf. id.* at 107–11.

189. *See* BGH Dec. 7, 1956, NJW 1158 (1957) (First Senate).

190. BGH May 29, 1952, MDR 693 (1952) (Second Senate).

191. BGH Dec. 4, 1952, JurionRS 11,445 (1952) (Third Senate).

192. BGH June 19, 1956, NStZ 485 (1996) (First Senate).

193. BGH Apr. 30, 1968, NJW 1339 (1968) (Fifth Senate).

194. Holzwig: Wilhelm Dotterwich, Paul Ludwig, Dagobert Moericke, Fritz Sauer, but not Wolfhart Werner; Brumshagen: Richard Busch, Karl Kirchner, Herbert Koeniger, Carlhans Scharpenseel, but not Theodor Krauss; Huppenkothen: Max Hörchner, Ernst Mantel, Ludwig Martin, Ludwig Peetz, but not Engelbert Hübner; Rehse: Rudolf Börker, Friedrich Kersting, Werner Sarstedt; but not Horst Herrmann or Rudolf Schmidt. *Cf.* Rottleuthner, *supra* note 53, at 107–11.

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G. Reverence for the German Legal Tradition

More availing than viewing the BGH's *Rechtsbeugung* jurisprudence as a mere function of judges' Nazi affiliations may be an examination of policies and concerns that drove the court's jurisprudence, as well as other factors at play.

At the institutional level, the BGH viewed itself as the direct successor to the Reichsgericht, which from 1879 to 1945 had served as Germany's high court for civil and criminal matters.[195] On the occasion of the opening of the BGH in October 1950, Justice Minister Thomas Dehler referred to the "rich tradition of the Reichsgericht," and the first president of the BGH, Hermann Weinkauff, spoke of Reichsgericht judicial "brothers who should be seated next to us."[196] In 1954, Walter Strauß, a high-ranking (German Jewish) official in the young FRG's justice ministry, characterized the BGH—approvingly—as "identical" to the *Reichtsgericht* and spoke of the former as the "return" of the latter.[197] At first glance, such pronouncement merely reflect the BGH's inability to come to terms with its institutional predecessor's role in Nazi Germany. But the picture is more complex.

Whereas German legal philosopher Hans Kelsen, from exile in Berkeley, had argued that the German Reich as a legal subject had been extinguished, an "overwhelming majority of [German] constitutional and international law scholars [eventually] supported the theory that the German Reich had remained legally intact despite Germany's defeat."[198] The Adenauer Administration also saw utility in insisting on the legal "continuity" of the Reich through World War II and Germany's defeat, so as to preserve future claims to Germany's 1937 territories.[199] And with the dawn of the Cold War, the United States and its allies came to rank FRG stability over historical accountability.[200] With amnesty legislation in 1951, many Nazi-era public officials, including judges, were reintegrated into the FRG's judiciary.[201]

Continuity of Germany as a legal entity was mirrored by a reverence for the country's legal tradition. In fact, Telford Taylor, chief prosecutor in the Nuremberg judges' trial, had invoked that very tradition, calling it the "German temple of justice"—albeit in order to juxtapose pre-Nazi Germany with Nazi Germany.[202] Continuity of legal tradition

195. *See* GÖRTEMAKER & SAFFERLING, *supra* note 48, at 269.
196. *See id.* (translated by author).
197. *See id.*
198. 4 MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 32–34 (2012) (translated by author).
199. *See* SHIDA KIANI, WIEDERERFINDUNG DER NATION NACH DEM NATIONALSOZIALISMUS? KONFLIKTLINIEN UND POSITIONEN IN DER WESTDEUTSCHEN NACHKRIEGSPOLITIK 48, 54 (2013).
200. *Id.*
201. *See* Inga Markovits, *Children of a Lesser God: GDR Lawyers in Post-Socialist Germany*, 94 MICH. L. REV. 2270, 2272–73 (1996).
202. NUREMBERG TRIALS PROJECT, TRANSCRIPT FOR NUREMBERG MILITARY TRIBUNAL 3: JUSTICE CASE 36–37, http://nuremberg.law.harvard.edu/transcripts/3-transcript-for-nmt-3-justice-case?seq=37 (last visited Oct. 27, 2021).

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likewise catered to German legal academia's self-perception. Since the nineteenth century, German legal academics had regarded law as a science (*Rechtswissenschaft*) dating back to Roman law. And despite periodic amendments of Germany's celebrated civil and criminal codes, both had largely remained in effect.[203] Reverence for German legal tradition thus continued to be engrained in the German legal community's identity, particularly among the many judges, justice ministry officials, and legal academics who worked for the state in both Nazi Germany and the FRG.[204]

Still, a discerning approach with respect to Nazi-era jurisprudence—let alone a categorical invalidation of Nazi-era Reichsgericht decisions (or even those of other "courts," such as the Volksgericht)—would no doubt have put moral and legal distance between the BGH and the horrors of the Nazi judiciary. Instead, the BGH cited Reichsgericht jurisprudence indiscriminately in *Rechtsbeugung* and other cases, at times to disastrous effect.

H. Collective Silence

Related to the conceptualization of a continuous legal tradition, German academics for decades exercised a sort of collective silence regarding Nazi-era jurisprudence generally, perpetuating misconceptions among later generations of lawyers.[205] This silence also reflected the young FRG's dominant political desire to "move on" from the transgressions of the Nazi era (*Schlussstrichmentalität*[206]). Konrad Adenauer, the FRG's first chancellor, made this clear in his inaugural address.[207] Legislative actions and court decisions likewise attested to this attitude.[208] Attempting to come to grips with this history, Hermann Lübbe, one of Germany's most influential political philosophers, surmised in 1983 that the emerging FRG's "silence [as to Nazi atrocities generally] was the socio-psychologically and politically necessary medium for transforming our postwar population

203. *Cf.* Kay Wagner, NS-Ideologie im heutigen Strafrecht 2–3 (2002) (clarifying that civil law, as pertaining to non-Jews, was less tarnished by Nazi reforms than criminal law, which was altered and amended by at least three major pieces of Nazi legislation).

204. *See generally* Bernd Rüthers, *Verfälschte Geschichtsbilder deutscher Juristen*, 2016 Neue Juristische Wochenschrift 1068.

205. *Id*. at 1069. *See also* Stolleis, *supra* note 64, at 23 ("An interesting example of delayed self awareness [sic] is the way in which the Association of German Public Law Teachers has so far [as of 2001] painstakingly avoided undertaking any form of analysis of its past. Having reconstituted their association in 1949 . . . , they have consistently avoided glancing in the mirror.").

206. This term may also be described the desire to draw a line under the past.

207. Konrad Adenauer, German Chancellor, Inaugural Speech (Sept. 20, 1949), www.konrad-adenauer.de/dokumente/erklaerungen/1949-09-20-regierungserklaerung. *But see* Birn, *supra* note 46 (pointing out that political currents with regard to the Nazi past were nevertheless multifaceted among political parties in the 1950s and 1960s).

208. *See generally* Görtemaker & Safferling, *supra* note 48, at 154–72.

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into citizens of the Federal Republic of Germany."[209] As one German legal historian explained, the legal community's silence meant that Germany's:

> [H]istory under National Socialism could be disregarded or, at most, remembered only as a time marred by a regrettable perversion of justice. The legal authors of those years kept silent about their earlier publications. Their pupils adjusted the bibliographies. Librarians were instructed to sift out the writings from the relevant period and stash it away in the vaults.[210]

With rare exceptions,[211] treatises omitted the impact of Nazi-era academics,[212] legislation, and ideology on FRG law,[213] especially in terms of their impact on particular legal doctrines and interpretations of statutes.[214] When in 1959 an East German campaign exposed some of the FRG judiciary's Nazi-era ties,[215] the campaign was decried as propaganda in West Germany.[216] A 1960 treatise[217] amounted to an effort to characterize indefensible Nazi court decisions as deviations from

209. Hermann Lübbe, *Der Nationalsozialismus im deutschen Nachkriegsbewusstsein*, 26 Historische Zeitung 579, 585 (1983) (translated by author). *See also* Stolleis, *supra* note 9, at 21 ("Those who had believed in genuine moral renewal were disappointed to see the public sector filling up again with former NSDAP members. Those who really did have a guilty past refused to confront the matter. All this was overshadowed by the *Wirtschaftwunder*—the economic miracle—by integration into Western Europe, by the euphoria of winning the 1954 World Cup and the status that victory conferred, along with a new-found affluence reflected in holidays abroad and a general mood of eat-drink-and-be-merry.").

210. Stolleis, *supra* note 64, at 5.

211. *See, e.g.*, Franz Wieacker, Privatrechtsgeschichte der Neuzeit 514–15 n.2 (2d ed. 1967) (admitting bias due to his own involvement in civil law reforms in Nazi Germany, and stating *inter alia* that "ruthless disregard for the law, ideological biases and power-driven perversion of purpose interfered" with academic legal work in Nazi Germany (translated by author)). In addition, in recent years, the German Ministry of Justice and the Interior Ministry have commissioned comprehensive historical inquiries into their Nazi-era ties. *See* Görtemaker & Safferling, *supra* note 48. *See also* Christiane Habermalz, *Wie Nazis im Innenministerium Karriere machten*, Deutschlandfunk (Nov. 5, 2015), www.deutschlandfunk.de/aufarbeitung-der-ns-zeit-wie-nazis-im-innenministerium.862.de.html?dram:article_id=336084.

212. Rüthers, *supra* note 204, at 1069.

213. *See, e.g.*, Wagner, *supra* note 203, at 20 (noting, for example, that the BGH failed to explore Nazi-era origins of Reichsgericht cases that rendered "healthy folk sentiment" the legal test, and noting further that contemporary treatises likewise skip such discussion (translated by author)).

214. *See id.* at 2 (noting that the BVerfG is likewise to blame).

215. *See* Rottleuthner, *supra* note 53, at 31–34.

216. It is now accepted that the facts exposed were largely accurate, in part due to documents available only in East Germany or the Soviet Union. *Id.* at 31–34. The GDR government made it a point of distinction to cleanse the judiciary's ranks of former Nazi party members, only to replace them with a majority of SED members. *Id.* at 53–56. East Germany went so far as to embrace the Nuremberg judges' trial as conducive to the GDR's FRG "blood judges" narrative. Görtemaker & Safferling, *supra* note 48, at 61. Ignored was the fact that the United States, the "class enemy," had conducted those proceedings. *Id.*

217. Hubert Schorn, Der Richter im Dritten Reich (1959).

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otherwise proper courts of law in Nazi Germany.[218] And even though the Eichmann trial, the Frankfurt Auschwitz trial, and other developments in the 1960s resulted in a younger generation of Germans questioning the country's dealings with its Nazi past, "lawyers, on the whole, responded by withdrawing into their own closed world."[219]

I. The Ban on Retroactive Criminalization and the Concern for Judicial Independence

The Basic Law's ban on retroactive criminal laws[220] added to the BGH's cluster of issues. Because *Rechtsbeugung* remained in force with identical statutory language compared to Nazi-era criminal law,[221] the BGH had to develop its jurisprudence with both the Nazi past and the FRG future in mind.

Early on in the Holzwig decision, this led to the creation of judicial privilege, purportedly to help ensure judicial independence[222] as derived from Basic Law Article 97(1), i.e., "the idea that state power must be divided."[223] In hindsight, the unilateral creation and scope of this unprecedented judicial doctrine appears suspect or overblown. After all, the Basic Law's protection of *independence* in judicial decision making went hand in hand with judges' *dependence* on law[224]: the notion that judges themselves are accountable.[225] Moreover, since judges judge the criminality of other judges with section 336 cases, separation-of-powers concerns may be a red herring[226]—at least when ignoring any deterrent effect of potential or actual prosecutions.

But at the time of the privilege doctrine's initial pronouncement (1952), the institutions of the FRG were in their infancy,[227] and Germany could hardly point to a historical record of democratic governance or effective separation of powers. "Since the time of Bismarck, German judges [had been] part of . . . a subservient state bureaucracy, appointed in their youth."[228] And the history and demise of the Weimar Republic only buttressed concerns as to judicial independence. The judiciary was known to

218. *See* Hoffmann, *supra* note 38, at 668 (also noting, however, that Schorn was no Nazi sympathizer, having rejected Nazism and put down the gavel in 1938 after he had been reassigned multiple times). *See also* Fritz Bauer, *Die "Ungesühnte Nazijustiz,"* 1960 Die Neue Gesellschaft 179.

219. Stolleis, *supra* note 64, at 21–22.

220. GG art. 103(2).

221. *Cf.* Das Strafgesetzbuch, *supra* note 17, at 520.

222. *See* Bundesgerichtshof [BGH] Feb. 12, 1952, 2 BGHSt 173 (1952) (First Senate).

223. Dubber & Hörnle, *supra* note 4, at 637.

224. *See* GG art. 97(1) ("Judges shall be independent and subject only to the law.").

225. *See generally* Seebode, *supra* note 18, at 1, 4.

226. *See id.*

227. Stolleis, *supra* note 64, at 3 (speaking to the state of affairs in legal academia after World War II and noting that churches "were virtually the only major organizations in a position to restore Germany's place in the civilized world").

228. Okum et al., *supra* note 34, at 1155 (symposium contribution by Jack Weinstein).

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be "blind in the right eye"—hostile to the republic, sympathetic to a return to a monarchical system, and overzealous in convictions of leftists.[229]

Judicial independence had become even more besieged in Nazi Germany.[230] Not a single judge ever declared invalid a Nazi law, even though Weimar-era Reichsgericht jurisprudence clearly afforded judges the right—and imposed the duty—to review laws for their constitutionality.[231] Perhaps the principal critic of the BGH's *Rechtsbeugung* jurisprudence, Günther Spendel, nonetheless reasoned as late as 1999 that "punishment for negligent [*fahrlässige*] law bending . . . is not unobjectionable in terms of the judiciary's status since judicial privilege and thus judicial independence might suffer."[232]

A general argument for a kind of limited judicial privilege that would insulate judges from criminal liability under certain circumstances, however, still left unanswered the particulars of this doctrine and the crime of *Rechtsbeugung* generally. As discussed above, a string of contradictory decisions on such decisive questions as intent, applicable law beyond positive law, the particular responsibility of judges, and the nature of legal proceedings evinced the BGH's continuing struggle.

J. Institutional Tolerance for Doctrinal Inconsistency

As is customary in civil law jurisdictions, German courts—with one notable exception[233]—are not legally bound by precedent.[234] Nor do they impose on themselves a doctrine of stare decisis.[235] Rather, "precedent" in German courts affects future decisions by virtue of its rationale on the merits,[236] even if German courts in practice are prone to rely on prior decisions extensively.[237] That said, German law[238] mandates that jurisprudential conflicts between BGH Senates be resolved in a kind of en banc procedure before a so-called Grand

229. Görtemaker & Safferling, *supra* note 48, at 269.
230. *See* Hoffmann, *supra* note 38, at 671.
231. *See id*.
232. Spendel, *supra* note 129, at 73.
233. Bundesverfassungsgerichtsgesetz [BVerfG] [Federal Constitutional Court Law], Dec. 13, 2003, Bundesgesetzblatt [BGBl.] I at 2546, § 31, para. 1 ("The decisions of the Federal Constitutional Court bind state and federal constitutional organs as well as courts and administrative agencies." (translated by author)). *See also* Merhad Payandeh, Judikative Rechtserzeugung 7 (2017) (noting that this constitutes the only explicit statutory instance in which courts and other state institutions are bound by judicial pronouncements beyond a particular case); *but see* Andreas Heldrich, *50 Jahre Rechtsprechung des BGH: Auf dem Weg zu einem Präjudizienrecht?*, 33 Zeitschrift für Rechtspolitik 497, 497 (2000) ("Apparently our legal systems has been developing increasingly strong resemblance of the Anglo-American case law system." (translated by author)).
234. Patrick Melin, Gesetzesauslegung in den USA und in Deutschland 282 (2005).
235. *See* Neil Duxbury, The Nature and Authority of Precedent 114, 116 ("Stare decisis is usually not a constitutional or statutory requirement, but one which courts impose on themselves.").
236. Melin, *supra* note 234, at 282.
237. *See* Payandeh, *supra* note 233, at 125–28.
238. *See generally* Gerichtsverfassungsgesetz [GVG] [Law on the Constitution of Courts] Sept. 12, 1950, BGBl. I at 455 (as amended).

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Senate (*Große Senat*).[239] Yet, in spite of obvious conflicts in the court's *Rechtsbeugung* jurisprudence—implausible oversights—the BGH appears to have never availed itself of this procedure. This omission, along with the continual failure to discuss in explicit terms conflicting decisions, is also at odds with the principle of uniform jurisprudence (*Gebot der Einheitlichkeit der Rechtsprechung*), i.e., ensuring "homogenous and consistent" judicial decision making.[240] Similarly questionable is the BGH's failure to consider other legal arguments, such as probing the underlying reasons against retroactivity, a subject altogether neglected by German legal academia (and the courts) in the postwar period.[241]

Within the FRG judiciary, however, district courts must share in the blame. Take, for instance, the Holzwig decision,[242] the first and second Huppenkothen decisions,[243] the case of navy judge Lüder,[244] or that of district court president Müller.[245] At least in the latter four, arguably, the BGH had remanded with instructions that should have led to conviction. Instead, the district courts acquitted. The Hoffmann and Ferber decision is even more striking, as the district court, with hands bound by the BGH's remand instructions, stayed proceedings for six years only to then find the defendant no longer fit to be retried.[246] This complicates wholesale condemnation of the BGH's role.

239. *See* Jürgen Cierniak & Jochen Pohlit, *GVG § 132 Große Senate*, *in* 3 Münchener Kommentar zur Strafprozessordnung 348 (Christoph Knauer et al. eds., 2018) (detailing the history since the predecessor statute that went into effect in 1877). *See id.* at 351–52 (defining conflicts as a "statute or legal concept applied to a comparable set of facts" (translated by author)).

240. *Id.* at 347.

241. Rückert, *supra* note 50, at 664–65 ("One [theory of liability] that was avoided [in German legal scholarship after the war] . . . would have relied on crimes against humanity. [Such a theory] could have resorted to constitutional and international law, which likewise had been rendered binding by the Basic Law, in order to explore tensions between crimes against humanity and the bar against retroactive laws . . . . Arguments would have come out in favor of and not against retroactivity and Nuremberg . . . . As far as I can tell, there was silence regarding the underlying reasons against retroactivity . . . ." (translated by author)).

242. On remand, the Hamburg District Court heard testimony by high-ranking former navy judicial officials that war courts were not instruments of arbitrary Nazi power but rather proper courts of law. Greven & von Wrochem, *supra* note 103, at 63. The court acquitted the defendants, ignoring the BGH's findings as to the war court's lack of authority to issue a death sentence, and stating *inter alia* that intent required more than establishing that a judge "was a staunch national socialist since there could have been altogether commendable reasons for this." *See* 10 Sagel-Grande et al., *supra* note 114, at 491 (reproduction of the entire decision).

243. Bundesgerichtshof [BGH] May 29, 1952, MDR 693 (1952) (Second Senate); BGH Feb. 12, 1952, 2 BGHSt 173, 177 (1952) (First Senate) (in acquitting, the Munich District Court I cited adherence to "then applicable statutes and jurisprudence," apparently ignoring *inter alia* the BGH's earlier criticism of the court-martial proceedings, even under Nazi law (Stephan Alexander Glienke, *Der Dolch unter der Richterrobe*, Zeitgeschichte Online (Dec. 1, 2012), https://zeitgeschichte-online.de/thema/der-dolch-unter-der-richterrobe).

244. Walle, *supra* note 135, at 232–35.

245. BGH Dec. 12, 1952, JurionRS 11,464 (1952) (Second Senate). *But see* Rottleuthner, *supra* note 53, at 112 (noting, without explanation, that the court here remanded with a "tendency of acquittal" (translated by author)).

246. *Cf.* BGH July 21, 1970, NJW 571 (1971) (First Senate).

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To summarize, the FRG legal community's inability or unwillingness to clearly separate itself, its teachings, its jurisprudence, and its codified bodies of law from the Nazi past made it exceedingly difficult for FRG courts to condemn or convict Nazi-era judges. Moreover, the country's early political momentum away from a reckoning with its past further detracted from such accountability. While judicial privilege was perhaps the most compelling reason to limit *Rechtsbeugung*'s scope generally, especially in the context of Germany's history, the BGH's application of the privilege to *Rechtsbeugung* cases, in effect, became a bar to convicting any Nazi-era judges. A more robust jurisprudence, one that would have addressed systematically tensions across decisions and refines legal doctrines over time, could have helped the BGH develop a *Rechtsbeugung* jurisprudence, including judicial privilege, that would have been in harmony with the statute's plain text, and internally consistent across decisions. But the court did not avail itself of this route, not even where it was required to do so by law. That said, the FRG's disastrous postwar *Rechtsbeugung* record is not attributable solely to the BGH; rather, district courts share in the blame.

III. *Rechtsbeugung* in a Reunited Germany

As detailed below, the BGH came to distance itself from its postwar decision past and its decisions contributed to some measure of accountability concerning the GDR judiciary. This followed a period of implicit defiance of the amended *Rechtsbeugung* statute, and ultimately, the court's *Rechtsbeugung* jurisprudence still suffers from shortcomings that render it difficult to apply in practice. What follows is an examination of the legislative history of the 1974 amendment; an analysis of BGH decisions that resulted in convictions of FRG judges; and, finally, an assessment of the *Rechtsbeugung* doctrine as it stands today.

A. *Defiance in the 1970s and 1980s of the Amended Governing Statute*

Four years after the final BGH decision concerning Nazi judges, a 1974 amendment of section 336 eliminated altogether the reference to "intent" (*vorsätzlich*).[247] The executive branch's draft had included "purposeful or conscious" (*absichtliches oder wissentliches*), i.e., direct intent,[248] which had come to be accepted as the BGH's interpretation.[249] However, the Bundestag's judiciary committee struck this language, reasoning that conditional intent (*bedingter Vorsatz*) sufficed in light of the insurmountable bar that the BGH had read into intent in its Nazi-judiciary jurisprudence.[250] The revised section 336 (renumbered

247. Spendel, *supra* note 129, at 1–4. *See also* Kuhlen, *supra* note 6, ¶ 1.
248. Spendel, *supra* note 129, at 54–55.
249. Kuhlen, *supra* note 6, ¶ 1.
250. Müller, *supra* note 29, at 135.

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section 339 in 1997[251]) read: "A judge, an officeholder or an arbitrator who in conducting or deciding a legal case is guilty of bending the law for the benefit or to the detriment of a party will be punished with imprisonment of one to five years."[252] Through this amendment, the Bundestag came to reject the sum of the BGH's decisions, which—without clear statutory basis[253]—had limited *Rechtsbeugung*'s reach to direct intent.[254]

Remarkably, the BGH subsequently, at least initially, clung to requiring direct intent. In a factually bizarre decision dating to 1984, a juvenile-court prosecutor had made it a practice to visit defendants' homes, and, typically after soliciting consent, had administered spankings of their bare behinds in lieu of prosecution.[255] The BGH referred to a "direct intent" requirement multiple times without citing the statutory language, any change therein, or the court's own jurisprudence.[256] Moreover, the BGH now referred to "law *breaking*" (*Rechtsbruch*) rather than bending,[257] relying both on a rather tacit endorsement of a narrow reading of *Rechtsbeugung*[258] by an executive-branch official who had participated in the relevant Bundestag subcommittee, as well as asserting the general consideration that it was not the goal of the statute to cause the "decisionmaker to feel legally uncertain."[259] Rather, law breaking, so the court, required a "fundamental violation of the administration of justice."[260] The prosecutor's argument that he had acted in the spirit of juvenile law's "pedagogical" purposes did not persuade the BGH to reverse the lower court's direct-intent finding.[261] Nonetheless, the BGH reversed by finding the prosecutor's vigilante spanking to fall outside the scope of the statute's "in conducting or deciding a legal case."[262]

The decision in some respects was a doctrinal replay of the 1950s and 1960s—at least in terms of its loose treatment of statutory language. Postwar "continuities," however, could no longer be blamed for the court's decision making. Instead, the following observation may be more pertinent:

251. *Cf.* Uebele, *supra* note 5, at 2296.

252. Kuhlen, *supra* note 6, ¶ 1 (translated by author). *Cf.* Uebele, *supra* note 5, at 2296.

253. As Spendel explains, "intent" without more is inclusive, referring to both *dolus directus* and *dolus eventualis*. Spendel, *supra* note 129, at 54.

254. *Id.* at 54–55. *But see* Uebele, *supra* note 5, at 2296 (omitting any mention of tension between BGH jurisprudence and the amended legislation).

255. BGH May 23, 1984, NJW 2711 (1984) (Third Senate).

256. *Id.*

257. *Id.*

258. *See* Seebode, *supra* note 18, at 1, 2 (noting that in 1973 a representative of the Ministry of Justice to the *Bundestag*'s select committee on criminal justice had observed that "the term Rechtsbeugung . . . [contains] a normative element . . . which itself functions as a limit" (translated by author)).

259. NJW 2711, 2712 (1984) (translated by author).

260. *Id.*

261. *Id.*

262. *Id.*

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> [S]mall groups, such as the clergy, business managers, and academics, have a tendency to co-opt younger colleagues. In other words, they push their own disciples through the eye of a needle to make them part of the system. This makes the up and coming generation extremely dependent on the patronage and good will of the older generation. . . . [B]reaking the taboo of mentioning the past can be a risky business. The cartel of silence does not collapse until public pressure on the older generation increases or until the job market expands and diversifies to the extent that the profession can no longer respond homogeneously.[263]

And indeed, unlike in the immediate postwar years,[264] German legal scholars starting in the 1980s criticized vehemently the BGH's intent rationale[265] as the "quasi illegal"[266] rewriting of the statute's key term (*Rechtsbeugung*)[267]—an approach that ran counter to prior BGH jurisprudence limiting statutory construction to the confines of a term's plain meaning.[268] German canons of statutory construction bear out the criticism. Without a "gap" in the law, the BGH lacked authority to extrapolate from a term teleologically (i.e., *praeter legem*) or to altogether formulate judicial rules outside of the confines of positive law (i.e., *extra legem*).[269] Instead, the BGH, conveniently, sidestepped any discussion of statutory construction in construing *Rechtsbeugung*.

B. *Holding the GDR Judiciary Accountable*

As in postwar Germany, prosecutions of former GDR judges after reunification encountered a number of threshold obstacles: what law would apply to these judges' actions, and what significance—if any—would German courts attribute to unwritten law? In addition, the statute of limitations, for cases that dated back more than five years, could have derailed prosecutions.[270]

In the BGH's first post-reunification decision addressing *Rechtsbeugung* in the former GDR, the court observed that *Rechtsbeugung* had been a crime in the GDR,[271] punishable under Section 244 of the GDR Penal Code: "Whoever knowingly in conducting a judicial proceeding or an investigation as a judge, prosecutor

263. Stolleis, *supra* note 64, at 26.
264. *Id.* at 10 (describing how, in the 1950s and 1960s, "[t]he associations of teachers of civil and penal law, public law, teachers and legal historians regrouped," "greet[ing] one another with an enigmatic smile, united in silence about the past").
265. *See, e.g.*, Uebele, *supra* note 5, at 2307.
266. Ute Hohoff, An den Grenzen des Rechtsbeugungstatbestandes: Eine Studie zu den Strafverfahren gegen DDR-Juristen 9 (2001) (translated by author).
267. *Id.*
268. Spendel, *supra* note 129, at 40.
269. *See, e.g.*, Melin, *supra* note 234, at 286, 289.
270. *See* Uebele, *supra* note 5, at 2323.
271. *See* BGH Dec. 13, 1993, NJW 529, 1994 (Fifth Senate).

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or member of an investigatory body decides contrary to law and to the advantage or detriment of a subject will be punished with imprisonment of up to five years."[272] The Unification Treaty, effective August 31, 1990,[273] rendered applicable article 2 of the (West) German Penal Code, in turn applying the law governing at the time of the crime (the GDR Penal Code's section 244) unless prior to (final) judicial disposition, a more favorable law would go into effect.

The BGH deduced a most-favored-law-bender doctrine: a *Rechtsbeugung* conviction would require a violation of both GDR Penal Code section 244 *and* FRG Penal Code section 336.[274] But if GDR courts could not be considered courts of law under FRG law, GDR judges (and other officials) could not be convicted of *Rechtsbeugung* under section 336, the more favorable law in that event.[275]

Weighing the GDR's professed constitutional rule-of-law principles against a lack of judicial independence (de jure and de facto) in a system controlled by a single ruling party, the BGH concluded that GDR courts had functioned "in large part and despite various pressures in a reasonably neutral manner."[276]

With the door cracked open to prosecutions, the court found that "contrary to law" (*Gesetzeswidrigkeit*)[277] would be evaluated under GDR law,[278] including the GDR's treaty obligations as a 1976 signatory of the International Covenant on Civil and Political Rights.[279] Then, citing Basic Law Article 103(2)'s prohibition against retroactivity, the BGH articulated an entirely new standard for *Rechtsbeugung*: "except for individual excessive acts, punishment of GDR judges for *Rechtsbeugung* must be limited to cases in which a decision's unlawfulness was so obvious, and in which rights of others, especially their human rights, were violated in such a grave manner as to render the decision arbitrary."[280] Next, the court, without citing any authority, set out categories of cases that could meet this test: decisions stretching the language of the GDR Penal Code to an "obviously unlawful" extent; sentencing decisions where the crime had been divorced from the severity of the punishment so as to appear "grossly unlawful and a violation of human rights"; and proceedings, criminal or otherwise, where the objective had not been the attainment of justice but the suppression of political opposition or targeting social groups.[281]

272. *See* Spendel, *supra* note 129, at 1.
273. Einigungsvertrag [Unification Treaty] Aug. 31, 1990, BGBl. II at 889, arts. 8, 9, 315.
274. *See* BGH Dec. 13, 1993, NJW 529 (1994) (Fifth Senate).
275. *See id.* at 530.
276. *See id.* at 531 (translated by author).
277. Strafgesetzbuch [StGB] [Penal Code] § 244, www.gesetze-im-internet.de/englisch_stgb.
278. BGH Dec. 13, 1993, NJW 529 (1994) (Fifth Senate).
279. *Id.* at 532.
280. *Id.* (translated by author)
281. *Id.*

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With this framework in place, the court nevertheless affirmed the acquittal of two FRG labor court judges.[282] In 1989, one of the judges had dismissed an employee's unlawful-termination claim.[283] The employee had been terminated after refusing to join a party paramilitary organization and thus losing his party membership.[284] While the BGH acknowledged the GDR's abusive use of terminations for political purposes, it found the dismissal here not "arbitrary"[285] as required by the new test for *Rechtsbeugung*.

For those expecting accountability for the GDR judiciary's transgressions, the outcome of this early case could have given rise to the concern that history was about to repeat itself. Beyond the outcome in this particular case, the BGH's lengthy discussion of the presumptive legal integrity of GDR courts, while perhaps necessary to escape a categorial bar for *Rechtsbeugung* prosecutions under the BGH's jurisprudence, must have sounded hollow in light of GDR judges' 200,000 political proceedings and sixty to seventy politically motivated death sentences.[286]

Yet upon close examination, the decision still signaled a departure from the court's postwar jurisprudence and laid the foundation for a more exacting examination of GDR judicial transgressions. The alleged law bending here was readily distinguishable from the BGH's Nazi judiciary jurisprudence—short-lived loss of livelihood compared to loss of life. The employee's harm was arguably de minimis since another GDR judge reversed the dismissal of the claim within two months.[287] What is more, the BGH's finding that the GDR was bound by human rights law foreclosed a narrow reading of "GDR law," unlike in many of the BGH's earlier decisions with respect to Nazi law.

Less than a year later, in 1994, the Fifth Senate addressed the appeal of two military prosecutors who in 1984 had failed to prosecute a ministry of state security guard who, highly intoxicated, had shot to death two passersby and injured a third.[288] While still referring to law *breaking*,[289] the BGH found the prosecutors' "arbitrary" actions equivalent to human-rights violations in that facts had been "gravely misrepresented in order to achieve a political aim."[290] Specifically, the decision not to prosecute had omitted the officer's blood-alcohol content altogether; his contemporaneous explanation for his broken leg (accidental discharge of his handgun) had morphed into the result of an altercation; and records showed that the prosecutors had not even attempted to investigate the

282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 532 (arriving at this conclusion based on the employee's inability to fulfill a leadership position without being a member of the party).
286. *See* Hirsch, *supra* note 170.
287. BGH Dec. 13, 1993, NJW 529 (1994) (Fifth Senate).
288. BGH Sept. 5, 1994, NJW 3238 (1994) (Fifth Senate).
289. *Cf.* BGH May 23, 1984, NJW 2711, 2712 (1984) (Third Senate).
290. NJW 3238, 3241 (1994) (translated by author).

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killings.[291] All this, so the BGH, had been done so as to perpetuate the GDR's political system at the expense of justice.[292]

C. The BGH's Unprecedented Mea Culpa

Then, in November 1995, the Fifth Senate ruled on a case concerning a GDR Supreme Court (*Oberste Gericht*) judge, who, as a non-presiding member on three panels, had voted in favor of sentencing four defendants to death in 1955 and 1956.[293] According to the *Oberste Gericht*, these defendants had violated Article 6(2) of the GDR Constitution, which criminalized so-called hate speech against the state.[294] All four were accused of spying for foreign intelligence services at various levels of responsibility—from serving as the "main agent" for the Gehlen Organization to reporting on GDR academics and industrial production.[295] The Berlin District Court had convicted the defendant judge of *Rechtsbeugung* and manslaughter in all three cases.[296]

In affirming the conviction, the BGH found the statute of limitations to have been tolled since any earlier prosecution, "quasi with the authority of law" (*quasigesetzlich*), would have been futile due to the political nature of the trials.[297] Relying on its labor court decision, the BGH ruled out the possibility that the judge had abused the scope of the relevant provision's language, even though its vagueness had rendered the provision incompatible with "rule-of-law principles."[298] The BGH similarly rejected procedural defects as grounds for liability.[299]

Rather, so the court, *Rechtsbeugung* had occurred due to "overly harsh punishment."[300] Whereas death sentences could not be considered "law bending" per se in light of their general international use at the time,[301] "state-ordered extermination of a human life" triggered the need for high scrutiny, especially in cases involving political crimes.[302] The BGH referred to the "preeminent significance" of human life, which may preempt otherwise applicable law in light of "overriding extra-statutory principles and international legal norms"[303]—as clear a reference as any to Radbruch.

291. *Id.*
292. *Id.*
293. BGH Nov. 11, 1995, NJW 857 (1996) (Fifth Senate).
294. *See id.* at 857–58.
295. *Id.* at 860–62.
296. *Id.* at 857.
297. *See id. See also* Uebele, *supra* note 5, at 2323 (pointing out that the statute of limitations finally expired on October 3, 2000, for all politically motivated law bending that had occurred in the GDR).
298. NJW 857, 858 (1996) (translated by author).
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at 859.
303. *Id.* In other words, the court reached the same conclusion as in the cases against Berlin Wall guards (*Mauerschützenfälle*). *See generally* BGH Nov. 3, 1992, 39 BGHSt 1 (1992) (Fifth Senate); BGH Mar. 25, 1993, 39 BGHSt 168 (1993) (Fifth Senate); BGH Mar. 20, 1995, 41 BGHSt 101 (1995) (Fifth Senate). The court cited those cases directly in this *Rechtsbeugung* case. *See* NJW 857, 859 (1996).

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Next, the court acknowledged that the Nazi regime had been enabled by willing judges and prosecutors who had "perverted the law," and many of whom should have been, but were not, convicted of their crimes.[304] With respect to intent, the BGH explained:

> In light of especially high demands with respect to the *actus reus* of *Rechtsbeugung*, which is limited to obviously severe human-rights violations by means of unbearable, arbitrary acts, it is . . . hardly imaginable for a career judge not to recognize the evident unlawfulness of his decision. This applies equally to the defendant's career and even in consideration of his [less exacting education] as a people's judge.[305]

The BGH further conceded that even among GDR jurists, ignorance of justice (*Verblendung*[306]) could not negate intent, not even direct intent.[307]

Rounding out a mea culpa unprecedented in the BGH's jurisprudence, the court characterized its own case law as an "altogether failed" attempt to hold accountable the Nazi judiciary for its crimes:

> Even though the corruption of judiciary personnel by those in charge of the Nazi regime was manifest, the pursuit of Nazi crimes in this area encountered significant difficulties. The death sentences by the Volksgericht remain unpunished, none of its career judges or prosecutors was convicted of *Rechtsbeugung*; the same applies to judges of the special courts and war courts. The BGH's jurisprudence proved essential to this development. This jurisprudence has been the subject of considerable criticism, which this Senate deems valid. All told, this Senate regards failure to pursue Nazi judges due principally to the far-reaching limits on the construction of the intent requirement for *Rechtsbeugung*.[308]

In explicit terms "never heard before by the BGH,"[309] the court's Fifth Senate thereby distanced itself from the court's earlier cases, and the overly exacting intent requirement in particular. As culprits, the BGH cited the 1956 Simon et al.[310] and the 1968 Rehse decisions, rendered by the First and Fifth Senates, respectively.[311] What is more, the court stated that its critics[312]—including criminal law professor Günter

304. *Id.*
305. *Id.* at 862.
306. A more literal translation of *Verblendung* would be "blindness." *See, e.g.*, *Verblendung*, LANGENSCHEIDT, http://en.langenscheidt.com/german-english/verblendung (last visited Mar. 26, 2020).
307. NJW 857, 863 (1996).
308. *Id.* at 864.
309. *See* Otto Gritschneider, *Rechtsbeugung: Die späte Beichte des Bundesgerichtshofs*, 1996 NEUE JURISTISCHE WOCHENSCHRIFT 1239.
310. BGH Dec. 7, 1956, NJW 1158 (1957) (First Senate).
311. BGH Apr. 30, 1968, NJW 1339 (1968) (Fifth Senate).
312. *Id.* (citing Günter Spendel, *Rechtsbeugung und BGH: Eine Kritik*, 1996 NEUE JURISTISCHE WOCHENSCHRIFT 809; Günther Gribbohm, *Nationalsozialismus und Strafrechtspraxis: Versuch einer Bilanz*, 1988 NEUE JURISTISCHE WOCHENSCHRIFT 2842).

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Spendel, who had criticized the court's jurisprudence for decades[313]—had been right.[314]

D. *Accountability at Last?*

FRG prosecutors opened hundreds of cases against former GDR officials[315] of which 183 led to convictions.[316] Of these, there were 104 prosecutions of former GDR judges of whom sixteen were convicted—all but three with sentences on probation.[317] Thus, in the 1990s, there were far more *Rechtsbeugung* cases against (GDR) jurists than during the entire period of 1871 to 1990.[318]

What is more, whereas prosecutions of Nazi judges had been confined to death-sentence cases,[319] GDR judges were prosecuted in the FRG for decisions in seemingly all areas of law and severity of offenses.[320] Roughly, these cases can be divided into four categories: labor-law cases in which GDR courts had dismissed workers' claims for unlawful termination so as to exercise economic pressure; fleeing the GDR; uttering regime-critical statements; and the so-called Waldheim proceedings in which 3,400 German prisoners, held by the Soviets and accused of being Nazis, had been handed over to a GDR special court in Waldheim in 1950 and sentenced to death and long-term imprisonment in summary proceedings.[321]

That said, just over a dozen convictions of GDR jurists and an overall conviction rate for GDR *Rechtsbeugung* of 19.4%[322] perhaps demonstrate a more nuanced approach to GDR jurists' criminal liability than some might suggest.[323] In fact, Spendel and others

313. Gritschneider, *supra* note 309, at 1241.

314. In other cases, the BGH to this day shirks institutional responsibility for insufficient prosecutions and convictions of Nazi criminals. *Compare* BGH Sept. 20, 2016, NJW 498, 500 (2017) (Third Senate) (dismissing any inconsistencies with the BGH's 1969 *Schatz Auschwitz* decision), *with* Anette Grünewald, Case Commentary, 2017 NEUE JURISTISCHE WOCHENSCHRIFT 498, 500 (remarking that the BGH's 2017 decision, while holding accountable a former SS officer at Auschwitz-Birkenau, still leaves a "foul aftertaste").

315. *See* HOHOFF, *supra* note 318, at 5, 21.

316. DUBBER & HÖRNLE, *supra* note 4, at 640.

317. Martina Künnecke, *The Accountability and Independence of Judges: German Perspectives*, *in* INDEPENDENCE, ACCOUNTABILITY AND THE JUDICIARY 217, 229 (Guy Canivet et al. eds., 2016). This figure was accurate at least as of 1998. *See id.*

318. KÄSEWIETER, *supra* note 5, at 88. For other relevant BGH decisions, refer to: BGH Oct. 29, 1992, 38 BGHST 381 (1992); BGH July 5, 1995, 41 BGHST 41, 157 (1995); BGH Sept. 15, 1995, 41 BGHST 247 (1995). Furthermore, unpublished decisions are listed in KÄSEWIETER, *supra* note 5, at 88 n.38.

319. For instance, no judges were prosecuted for applying laws such as the decree disowning Jews retroactively after the pogrom of November 8 to 10, 1939, or the deprivation of citizenship through the "Reich Citizen Law" of November 25, 1941. *See* Spendel, *supra* note 129, at 37.

320. KÄSEWIETER, *supra* note 5, at 89.

321. *See id.* at 93–95. Taking into account the Waldheim convictions, 150 members of the Nazi judiciary were convicted of crimes by East German courts. *See* ROTTLEUTHNER, *supra* note 53, at 96.

322. *See* HOHOFF, *supra* note 318, at 5, 21.

323. *Cf.* KÄSEWIETER, *supra* note 5, at 89.

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bemoaned *inter alia* the "insufficient punishment" in terms of sentences given.[324]

The adequacy of prosecutions, convictions, and sentences aside, the BGH's "unique *obiter dictum* . . . [has been said to] suffer[] only from the shortcoming that it c[ame] too late to affect defendants [who acted as judges in Nazi Germany]."[325] In other words, the price of the concession, a "confession"[326] according to some, was cheap. Nonetheless, it required the BGH to swallow its institutional pride—no small feat given the rarity with which German high courts depart explicitly from their jurisprudence.[327]

Circumstances were more conducive to a critical evaluation of the Nazi judiciary and the BGH's treatment of the same than in the FRG's early decades. No Nazi-era jurists were likely to still work in government, and the political clout of Nazi-era generations was receding. More on point, the judges of the BGH's Fifth Senate its 1995 decision were born in 1934, 1935, 1944, 1948, and 1949, meaning that none had attended university, practiced law, or worked as judges in Nazi Germany.[328]

Moreover, GDR judges' ranks had been purged zealously after reunification,[329] with a mere 9.2% of former GDR judges and prosecutors in office as of 1994.[330] While this led to accusations of a "judicial war against GDR jurists,"[331] not unlike the victor's justice critique following World War II, it eliminated a replay of the "continuities" problem that had tainted the BGH's and lower courts' jurisprudence.

Meanwhile, unlike in the postwar era, the Bundestag had provided two important impulses to the court. In addition to the above-described amendment of section 336, a 1985 Bundestag resolution had rebuked, at least implicitly, the BGH's failure to deprive Nazi courts of their status as courts of law. The resolution called the Volksgerichtshof an "instrument of terror" and a court of law in name only, ordering the federal reporter to delete from its registry all published Volksgerichtshof decisions, including 5,000 death sentences.[332]

324. Spendel, *supra* note 129, at 19.

325. Thomas-Michael Seibert, *Rechtsbeugung: Heimsuchung durch Gespenster*, *in* Peter-Alexis Albrecht et al., Festschrift für Walter Kargl zum 70. Geburtstag 545, 551 (2015) (translated by author).

326. Gritschneider, *supra* note 309.

327. Counterintuitively, it appears that the U.S. Supreme Court overturns its own precedent more frequently than, for example, the German Constitutional Court. *See, e.g.*, Thomas Lundmark, *Umgang mit Präjudizienrecht*, 2000 Juristische Schulung 546, 547 (noting that between 1951 and 2000 the BVerfG overturned its own precedent in only about a dozen cases (out of 3,500), whereas the Supreme Court did so in 115 published cases (out of roughly 6,553)).

328. Gritschneider, *supra* note 309, at 1240.

329. Markovits, *supra* note 2011, at 2271–72.

330. *Id.* at 2271 (noting, too, that both the Weimar Republic and Hitler had retained the vast majority of judges).

331. Käsewieter, *supra* note 5, at 89 (translated by author).

332. Beschluss des Deutschen Bundestages aufgrund der Beschlußempfehlung des Rechtsausschusses [Resolution of the Bundestag on the Recommendation of the Judiciary Committee], Jan. 25, 1985, Deutscher Bundestag: Drucksachen und Protokolle [BT] 10/2368.

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Still, some of the elements of the BGH's postwar *Rechtsbeugung* jurisprudence lingered. It would take the BGH another twenty years to abandon direct intent's infamous cousin, judicial privilege,[333] which the court had derived from *Rechtsbeugung* (and its purported direct-intent requirement) in the 1950s.[334] In a 2015 decision, the BGH called the rationale for judicial privilege "largely obsolete" after the 1974 amendment that had eliminated any mention of intent from the statute.[335] The concession, albeit belated (forty-one years after the statute's amendment), nevertheless evinced the BGH's willingness to give effect—in *Rechtsbeugung* jurisprudence—to the legislature's change to the statutory language.

The court also stuck to its "arbitrariness" test,[336] i.e., the requirement that the judge must have "departed from law and justice consciously [*bewusst*] and in a grave manner."[337] Although the court now applied the test to the actus reus element of *Rechtsbeugung*, not the mens rea element,[338] the test smelled of the previous direct intent requirement.[339] The BGH also failed to square its conditional intent requirement (*bedingter Vorsatz*), now an established part of its mens rea analysis,[340] with the heightened actus reus requirement.[341]

In sum, whereas some GDR judges were held accountable for their judicial transgressions and the BGH came to distance itself explicitly from contrived jurisprudence and judicial outcomes in its Nazi judiciary cases, the court's *Rechtsbeugung* jurisprudence today remains controversial and arguably convoluted, even after some cases in recent years that did not arise out of a transitional setting.[342]

As a recent edition of a leading German treatise concludes, for everyday practice, the "complete lack of contours makes it frequently impossible for those applying [*Rechtsbeugung*] as well as those at whom the crime is addressed (without exception licensed attorneys) to distinguish criminal from lawful conduct."[343] This, it must be stated, is

333. *See* BGH May 13, 2015, NStZ 651, 653 (2015) (Third Senate).

334. The BGH thereby eliminated the need to prove *Rechtsbeugung* in order to convict judges of other crimes—a doctrine that had given *Rechtsbeugung* a strange afterlife as a defense for Nazi judges after *Rechtsbeugung*'s statute of limitations had expired.

335. *See id.* at 653.

336. *Id.* at 40–41.

337. Uebele, *supra* note 5, at 2308 (translated by author).

338. *Id*. at 2306 n.133.

339. *Id*. at 2308.

340. *Id.* at 2318 (noting that today, prevailing opinion considers conditional intent [*bedingter Vorsatz*] to be sufficient).

341. *See id.* at 2308. *See also* Dubber & Hörnle, *supra* note 4, at 638.

342. Uebele, *supra* note 5, at 2295–96 (noting a minor trend in recent years for the BGH to affirm convictions of defendants whose actions were not politically motivated, but also stating that the German Federal Statistical Office only began tracking *Rechtsbeugung* as a separate category in 1995). *But see* Dubber & Hörnle, *supra* note 4, at 637 ("Criminal convictions for 'bending the law' are rare: for instance, in 2010, nobody was convicted . . . .").

343. *Id.* at 2308.

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a rather devastating result, some six decades after the founding of the BGH, and after roughly a century and a half of the statute's existence.

Conclusion

The German experience with *Rechtsbeugung* provides a cautionary tale of judges' unwillingness to hold other judges—their professional colleagues—criminally responsible, even for the worst of judicial transgressions, such as those committed by judges in Nazi Germany. As a consequence, the BGH's *Rechtsbeugung* jurisprudence during the postwar period was intellectually dishonest, lacked decisiveness in light of the transgressions at hand, and failed to bring even a modicum of accountability to the undeniable judicial atrocities at hand. Following German reunification, the court was less lenient in cases of GDR judges. In this context, the court came to renounce its postwar *Rechtsbeugung* jurisprudence in clear and decisive terms, and affirmed convictions of GDR judges. Yet, the BGH's jurisprudence remains elusive to this day.

Beyond doctrinal analysis, this Article provided a comprehensive explanation as to why German courts, and the BGH in particular, fell short. German courts failed because the German judiciary as well as legal academia in the postwar period bought into the illusion that Germany's legal tradition and legal institutions had survived the Nazi period intact. German courts also failed because their professed concern about judicial independence gave rise to a kind of judicial privilege that, lacking any statutory foundation, grew into a bar on successful *Rechtsbeugung* prosecutions. Finally, German courts failed because of their unwillingness to square their rationales across decisions—an issue that still plagues the BGH's *Rechtsbeugung* jurisprudence.

Of course, the goal of this Article was not to rationalize what happened, but to draw conclusions from Germany's experience—not just any conclusions but those that stand up to scrutiny. If the German example warrants generalization, it shows that courts are inherently poor arbiters of other judges' misconduct on the bench, and that adding potential criminal penalties to the equation, in fact, hurts efforts to impose some level of accountability on judicial misconduct.

With these findings in mind and supposing that a "perfect judicial system can be devised by the hands of man,"[344] criminalizing judging, at least in the manner done in Germany since the nineteenth century, is unlikely to get us there. If this holds true of the kind of rule-of-law country (*Rechtsstaat*) that the FRG has become, there is no reason to suspect that courts in countries with spottier rule-of-law records would perform better. That said, this Article focused exclusively on the German experience, and future comparative research should probe whether Germany's experience, in full or in part, is an outlier after all.

344. *Cf.* Ervin Jr., *supra* note 3, at 126.

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