INGA MARKOVITS

Justice in Lüritz

I. The Project

There is no Lüritz. But the place hiding behind this name exists: a town of about 55,000 inhabitants in that northern part of Germany that not so very long ago belonged to the German Democratic Republic, now deceased. It is a pretty place with a large market square, some beautiful churches, the remnants of two city gates, a big shipyard (since 1989 much reduced), a once lively port (now also with little traffic), and a number of picturesque Renaissance buildings sprinkled throughout the city. One of them houses the local magistrate's court, the *Amtsgericht*. With one exception, all of its eight judges are West Germans.

In the days of Socialism, another court was operating in the very same rooms and corridors: the *Kreisgericht* or district court, also a trial court. By 1989, its five judges adjudicated together about 1,000 cases per year, a motley mixture of civil, criminal, labor and family law disputes. Today, four of these judges are attorneys in town; the fifth, still young and inexperienced when the Wall came down, was the only one to remain on the bench when the rule of law took over. In the Lüritz court's archive, socialist and capitalist caselaw stands side by side on shiny metal shelves (the old oak shelves were thrown out soon after reunification), and only the different color of the folders, and the sudden increase in the number and thickness of the files, might tell a casual visitor that, around 1990, some important changes must have occurred in the city's legal life.

Inga Markovits is "Friends of Jamail" Regents' Chair in Law, The University of Texas. This essay is the forerunner to a book on the rise and fall of socialist law in the GDR, reflected in the daily work of one East German trial court and in the experiences of the court's staff and its users. The court, located in a town that I call "Lüritz", holds in its archive records that cover almost the entire life-span of the GDR. These records, supplemented with interviews in town, provide most of the information on which this article relies. Since under German law, court records are not publicly accessible, I will not include any case-identifications in these footnotes. I have also changed the names of all Lüritz citizens appearing in my story. Although they will remain anonymous, I am very grateful to the many eye witnesses to legal life in Lüritz without whose help this project could not have been carried out.

I owe thanks, again, to the German Volkswagen Foundation for financing my many trips to Lüritz, and to the University of Texas Law School for providing me with time and peace for writing when it was most needed.

I found the Lüritz courthouse not by accident. After the GDR collapsed, an East German colleague had told me that, with the chronic staff shortages in the socialist administration of justice, many superannuated records could not regularly be weeded out, as the law required, and I might find casefiles in East German courthouses dating back as far as 1945. An investigation of 24 trial courts in the former GDR eventually led me to the Lüritz *Amtsgericht*. At first sight, the building's size filled me with hope: a three-winged manor house built for the daughter of a duke more than 400 years ago, in which there surely must be enough space to have preserved the court files of four decades. And indeed, the Lüritz archive was well stocked with caselaw from the very beginnings of the GDR — not without gaps, but complete enough to allow me to survey the lifecourse of this legal system in one town.

As I walked out of the courthouse after that first visit, I noticed a little door in the stairwell's wall, too low to allow an adult to enter without crouching. "That's the wood cellar," I was told. "It's where we keep our waste paper." After *die Wende*, the political turnabout, the court had not yet found the money to have its rubbish hauled away. The wood cellar turned out to be a dungeon-like room filled to shoulder level with discarded files. I spent my next Spring Break sifting through the paper-mountains and discovered ledgers and statistics of all sorts, correspondence between the district court and the judicial administration, citizens' petitions and complaints, minutes of meetings at the court and elsewhere, personnel files, arrest warrants, work plans, judges' notebooks recording briefings held at higher courts — samples, and often more than that, of forty years of paperwork surrounding the daily activities of a socialist trial court. When I was a child, I used to play with the idea of stealing the contents of a mailbox at a busy intersection in town, and, by reading every letter in it, learning what life was all about. Now, many years later, I had found my mailbox.

Based on the Lüritz files, and on interviews with the court's former staff and with its clients, I plan to trace the rise and fall of a totalitarian legal system in the legal experiences of ordinary men and women. I am not interested in the Party Congresses and Supreme Court decisions and in the twists and turns of the legal policies of the mighty. We know enough about those. I want to know what happened at the bottom. Central decisions must be carried out by local people, and there is no reason to believe that the famous gap between law on the books and in real life did not also exist under Socialism. What did socialist justice and injustice mean to those who experienced it first-hand? With socialist statute books and legal institutions now dead and gone, the place where the past survives is in the

habits and beliefs of the people who lived it. It is their legal past that I am looking for.

Since this is work in progress, my report will deal as much with the difficulties I encounter along the road than with the final destination of my project. There are so many chances to go wrong. The unimportant heroes of my story leave less dramatic traces than their notorious rulers, and their "unhistoric acts"[1] may easily be misinterpreted or overlooked. Coming from the outside, I may misread events and people. A foreign past is harder to make sense of than a more familiar one, and a totalitarian past is hidden under additional layers of deception and secrecy. Moreover, the fact that Socialism collapsed so rapidly and so completely under its own monstrous weight lends plausibility to capitalist claims of moral superiority that make it difficult to perceive even local East German legal history in any but the bleakest light, and I must guard against my prejudices and preconceptions no less than against my gullibility. Much of what I say will be based on guesswork, on speculation, or on an arrangement of facts that another researcher might have arranged in a different pattern. But for present purposes, it is the enterprise itself that counts — the excursion into the daily life of the law in a totalitarian past — to which I invite you to come along. I know of no other socialist legal history in which the data allow us to get as close a view of "what really happened"[2] as in Lüritz.

II. METHODS

First, a word about my methods. The Lüritz files encase an entire epoch in the confines of two rooms — an organism, now extinct, that, like a fly in amber, miraculously was preserved for our inspection. But there is nothing still and transparent about the Lüritz files. They are extraordinarily dusty, and despite their dust, they are filled with life. GDR court records are quite unlike their West German or American counterparts. American trials are recorded *verbatim* by a court stenographer but, because of the length and the costs involved, are only rarely transcribed and thus are usually not available in print. West German trial records, though always typed, refer extensively to the lawyers' briefs and deal only with the legal issues in controversy, ignoring the social context of a dispute, and while the record will be thick with proofs like bills, receipts, affidavits, and the like, it often is impossible to piece together all the evidence into a coherent tale. By contrast, East German trial records tell a human

1. George Eliot, *Middlemarch*, Norton Critical Edition, Bert G. Hornback (ed.) at 578 (New York and London 1977).

2. Leopold von Ranke's famous quote "Wie es eigentlich gewesen" is cited by Peter Gay, *Style in History* (New York 1974) at 68.

story, beginning at the beginning, and, frequently, not even stopping at the end.[3]

Most plaintiffs and defendants wrote their own briefs, often by hand, explaining in their own words what had happened and why they had suffered an injustice that the court needed to correct. Few parties hired lawyers, and even if they did, the lawyers' briefs read as if dictated by their clients and are filled with moral outrage and with many exclamation marks. The oral argument was conducted in human, not legal language; indeed, socialist judges were constantly admonished by superiors to make themselves easily understood by every person in the courtroom. Trials were recorded not in stenography but longhand by a court secretary who in great haste took down as much of the proceedings as she could. Transcripts are often written in fleeting script and filled with abbreviations. But they also seem less guarded than a subsequent report might be because the time pressures did not always allow a writer to carefully choose her words.

In criminal cases, judges began the trial by conducting lengthy examinations into a defendant's upbringing and his moral and political development. In all disputes, other people than the immediate participants often would add their voices to the story: witnesses told at great length of what they knew; co-workers of the defendants reported on their moral character and working habits. And even after the verdict, judges might discuss with parties how to deal with the results of a decision, or, in criminal cases, might hold post-mortems at a defendant's place of work to ensure that his work collective benefited from the lesson. Each Lüritz trial record thus embodies the story of a social conflict, often told from several angles, and its authoritative resolution by the court.

Even the paper used contributes to the story line. In the immediate post-war years, when everything was scarce, verdicts and briefs were written on anything that would take ink or fit into a typewriter, and if you turn a sheet, you might find on its back the text of a recycled judgment from bourgeois days or the raised fist of a socialist poster hero, now cut down to page size. When paper was available again, it still, for an impoverished judiciary, was so expensive that until the very end of the GDR the Lüritz court used half pages if the text did not require the space of a whole sheet. Typewriter ribbons and carbon paper were kept in service far beyond their usefulness, and on many documents you find that someone traced the letters with a ballpoint to make them visible at all. Photocopies, on silken yellow paper obviously not purchased from Xerox, offer only runny

3. On the use of trial records as windows onto legal culture see Markovits, "Rechts-Geschichte," in, Peter Becker & Alf Lüdke, (eds.), *Akten, Eingaben, Schaufenster: Die DDR und ihre Texte* (Berlin 1996) at 259.

and blurry visions of a text. And the court's rank within the socialist pecking order is obvious from a comparison of stationery in the Lüritz archive, with the best paper used by state-owned enterprises (quite white and relatively firm and smooth), Party and union letters coming next in quality (a little rougher and with less body), and the court's paper at the bottom of the ladder (a brittle and porous grayish-white). Occasionally, the snowy letter of a West German attorney lies between the sheets. One wonders what the Lüritz judges must have thought, comparing the luxurious white of their ideological opponent's message with their own poor-man's gray.

How do I read the files? Since I cannot study every single record in the archive, I read the entire yearly output of the court in three to five year intervals — spacing the distance shorter in eventful times (such as the building of the Wall in 1961 or the final years of the GDR) and longer in more tranquil periods. I pay as close attention as I can to people's own description of a conflict. I look for changes in procedure, in the use of political language, in references to the Party, in the precision, or lack thereof, of legal arguments. I keep a close tab on the court's staff, on the activity of lawyers, and on appearances of repeat players in the trial records. I count a lot—not just the obvious things such as plaintiffs and defendants, issues in controversy, and the like but also facts that might help me to understand the social meaning of a dispute. How close to each other are plaintiffs and defendants in private lawsuits? From the record, I know whether they live in the same or in neighboring houses. I know in many cases whether they are relatives or once were married to each other. Tracing their relations can give me an impression of the human proximity, or distance, of civil litigation under Socialism. What kind of debts do plaintiffs enforce through litigation? I distinguish between personal debts (based on, let's say, a personal loan or the private sale of a bicycle to a neighbor) and market debts (enforced by or against socialist businesses) to learn something about the role of the economy and about the importance of money in East German caselaw. How often, in criminal cases, did the judge deviate from the prosecutor's suggested penalty? Changes over time will tell me something about the growth, or waning, of judicial independence within the socialist administration of justice.

I supplement my readings of the files with interviews in town. The inhabitants of Lüritz tended to stay put: in socialist days, because the housing shortage in the GDR made it next to impossible to find an apartment in another town; in capitalist days, because my informants, usually older people, in an economy of high unemployment are unlikely to be lured away by jobs. As a result, I have been able to find eyewitnesses to legal life in Lüritz whose stories may go back as far as the 1950s. I have interviewed many of the judges who

served on the Lüritz bench: the court's last director, a smart, energetic, and bitter woman; her predecessor, a gloomy man who left the court in 1984, "fed up with everything"; their younger colleagues, disillusioned even before the fall of Socialism. My best eyewitness is Frau Rüter, now 82, who joined the court in 1953 as a "people's judge" (one of those trusted proletarians trained in crash courses to replace the Nazi judges whom the East German government kicked out soon after the war)[4] and who stayed on the bench until 1980. I have questioned notables in town about their use of and their opinions about the law: the man who for 25 years was First Party Secretary in the district — under Socialism, the local Prince — and who died in 1999 without so much as an obituary in the local paper; his liaison to the court and other "organs of order and security," a mousy, respectful man; the head of the city's feared Department for Interior Affairs, a graduate of the *Stasi* Academy near Berlin, who in the tumultuous fall of 1989 was denounced by his own son on the Lüritz market square. It seems as if I even know those judges now long dead or gone, whose handwriting and reasoning styles I recognize in the files, and whose portraits Frau Rüter has drawn for me. There is her friend Judge Haas, for instance, a war widow with two small children, like Frau Rüter a "people's judge," who joined the court in 1951, whom I already knew from her decisions to be a warm-hearted and resolute believer in Socialism. And there is a cast of other characters: Judge Lindemann, another early "people's judge," who under Hitler had spent years in concentration camp and who was always sick; Judge Lübtow, a rare bourgeois holdover from the past ("but always helpful if you had a tricky legal problem"); Judge Gustafsen (who lived in the little flat in the courthouse's attic and who drank too much); Judge Schmalz, a self-righteous ideologue to whom I had taken a disliking in the files and whom Frau Rüter did not care for either ("a slimebag"). These are the actors of my drama and the files my script. What can I learn from them?

III. Problems

1. What can I learn from court files in the first place? Litigation reflects the malfunctionings of social life: crimes, divorces, evictions, firings, people breaking their promises. Court cases do not tell us about the marriages that work, the employees who conscientiously do their job, the vast majority of people who do not break the law. Would I have been better off stealing my mailbox after all? But even the negative selection of life-stuff that one finds accumulated in the archive of a trial court reflects the social context from which the sam-

4. On "people's judges" see Feth, "Die Volksrichter," in, Hubert Rottleuthner, (ed.), *Steuerung der Justiz in der DDR* (Köln 1994) at 351; Julia Pfannkuch, *Volksrichterausbildung in Sachsen 1945 – 1950* (Frankfurt a.M. 1993).

ples have been taken. My civil litigation files, for instance, tell me what the citizens of Lüritz considered to be worth a fight. They tell me who fought whom; who looked to the law for help and how easy or difficult it was for the contestants to get into court. I can learn from my files how this society resolved at least some of its conflicts and how religiously it kept to its own rules. My files reflect what Lüritz people meant by justice. What did they think the law owed them? When did they feel that their rights were violated? And every one of these records mirrors the authority relationship between the Lüritz citizen and their socialist state: the court's parental,[5] and often, plain authoritarian conviction that citizens needed education and guidance and the citizen's responses to that claim, a changing mixture of deference, timidity, resignation, manipulation, and, surprising often, cheeky self-assertion.

Moreover, since these are trial records of a state that believed in planning, the Lüritz files contain a lot of information solicited not necessarily to resolve the case at hand but to inform the state's social engineering goals at large. Both parties to a divorce suit, for example, had to fill out lengthy questionnaires about their married life and about the causes for its disintegration. Their statements provide telling information not only about basic social data (such as the comparative incomes and education of men and women) but also about the personal relationships of men and women under Socialism. "What was the state of gender equality in your marriage?" one of the planners' questions asked, separately, of each spouse. "No problem, I always helped with the dishes," most men replied. "No problem, he always helped with the dishes," most women wrote. And I, reading their responses decades later, for a minute feel sympathy for the socialist state that found it so difficult to impress notions of gender equality upon a traditional and parochial people.

There are many other instances in which the files throw light on matters far beyond an individual dispute. Arrest warrants, for example, contained the question whom to inform about a suspect's imprisonment. Most of those apprehended named a relative. Many said: "nobody." But in reading hundreds of arrest warrants I have not found a single case in which somebody said: "my lawyer." Whatever lawyers did for their clients under Socialism, they were not considered natural allies against the state. In fact, wherever I look, the Lüritz trial records are full of information about everyday life in the GDR. Labor law case files tell about the working conditions in enterprises. State suits to terminate parental rights are filled with infor-

5. The term "parental law" was coined to Harold Berman who was the first to analyze the peculiar mixture of authoritarian control and solicitude in socialist legal systems. See Harold Berman, *Justice in Russia. An Interpretation of Soviet Law* (Cambridge 1950).

mation about child-rearing patterns and problems. Witnesses' testimony in divorce suits provide glimpses into socialist work-a-day reality. "I'm living right above them and I can hear everything," a neighbor might testify in a divorce case, informing the judge about the couple's fights and me about the fragile privacy within the thin walls of socialist pre-fab apartment houses.

2. So I can learn something from the Lüritz files that speaks of more than the pathology of daily life. But can I trust the files? After all, this was a totalitarian state that kept its dirty secrets under much tighter wraps than a democracy is able to do. For example, "political" cases were not handled by the Lüritz District Court but by a trial court in the regional capital or — in more serious cases — by a special panel at the regional Court of Appeals. That might mean that the most troubling legal incidents in Lüritz cannot be researched in the Lüritz archive and that my view of local justice under Socialism might be too rosy.

Today, most case files involving crimes against the state that were committed by Lüritz citizens are stored by the prosecutor's office in the regional capital. Those dealing with offenses investigated by the secret police are held by the *Stasi* Archive (also called Gauck Archive after its first director, the East German pastor Joachim Gauck) in Berlin or by one of its regional branch offices. I followed my political defendants from Lüritz to both locations. Access to secret police files of the former GDR for researchers is fraught with complications, and I could do no more than spot checks on my Lüritz subjects in the *Stasi* Archive.[6] But the prosecutor's office in the regional capital today still holds a complete set of index cards from the GDR Court of Appeals that contains the names, addresses, offenses, and sentences of all "political" defendants in the region since 1969. Checking for Lüritz addresses, I could determine the number of people from my town whose crimes were considered so threatening to the state that they could not be handled back in Lüritz but had to be adjudicated by the more reliable and distant courts in the regional capital.

Their numbers turned out to be far lower than I had expected. On average, not more than 1% to 2.5% of the annual criminal caseload of the Lüritz trial court (or 2 to 10 cases of a yearly caseload

6. Under the *Stasi*-Records Act of 1991, only *Stasi* victims have unrestricted access to their files. Researchers can use victim files only if the victim consents or if all identifying details in a file have been expunged. The process requires multiple xeroxings of each page and places the selection of the files and the choice of whether and how fast to copy often copious records into the hands of academically untrained Gauck-Archive personnel. See Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik of Dec. 20, 1991, *Bundesgesetzblatt* (henceforth BGBl.) I 2272 (1991) and Markovits, "Selective Memory: How the Law Affects What We Remember and Forget About the Past," 35 *Law & Society Review* 513 (2001).

of 400 to 500 prosecutions) dealt with *Stasi*-investigated cases that were adjudicated out of town.[7] To judge by the case files in the prosecutor's office, the crucial criterion for separating regional from local defendants or black sheep from gray was not their type of offense ("resistance to state authority," for instance, was routinely handled by my trial court) nor the severity of the offense (penalties handed out in the regional capital were not necessarily higher than those the defendant could expect from the court in Lüritz) but a case's potential to cause political embarrassment. Workers and peasants who "resisted state authority" while drunk would be prosecuted in town. A middle-class defendant or that rare troublemaker who was sober when he got into a fight with the police might find himself in court in the regional capital. Chance played a role as well, and on a number of occasions the court in the regional capital returned a case that seemed sufficiently innocuous to the Lüritz *Kreisgericht*.

While comparing my records from the prosecutor's office and the *Kreisgericht*, I also made another discovery, more significant for this project. My own assessment of what makes a case "politically embarrassing" is not the same as that of East German law officials at the time. They seem to have removed from local view all those offenses that might upset the town's inhabitants or that they feared might become sensational copy for a Western journalist. Though under GDR rules of procedure, the public, under fairly easy pretexts, could be excluded from a local trial[8] and often was, even then word of a troublesome event might get around more easily in a defendant's home town than in the more distant and anonymous regional capital. As I read the files, the choice of which branch of the police to have investigate a case and where to try it most easily can be explained by the desire to protect the political reputation of the GDR, with "reputation" understood in a narrow and, frankly, bourgeois sense as keeping up appearances, avoiding scandal, and, above all, not dirtying one's own nest.

But I, coming from a different time and place, find those offenses that reveal an actor's discontent and disagreement with the state much less "politically embarrassing" than those prosecutions that reveal the GDR's betrayal of its own hopes for a new society and that show its authoritarian and parental disregard for the autonomy of its citizens. Judged by those criteria, most "politically embarrassing" of-

7. Drawing on secret police statistics, Professor Rottleuthner reports that, in the entire GDR, roughly 3% of all criminal investigations were undertaken by the *Stasi*. See Rottleuthner, "Steuerung der Justiz in der DDR," in Ulrich Drobnig, (ed.), *Die Strafrechtsjustiz der DDR im Systemwechsel* (Berlin 1998) at 26.

8. Strafprozessordnung (Code of Criminal Procedure, henceforth StPO) of the GDR of Jan. 12, 1968, Gesetzblatt der DDR (henceforth GBl.) I p. 49 § 211 para. 3: "The court can. . .exclude the public if public deliberations would endanger state security or if the need to keep certain facts secret so requires."

fenses were investigated by the regular police and tried in Lüritz. Attempts to "flee the Republic," for example, were so commonplace and, it appears, so indisputably considered crimes, that most of them were handled by the Lüritz *Kreisgericht*. Parasitism or "a-social behavior,"[9]— that is: the intentional avoidance of work — (to me an offense reeking of Socialism's obsession with controlling all aspects of a person's life) to contemporary Lüritz authorities did not appear "political" at all but rather as the obvious infringement of an unquestionable social obligation. Truants thus were regularly tried in Lüritz and, at the peak of its prosecution, "a-social behavior" made up more than two fifths of the Lüritz criminal caseload. That means that even with the most awkward cases spirited away to the regional capital, enough politically touchy conduct was adjudicated by the Lüritz *Kreisgericht* to give me a fairly balanced picture of socialist political justice at the grass-root level.

3. But what about "telephone" law? We all have heard of the practice, said to have been common among socialist bosses of all types, of reaching for the nearest phone to tell a judge how the caller expected him or her to decide a particular case. Such telephone calls are unlikely to have been recorded by their recipients. I have never found a note suggesting such a phone call in my Lüritz records. Nor did the practice of higher courts of supervising and directing the decision-making processes of lower courts[10] leave obvious traces in the Lüritz case-files. If the regional Court of Appeals decided, as it was called, "to exercise control" over a local trial (most likely in cases that for one reason or another were considered sensitive), it would inform the Supreme Court and the Ministry of Justice of its intentions, outline its procedural strategy, and often ask advice from its superiors. But the supervision would leave no mark on the trial record in my Lüritz archive. Nor do my records tell me whether the Lüritz court itself avoided political trouble by looking for an out-of-court "political solution" to a dispute whose legal resolution might have caused embarrassment. Only in rare instances, due more to oversight and blunder than intention, will I be able to detect the fingerprints of official meddling in the Lüritz files.

Still, there are telltale signs that can alert a reader of these records to the possibility of outside interference with a case. Sometimes, I find a little slip between the pages of a trial record, no bigger

9. § 249 Strafgesetzbuch (Criminal Code) of the GDR of Jan. 12, 1968 in the version of Dec. 19, 1974, GBl. I p. 14 (henceforth StGB/GDR) provided penalties of up to three years in prison for those who "infringed upon the public order by avoiding regular work." By penalizing "parasitism" and "a-social behavior", GDR criminal policy followed in the footsteps of Nazi law; see Wolfgang Ayaß, *"Asoziale" im Nationalsozialismus* (Stuttgart 1995).

10. See the collection of studies in Hubert Rottleuthner, (ed.), *Steuerung der Justiz in der DDR* (Köln 1994).

than a dry cleaner's receipt, by which the regional court announced the return of a particular case-file to the Lüritz archive. Most likely, these are cases in which the regional court decided to "exercise control" over a local trial and needed to see the record. My Lüritz case-files will keep mum about why the regional court was interested in the case and what solution to the dispute it was advocating. But since the regional court reported regularly to the GDR Ministry of Justice, I can find its reports, including those concerning the Lüritz *Kreisgericht*, in the collection of documents from central GDR authorities now held by the Federal Archives in Berlin.

Sometimes a time-gap in the progress of a Lüritz case arouses my suspicion. A suit is filed, the legal process is beginning to take its course, but then, out of the blue, the court suspends the case for half a year after which the suit is either dropped or dismissed. In many of these instances, there may have been an innocent explanation for the delay: the parties may have asked the court for time in order to work out a settlement. But it is also possible that the court itself initiated the delay or stalled the process on instructions from the supervising Court of Appeals in order to enlist the help of government or Party officers to resolve a conflict out of court that it did not want to subject to the authority of legal rules or the publicity of even an East German oral argument and trial. This does not necessarily mean that the parties got more, or less, than if the dispute had been terminated by a judgment. But it means that the conflict was resolved by way of politics, not law, and that it could be kept out of the public and, many years later, the researcher's, eye. One could compare the outcome to a settlement, but a settlement not driven by the parties' wish to cut the risks of losing but by the Party's wish not to lose face. Again, I will not know from the Lüritz record what it was that worried the trial court or that attracted the superior court's attention. All I have to go on is a vague suspicion caused by an unexplained delay. With luck, I might, again, discover its reason in the regional Court of Appeals reports held by the Federal Archives in Berlin.

And finally, there are cases in which the facts themselves pique my curiosity. A fight between two wealthy Lüritz doctors over the height of a hedge between their gardens is finally resolved when the GDR Ministry of the Environment furnishes one of the parties with a letter emphasizing the desirability of preserving the hedge in an untrimmed state. Why should the Ministry bother about a law suit of two small town doctors unless at least one of them had friends in high places? The manager of a large state-owned chicken farm is convicted of an economic crime for ordering the destruction of 40,000 newly hatched birds when every chicken-processing factory in the country, already burdened by quantities of unsold chicken products,

refuses to accept additional chickens. Who chose him as the designated villain in this economic mess?

The records held by the Federal Archives in Berlin help me to understand the regular, work-a-day supervision of local courts by the superior Courts of Appeal. But for the more suspicious cases, those with a whiff of favoritism or corruption that goes beyond the ordinary exercise of democratic centralism, written traces of someone's meddling are hard to find. Since "telephone law" allowed local bosses to contravene or by-pass central policies, it was officially disapproved of in the GDR. I was told by several former judges that trial judges, without real danger to themselves, could resist the attempts of local big-shots to dictate their decisions. That does not necessarily mean that judges did resist, nor does it mean that central authorities, if need be, did not rely on modes of interference that they would criticize if used by their subordinates. This was a legal system in which right outcomes — with "right" defined by those in power — mattered more than procedure, and many functionaries at all levels were willing to break the rules, with or without the pangs of a bad conscience, to please their higher-ups. How can I know about those cases?

If my suspicion is aroused, by asking. I have spoken with both doctors in the hedge case and learned that both pulled Party strings to win their case and that one of the contestants enlisted the help of the secret police for whom he worked as an informer. I questioned the manager of the chicken farm about his conviction and was shown the copy of a speech by Honecker in which the First Secretary railed against the "capitalist" perversion of destroying food stuffs for which the market had no demand. I spoke with the judges involved and with other judges who had heard and gossiped about these cases. Obviously, I can research only a few cases in depth. But my interviews teach me about the setting in which the judges and parties operated.

I learned from conversations with former Party functionaries about the "security conferences" in Lüritz at which, under the chairmanship of the local chief prosecutor, representatives of the Party Secretariat, the Police Department, the Department of the Interior, the Secret Police, and yes, the Director of my *Kreisgericht* met once a month to discuss "security issues" in the district: a rise in juvenile delinquency, or in the number of people caught while attempting to "flee the Republic," for instance; a spate of unexplained fires in the region, or the recent lawsuit of a dozen workers from the shipyard challenging the miscalculation of their annual bonuses. Anything that might cause "unrest" in town, that could affect the performance of local industries, that hinted at the possibility of civic discontent, or, worse, opposition, thus, once a month, would be the subject of a meeting of those in town who exercised the state's control over its citizens. The court was considered one of the socialist "security forces." It is

likely that the participants of these conventions regularly discussed some cases on the docket of the Lüritz *Kreisgericht*.

What would happen? I can guess. Take the case of the shipyard workers joining up to sue their socialist employer over bonuses. Socialist authorities disliked group actions: perhaps because they smelled of insurrection, and the rise of such cases in the 1980s in the GDR (quite a few of them in Lüritz) signaled trouble. The Lüritz court director very likely would mention the new case at the monthly "security meeting." Quite possibly, the Party Secretariat had already been informed. Those present at the meeting might think it best to defuse the issue by resolving the plaintiffs' problems out of court. The court would help by gaining its non-judicial colleagues time and would delay the hearing of the case. That much I know from several reports by the superior regional court in the Ministry of Justice's records in Berlin in which the regional court advises the Ministry of Justice of the filing of such suits in Lüritz or elsewhere and informs the Ministry that a date for trial has not yet been set and that local authorities are looking for "a political solution" to the dispute. Meanwhile in Lüritz, the court might orchestrate a meeting of state and enterprise officials who, with the assistance of the Party, could work out a compromise that halfway met the plaintiffs' expectations. A settlement of sorts, you might well say, although again one driven not so much by the parties as by the Party's obsession with complete control. The plaintiffs would eventually withdraw their suit — as the court record of the case will tell me. The rest of my story is built on interviews and guesswork. Reconstructing the political influence on court decisions is not a matter of putting two and two together: too many parts of the equation are missing. Rather, the researcher works like an archaeologist, rebuilding the remaining shards of an ancient vessel, while guessing, from the shape and curve of each fragment, at the pot's original shape. My interviews are indispensable for divining the outlines of my object of construction. Every piece counts. I learn, for instance, from a former court director that, although he was not friends with the two attorneys in town, he regularly met to play cards with the head of the city's Interior Department. "Aha," I think. Another chance for him to discuss a tricky case with the head of police and another bit of evidence for me to add to my collection of pottery shards.

4. But can I trust the people whom I interview? After all, they may lie to me. More innocently, they may misremember, or they may, in almost good faith, reconstruct their past to make it look the way they would have wanted it to happen. I cannot be sure. But as far as I can tell, I have encountered many omissions and evasions in the course of my project but very few lies. The most frequent fib seems to be the assurance that my conversation partner had never

been a member of the Party. But those are silly lies, easy to check, that usually collapse soon after being offered and that, moreover, are of no interest to me because under Socialism, the Party, like the Catholic Church in the Middle Ages, was almost the only place where people of intelligence and drive could achieve something. Like the medieval Church, the Party thus housed liberals and conservatives, reformers and reactionaries, good people and bad, and I assume that even those who were not Party members, if they held any status in this state at all, in one way or the other must have cooperated with the Party. I never ask my witnesses about their Party membership. The lie "I was not a member of the Party" is always volunteered.

In fact, I try not to ask any questions that might tempt the answerer to lie, such as questions about guilt or innocence. Once a lie is spoken, it pollutes the conversation, like an unpleasant smell, and it is difficult for both participants to return from the deceit to a relaxed and open give and take. Much better to talk about factual issues such as work loads, ambitions, colleagues, pleasant and unpleasant tasks—the thousand details of an ordinary workday that grounded my conversation partners in the world that I investigate.

But if blatant dishonesty is not a problem for my project, the subtle treachery of memory is. By the time I talk to them, most people's recollections, like a ray of light, have several times been broken in the prism of political events. My conversation partner, looking back upon his socialist past, will want to describe his former self as someone worthy of respect. He will want to see his present self as someone who deserves acceptance by the new society. And he will want to please me, the interviewer, by his answers. This is one reason, I believe, why my witnesses occasionally lie about their former Party membership. Anticipating a Westerner's ignorance about what it meant to be a member and her contempt for all things socialist, the witness' statement "I was not a member . . . " becomes an awkward and untruthful shorthand for the legitimate claim: "You should not write me off." In a way, Party membership has become an issue of conflicting German memories. The Eastern speaker remembers himself as an honorable man. But if he admits to his former Party status, he fears that he will not be believed by his Western listener. Hence the lie: to establish the self-perceived truth of his moral worth.

In this and many other situations, my respondents' memories may filter out those facts that are at odds with their desired self-representations. I, on the other hand, have seen the files. Within their limits, I will know more precisely what went on in a particular case than those who years ago were present when it happened. My conversations with Frau Rüter offer many examples of memory corrected and embellished over time. Take the court's practice, in the early

1960s, of discussing pending divorce suits with the members of the parties' work collectives. Frau Rüter remembers those occasions as tactful, pastoral encounters between the couple and a few trusted notables (the judge, the Party Secretary of the enterprise or collective farm, maybe a teacher or a union representative) trying to talk sense into a troubled and unhappy couple. But I know from the records that, at times, 50 or 60 neighbors and colleagues of the parties would be present, debating the spouses' failings in a local assembly hall, and that on at least one occasion the audience voted to evict the husband's new girlfriend from collective housing to make her move away and so to save the marriage. Frau Rüter, to this day, remembers the large bunch of flowers that a grateful couple sent her after a successful reconciliation. I know from the divorce files that the reconciliation was short-lived.

My witnesses also may "remember" things that did not happen. I ask Frau Rüter about some criminal case that she decided many years ago. Frau Rüter knows by now that, in my view, East German sentences were often very harsh. "I did come down hard on him, didn't I," she says. As a matter of fact, she did not. But she expects me to believe so, and her current expectations have pushed aside whatever recollections she might have of "harsh" or "mild" Lüritz penalties in the 1960s. My files will answer questions about factual matters long since past far more reliably than my conversation partners can today.

To my surprise, people may misremember not only failures and embarrassments but also acts of courage. Here is, again, a case decided by Frau Rüter. In 1958, she gave a suspended sentence to a young man accused of "resisting state authority."[11] He had gotten into a fight with the police. The GDR Supreme Court vacated the decision and returned the case to Lüritz with the instruction that a crime against the state that involved physical insurrection deserved a non-suspended sentence of some severity.[12] Meanwhile, the culprit, still at large when the Supreme Court heard his case, had the good sense to use his presence at the hearing in Berlin — these were pre-Wall days — to take the underground to West Berlin.

Frau Rüter, upon receipt of her instructions, adjourned the case. East German rules of procedure would have allowed a trial *in absentia*.[13] But she informed the Supreme Court that the defendant's presence at his trial was essential. As both the Lüritz court and the prosecution knew, at his arrest he had been badly beaten up by the

11. § 113 Strafgesetzbuch (Criminal Code) of May 15, 1871 as amended by Gesetz zur Ergänzung des Strafgesetzbuches (Law Amending the Criminal Code) of December 11, 1957, GBl. I at 643.

12. Supreme Court of the GDR, decision of June 3, 1958, 4 *Entscheidungen des Obersten Gerichts in Strafsachen* 155 (1960).

13. StPO supra n. 8 §§ 262-269.

police. The court could not clear up this facet of the case without his testimony. Since he had fled, she could only adjourn the trial until his unlikely return.

More than a generation later, I read this small-town people's judge's letter to the highest court in the land and wonder. Frau Rüter had in fact been criticized for what the Supreme Court also could have called bourgeois lenience. Now this response, charging, in turn, socialist police brutality. How did the Supreme Court take her answer? I ask Frau Rüter about the incident. She cannot remember. I finally show her a copy of the long-forgotten letter. "Oh, yes," she now says. "I got into a lot of trouble about this case." Why? Because in her correspondence with the Supreme Court she had referred to the police unit involved with the colloquial term "mugging commando" (*Überfall-Kommando*). The correct term should have been "rapid response squad (*Einsatzkommando*)."

I cannot believe that, in 1958, Frau Rüter's superiors found no more wrong with her bout of independence than her choice of words. These were more than ordinarily repressive days in the GDR. Yet this is how Frau Rüter's memory has preserved the incident. Maybe this third-generation communist simply refused to register accusations of bourgeois consciousness. Maybe Frau Rüter needed to forget the slight in order to maintain her lifelong faith in Socialism and its administration of justice. My lesson learned from this and many other conversations is that I cannot use my interviews as proof of indisputable facts and events. Some eyewitness reports may be "true" in the sense that they correctly describe what happened. Some may not. But they are always "true" to the state of mind of the reporter. The most important function of my interviews is that they allow me to understand events not from my own, often foreign and ignorant, perspective, but from the viewpoint of someone who experienced what she talks about firsthand. My interviews enable me to switch places and to put myself into another person's mind.

Here is an example. A Lüritz lawyer tells me of a case from the early 1980s in which his fifteen year old client received a nine month prison sentence for attempted *Republikflucht* ("flight from the Republic")[14]. All she had done was skip school, hitchhike to East Berlin, strike up a conversation with some Western students visiting the Eastern sector of the city, and ask them to mail a postcard to her mother from the West: "Hi Mom. Greetings from West Berlin." Before the postcard even had arrived in Lüritz, the girl had called her mother and had told her not to worry. But meanwhile, the Secret Police had gotten hold of the suspicious message, had visited the mother, and had made her drive with two *Stasi* agents to East Berlin to identify her child at a pre-arranged meeting place. At the rendez-

14. StGB/GDR), supra n. 8 § 213.

vous, the mother had walked up to her daughter and had greeted her with a Judas kiss.

This is the frightening story. But as I talk to the girl, now a young woman, about her ordeal I learn to my surprise that she is not angry at her mother. She does not feel betrayed. As she tells her story, the mother did not act like someone who entrapped her daughter, but on the contrary, like someone who supported her through this and other troubles up to this day. The mother would have preferred not to cooperate with the *Stasi*. But she wanted her daughter, then a difficult and rebellious child, out of harm's way, and even flirting with escaping to the West was dangerous. I have found a few denunciations in my files: most of them by parents who reported their children to the police either for planning to flee the Republic or for refusing to do what was considered honest work. In both types of cases, the informers' children — teenagers or young adults — predictably wound up in prison. But prison, to these parents, seemed to have appeared a safer place than the minefields one would have to cross to scale the Wall or even than the corruptive company of drunkards and good-for-nothings.

In a parental legal system, the Super-parent State could appear as a natural ally to a mother or father who could no longer control and protect a wayward child. I realize that my horror at the young woman's story was too simple. Neither the socialist state nor the parent in these stories knew how to handle a dependant's insurrection. But the mother's kiss was not a Judas kiss. Try, for an experiment, to mentally transpose her behavior into Nazi Germany. No loving Jewish mother could possibly denounce her daughter, for her child's own sake, to the *Gestapo*. But in the GDR, the state was both feared and trusted. After her time in prison, my conversation partner returned to a narrow world of work, housing, healthcare, safety and predictability. Her report helped to let me understand this world a little better. Every one of my interviews does. Without them the facts learned only from the Lüritz records would seem like a movie without sound: an often baffling and disjointed story.

IV. Findings

In this essay, I can give only a rough prospective of my findings; a timeline, not much more, of legal developments in Lüritz from the beginning to the end of the GDR and a quick sketch of Lüritz citizens' relationship with the law.

1. Confusion

On April 14, 1945, the city suffered its last air-raid of the war. Three weeks later came Germany's unconditional surrender. It took a while for the Allied Forces to agree on the border between the So-

viet and the Western occupation zones,[15] but by July 1945, Lüritz was definitely located in the Soviet Zone. A photograph in the town's museum from this time shows a little girl, handing a big bunch of flowers to a smiling Soviet soldier. But real life in Lüritz must have been frightening and chaotic. The city was swamped with refugees from the Eastern parts of Germany, looking for rest and shelter on their trek to the West. Townspeople who could manage joined their flight to the Western zones. Locals and refugees vied for scarce food and housing. The overcrowding brought typhoid in its wake. The Russians, undisciplined and unpredictable, were in control. It is hard to see how law in those years could have had anything to offer to Lüritz's battered citizens.

What law? What courts? Two months after the capitulation, on July 9, 1945, the Allied Control Council had ordered the restoration of Germany's traditional court system.[16] But on September 4, 1945, the Soviet Military Administration (SMAD) decreed that, in the Soviet Occupation Zone, all former members of the Nazi party were to be dismissed from the administration of justice.[17] Since already by 1935, 80% of all German judges had been members of the NSDAP,[18] the Soviet de-nazification program amounted to an almost total turnover of judicial staff. In fact, the purge could serve a double purpose: to cleanse a judiciary deeply tainted by the Nazi years, and to replace supposedly "a-political" bourgeois professionals by class-conscious and politically committed judges from the people.[19] Until those new judges could be found and trained, some temporary personnel was needed for the courts to function. A few sitting judges who had not been members of the Nazi party were allowed to carry on. Clean-vested bourgeois pensioners with legal training were resurrected from retirement. Where to find the rest?

On December 17, 1945, the Soviet Military Administration ordered the introduction of legal training courses for "people's judges."[20] The new East German government and Party authorities eagerly carried out the plans. The recruits, ordinary men and women of preferably proletarian background, were taught the rudiments of German law together with growing doses of socialist ideology, in crash courses that lasted six months at the beginning of the program

15. See Daniel Holtrop, "Schwerin as Case Study of the Anglo-American and Russian Occupations in Mecklenburg," unpublished paper delivered at the German Studies Association's Conference, Oct. 8-11, 1998, in Salt Lake City (on file with the author).

16. Ruth-Kristin Rössler, *Justizpolitik in der SBZ/DDR 1945 -1956* (Frankfurt am Main 2000) at 22.

17. Rössler, loc. cit at 22.

18. Rössler, loc. cit. at 14.

19. On the de-professionalization of the East German judiciary see Hilde Benjamin, (ed.(, *Zur Geschichte der Rechtspflege der DDR 1945-1949* p. 91 (Berlin 1976).

20. Benjamin, loc.cit. at 94.

and that eventually were lengthened to one, and finally, two, years.[21] Many of the new law students found it difficult to handle the syllabus. Like the Western occupation zones, the Soviet zone still was largely governed by the law of pre-war Germany, amended by decrees of the Soviet Military Administration, but dominated, nonetheless, by the great German codes of the turn of the century and their elaborate doctrinal apparatuses. The bourgeois law's most famous prototype, the *Bürgerliches Gesetzbuch* (Civil Code or *BGB*) of 1900, remained in force in the GDR until as late as 1975.[22] To join a training course for "people's judges," an applicant needed, besides what counted for good political character, no more than a completed grade school education.[23] No wonder that many of the candidates, unused to formal schooling and to deskwork, could not stay the course.[24] And many of those who passed, would have to struggle all their working lives with the doctrinal subtleties of the civil law. Judge Rüter, originally a cigarmaker by training, who entered the last, by now two year training course from 1951 to 1953, still speaks with gratitude of the few holdover bourgeois jurists on the Lüritz bench who helped her out if some intricacy of the *BGB* defied her. By 1960, all "people's judges" had to pass a two-year correspondence course with the country's new Academy for State and Law to retain their posts[25] and by then, the differences between the populist old guard and the new, academically trained judiciary began to blur and disappear. But justice in East Germany's early post-war years was colored by the strengths and weaknesses of the hodge-podge and populist "people's" judiciary.

The earliest case file in my Lüritz archive concerns a suit over the purchase of a horse, filed on January 26, 1946. By then, the court — as in the past still called an *Amtsgericht* — cannot have been in operation for more than a few weeks. Astonishingly, Lüritz citizens flock to the court as soon as its doors are opened. In 1946, about 350 civil cases are filed; in 1947, about 500; and in 1950, 788 civil suits are litigated in the Lüritz *Amtsgericht,* most of them between private parties. Despite the surrounding political chaos, Lüritz citizens vigorously pursue their legal rights.

Or maybe because of it. The issues in controversy reflect the neediness and deprivation of the times. There are many lawsuits over bicycles (the only means of transportation) and sewing machines

21. On the training of "people's judges" see Andrea Feth, *Hilde Benjamin – Eine Biographie* (Berlin 1997) at 60; Pfannkuch, supra n. 4.

22. It was replaced by the Zivilgesetzbuch (Civil Code; henceforth ZGB) of June 19, 1975, GBl. I p. 465 (1975).

23. Pfannkuch, supra n. 4, at 26.

24. Of 171 participants of the first course for "people's judges", 57% passed the final exams in the Fall of 1946. One year later, of 253 participants, 51% passed the second course. See Benjamin, supra n. 19, at 106.

25. Hilde Benjamin, (ed.), *Zur Geschichte der Rechtspflege der DDR 1949-1961* p. 160 (Berlin 1980).

(the only means to clothe your family). Brothers sue sisters over a pair of used boots or a loan of sheets and blankets. In 1946, 50% of the suits do not ask for money but for the return of objects, much more valuable than paper money that cannot buy what you need to survive such as potatoes, grain, firewood, and, in this agrarian economy, livestock from cattle down to chickens. Both refugees and locals use the law to hold onto the few possessions they have left. "I have lost everything," a refugee from East Prussia writes in his brief. "After repeated requisitions (by the occupation powers) I have nothing left," writes a local farmer. Legal battles are fought tenaciously: in 1946, 43% of the parties have a lawyer (by 1950, that number has fallen to 27%) and almost half of the cases end in judgments (by 1979, this percentage is 19%). Reading these files, one gets the impression of a world that is out of joint but whose inhabitants still cling to the values of their previous life: authority, rank, class, property, the keeping of promises. They expect the law to back up their traditional beliefs. In the early files, male litigants are identified by their station in life: "the metal worker Schmidt," "the pharmacist Schulze." Women are defined in relation to men: "the baker's widow Meyer," "the doctor's daughter Müller." The court's gauge of propriety is "*ein anständiger Mensch*" (a decent and decorous burgher).

In my civil files, the political terrors of the time appear primarily as echoes and reflections from a menacing outside world that private people try to avoid as best they can. Since the criminal law files in the Lüritz archives go back no earlier than to 1952, I have no immediate records of the violence caused by political collapse and hunger in the first years of Soviet occupation. The Soviet Army could not be sued and thus played no participating role in civil casefiles. Their criminal transgressions, like the wave of Soviet rapes in 1945 and 1946,[26] are never mentioned. But like Banquo's ghost, the memory of war and the reality of Soviet occupation are always present. Addresses reveal how refugees and local parties frequently have to double-up in overcrowded housing. Men are surprisingly often referred to as "in prison." "They took my husband in December 1945," a woman testifies. "My husband is a prisoner of war and will soon return," another woman plaintiff hopefully explains. Although the Soviet Army cannot be the object of civil litigation, it is often the cause of it. Who owns a cow that Soviet soldiers have taken from one man's farm and given to another? What about debts owed by an enterprise that is now in Soviet hands? In the Lüritz briefs, the occupation forces are always called "*der Russe*" (the Russian), always in the singular, and I envision the soldier in that photograph in the town's museum, with the same Cossack boots and belted uniform, though

26. See Norman M. Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945 - 1949* at 69 (Cambridge, Mass. 1995).

without the smile. "The Russian" giveth and "the Russian" taketh away. When he is done, the Lüritz judges have to sort out the legal consequences of his acts.

In the very first year or two after the war, several of those judges in Lüritz seem to have been university-trained lawyers recalled from retirement. The most permanent of them, Judge Wapnewski, is 68 years old when the court is opened and stays on the bench until 1952. To judge by their spindly, gothic handwriting, his two law-trained colleagues are even older. They do not stay long. A paralegal, acting as judge *pro-tem* in 1946, returns two years later as a "people's judge" — it is Herr Schmalz, the court's ideologue, who is the first graduate of the new training courses to be appointed to the bench in Lüritz. Two young men who were in the midst of their judicial internships when Germany collapsed, for a while with uncertain legitimation are employed as "*ex-officio*" judges and then disappear as well. Most of these people probably go West. I meet one of them years later when he writes from the Federal Republic to ask the court for some documents concerning his retirement pay. Since he had left the country illegally, he gets no reply. Not only judges disappear in these years: trials are adjourned because an attorney has gone West; work piles up in the court's offices because secretaries leave overnight. Everything is temporary and make-shift: the personnel, the law, the methods of reasoning by which the court arrives at its decisions.

The very early files give the impression that the law is on the brink of moving in a new direction but that nobody can tell yet what it is. Uncertainty and contradictions reign not just in Lüritz. In August 1947, the Communist Party, in the regional capital, organizes a demonstration of more than 1,000 people to protest against "too lenient" sentences for black-marketeers — clearly an event scheduled to send a warning to the courts. But six months later, newspapers report the first session of the province's new administrative court, also in the capital, and its verdict in favor of a private craftsman who had sued the state over a license. The administrative court, the very embodiment of liberal notions of the rule of law, would not live long.[27] In Lüritz, a disparate and transient group of judges tries to adjust old bourgeois law to new, unfamiliar circumstances.

27. The establishment of administrative courts in all of Germany was ordered by the Allied Control Council in October 1946, an order reluctantly reiterated by the Soviet Military Administration for the Soviet Occupation Zone on July 8, 1947. Between 1946 and 1948, several East German states passed legislation creating new administrative courts. Although the first East German Constitution of 1949, in its Art. 138, reaffirmed the GDR's commitment to establish administrative courts by federal legislation, that legislation was never passed, and the existing state administrative courts were silently abolished when, in 1952, the federal organization of the GDR war replaced by a highly centralized state structure. See Heike Amos, *Justizverwaltung in der SBZ/DDR* (Köln 1996) at 188; Janke, "die Verwaltungsgerichtsbarkeit in der SBZ und in der DDR," 46 *Neue Justiz* 425 (1992).

It takes the court less than a year to acknowledge that the Soviet occupation forces, like a *deus ex machina*, just by their actions can create new rights. In March 1947, the court awards to its original owner a cow that had been seized by Soviet soldiers and later was found astray by another farmer who then claimed to have obtained it in good faith. Relying on § 935 *BGB*, the court rules that an object lost against the will of its owner cannot be the subject of a good faith acquisition. But five months later, this time in a suit over an abducted horse, the court has changed its mind: any kind of Soviet requisition, whether ordered from above or carried out by marauding soldiers, extinguishes the original owner's rights and allows the *de novo* acquisition of an object by another. Judge Wapnewski writes: "Section 935 *BGB* is a principle geared to peace-times. It does not apply to war and post-war conditions." The original owner of the horse appeals with a plea for traditional justice: "Right must stay right, and wrong must remain wrong, even in times such as ours. Indeed, one might claim that the current times require particular attention to legal rules." As befits the confusion of the times, the Court of Appeals arranges a settlement that mixes conflicting values with the pragmatism of scarcity: the defendant may keep the horse but has to return to the original owner-plaintiff the first foal that the disputed mare will give birth to.

Legal values in Lüritz seem equally ambiguous with judges bowing both in the direction of the old and the new. One case file might contain precise citations to the *BGB*, the next decision may be grounded on only the vaguest reference to un-cited orders of the Soviet occupation forces. Judge Wapnewski switches back and forth between old Nazi vocabulary ("*gesundes Volksempfinden*"—healthy judgment of the folk), socialist newspeak ("the new convictions of the times") and plain good sense ("No reasonable person would pour valuable sugar into the plaintiff's gas tank just to damage his engine"). His views on the role of women in society are those of an unreconstructed 70 year old patriarch, but the views of his socialist colleague, the new "people's judge" Herr Schmalz, are no better.

But there is one important continuity in this clash of worlds and values. I was alerted to it by the suit of a woman, filed in August 1946, who went to court against the Lüritz bank to regain control over her bank account which had been frozen by the Soviet occupation forces because of its owner's alleged Nazi past. In her brief, the plaintiff claims mistaken identity: not she but her sister had been the Nazi bigshot. "It is not right that I should lose all my money because of the Party," the plaintiff wrote. For a moment, I was puzzled as I read this sentence. Should the Communist Party, at this early date, have actively intervened in the case? But then I realized: it was not the Communist Party that the writer had referred to. She meant the

other one: the NSDAP. The plaintiff's choice of words — just "Party," as if no further adjective was needed to describe so powerful and indisputable an entity — made me understand how seamlessly Lüritz citizens had moved from one Party to the next, from one condition of dependence to the other. No breathing space between totalitarian rule and totalitarian rule allowed them to develop the habits of autonomy on which the rule of law must rest. The two dictatorships were very different, and East German Socialism would leave far more room for Lüritz citizens to assert their human worth than the Nazi regime. But the continuity of the individual's subjugation to the state would shape East German law until the end of the GDR.

2. Beginnings

By the early 1950s, the new direction of East Germany and its legal system could no longer be in doubt. On October 7, 1949, the German Democratic Republic had been founded, five months after the West German Federal Republic. In 1952, together with the abolition of the country's federal structure, came the replacement of the traditional German combination of state and federal courts by a highly centralized three-tiered court structure; the Lüritz *Amtsgericht* was now a *Kreisgericht*.[28] In July 1952, East Germany's communist party, the SED[29], announced "the construction of Socialism" in the GDR.[30] By then, the first East German Five-Year Plan was in its second year, the collectivization of agriculture had begun, and law, particularly criminal law, had become a significant instrument to carry out the State's commitment to radical political and social change. 1952 also marks the retirement of Judge Wapnewski, now aged 74, from the Lüritz bench; he becomes an attorney in town. By now, there are four new "people's judges" at the *Kreisgericht*; by 1953, two more — Frau Rüter and Frau Haas — would join the court. Not all are present all the time: two of the Lüritz "people's judges," old communists, still suffer from the after-effects of their imprisonment under Hitler and, because of their poor health, often miss work; two others, in 1954, are diagnosed with TB and for months disappear from the files as well. The court can not yet do without some temporary help and, of the various signatures I find in the records, at least some belong to bourgeois stand-ins, temporarily recruited from Lord knows where. Frau Rüter remembers one of them, Herr Lübtow,

28. Verordnung über die Neugliederung der Gerichte (Decree on the Reorganization of the Court Structure) of August 28, 1952, GBl. 791 (1952).

29. SED stands for Sozialistische Einheitspartei Deutschlands (Socialist Unity Party of Germany), reflecting the 1946 unification, under considerable political pressure, of East Germany's Social Democratic Party (SPD) with the more powerful and overbearing Communist Party (KPD). See Hermann Weber, *Die DDR 1945 - 1990* (München 1993) at 14, 165.

30. Weber, id. at 34.

"one of the old guard," because of his helpfulness and his "beautifully manicured hands." As in other revolutionary times, smooth hands, for the cigar-maker, identify the member of the former ruling class. To Frau Rüter, Herr Lübtow is a valued colleague, but he clearly is also a relic of the past. The new Lüritz judiciary is proletarian (in outlook, if not necessarily in origin), consciously political, activist, ready to do its share in the creation of a new society.

Unlike in previous times, when the court waited for its clients to apply for help, it now goes out and searches for things to do. Frau Rüter and her colleagues define themselves as educators and missionaries of Socialism. Each week, judges and paralegals make the rounds in villages and collective farms near Lüritz to provide legal advice to citizens who might find it difficult to get to town. The chronicles of these visits—modest notebooks bound in black wax-cloth—register the legal problems of a battered and impoverished population trying to make due and record the advice of "barefoot judges" who pay more attention to practical than to legal issues. Lüritz judges arrange collective meetings on divorce suits to persuade their audiences that broken marriages are not private affairs but affect the welfare and productivity of the community. They speak at enterprises and at village halls, admonishing husbands to help their wives with household chores, encouraging wives to take up a job, and lecturing suspicious parents on the ill effects of physical punishment on children. In 1958, the Lüritz court and prosecutor's office hold 20 public meetings at various enterprises to discuss recent criminal sentences that "exemplify the new role of state and law" — whether to instruct or to scare the audience is not reported in my files. A total of 2,420 workers attend.

The language of judgments in these years is openly political. Alimony and support claims of ex-wives and children who defected to the Federal Republic are routinely rejected by the court because East German money "shall not be used to support West Germany's aggressive NATO policy" or because a child "has been removed from the educational influence of our workers-and-peasants state." In 1952, a man who, in violation of export restrictions, tries to sell 13 kilograms of lead in West Berlin receives a 5-year prison sentence with hard labor because "we cannot tolerate that metals needed for the peaceful reconstruction of the GDR are used for purposes of re-armament in West Germany." East German criminal law and policy in these years are obsessed with crimes against the economy (such as theft or embezzlement of state property, the violation of procurement targets, or the concealment of assets to prevent their requisition)[31] and with any

31. In the late 1940s and the 1950s, a series of extraordinarily harsh decrees protecting state economic planning and state property penalized even minor economic transgressions with long prison sentences. See in particular Wirtschaftsstrafver-

behavior challenging state authority: "rebellion" (*Aufruhr*), "resistance" (*Widerstand*), "illegal possession of firearms" (mostly of left-over weapons and ammunition from the War), and "the incitement to boycott" (a new crime, tenuously and without any legal qualms based on a seemingly throwaway sentence of the new East German constitution from 1949[32]), which under Lüritz case-law can mean anything from the distribution of Western literature to an attack on a policeman. In 1953, of a batch of 67 arrest warrants found in the Lüritz archives, 73% deal with offenses against the state or the economy. Two years later, of an incomplete sample of 81 arrest warrants, almost one fifth is for men (almost always drunk at the time) who got into a fight with the police. Reading these files, one gets the impression of a highly charged political atmosphere in which an authoritarian and messianic state confronts a worn-out and resentful population.

The Lüritz court seems to operate in a world of friend against foe, new against old, right against wrong, with "right" not defined in moral terms but in terms of historical correctness. In criminal cases, defendants are identified by cues that help the court to place them in

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ordnung (Decree on Economic Crimes) of Sept. 23, 1948, ZVOBl. p. 439 (1948); Verordnung über die Bestrafung von Spekulationsverbrechen (Decree on the Punishment of Speculation) of June 22, 1949, ZVOBl. p. 471 (1949); Gesetz zum Schutze des innerdeutschen Handels (Statute on the Protection of Inner-German Trade) of April 21, 1950, GBl. p. 327 (1950), and Gesetz zum Schutze des Volkseigentums (Statute on the Protection of People's Property) of Oct. 2, 1952, GBl. p. 982. A year after the passage of the Statute on the Protection of People's Property, a GDR Supreme Court Guideline considerably softened the harshness of East Germany's law on economic crimes by restricting its application to "severe attacks" on state property; see Richtlinie Nr. 3 des Obersten Gerichts of Oct. 28, 1953, ZBl. p. 543. Former Minister of Justice Hilde Benjamin in 1980 admitted that the ruthless application of East Germany's early law on economic crimes had led to "difficulties" which taught "a serious lesson" to East German criminal policy. See Benjamin, supra n. 25, at 314 (1980).

32. Prior to the foundation of the GDR in 1949, crimes such as "sabotage" or "subversion" were punished under Decree No. 160 of the Soviet Military Administration, which provided for severe penalties, including the death penalty, for attacks on the new state order; see Benjamin, supra n. 19, at 243. After the creation of the GDR, the GDR Supreme Court, in the 1950s, produced a large body of case law punishing a variety of attacks on the new "antifascist-democratic order" from "sabotage" and "espionage" to the spreading of political jokes directly under Art. 6 Para. II of the new East German Constitution which condemned the "incitement to boycott" as a "felony;" see Benjamin, supra n. 25, at 291. In 1958, the amorphous criminal case law under Art. 6 Para. II of the Constitution was dispensed with when an amendment to the Criminal Code introduced a list of still very ambiguously defined crimes against the state; see Strafrechtsergänzungsgesetz (Law Amending the Criminal Code) of Dec. 11, 1957, GBl. I p. 643 (1957). In 1968, the Strafrechtsergänzungsgesetz was replaced by the new East German Criminal Code, which distinguished between "felonies directed against the GDR" (chapter 2), punished with mandatory and often lengthy prison sentences and the less serious "crimes against the state order" (chapter 8) such as "resistance to state authority" (§212) or "illegally passing the state border" (§213), which gave room to a much wider spectrum of penalties, including conditional sentences. The death penalty, originally an option for several "felonies directed against the GDR" under the 1968 Criminal Code, was abolished in 1987 by a Decree of the Council of State (GBl. I p. 192).

the camp of progress or reaction: someone is a reliable worker (good); police have found "American gangster novels" in his possession (bad); a defendant has spent her last vacations in West Germany — these are pre-Wall days (bad, or at least suspicious). "*Bei uns*" ("with us") is one of the court's most frequently used expressions. It reflects the feelings of endangerment and isolation of a new creed whose members have to stand together to defend a cause. "In our GDR we cannot tolerate. . .," the court might write, or "we in the GDR insist that. . . ." Those who do not join ranks with the forces of progress have no legitimate place in this society. That applies particularly to people who refuse to work: the "a-socials" or *Assis* who even before "parasitism" becomes a crime in the GDR[33] are punished under rules of the old German criminal code that judges in the early Nazi years had also used, in a similar spirit of "we" against "them," to penalize those who did not fit in.[34] "We in the GDR have no use for people of this type," the court writes in a sentence for vagrancy in 1952. And in 1958, in a decision in which someone is punished with 6 weeks in prison for failing to register at his place of residence, Judge Schmalz explains: "Every citizen of our Republic must strictly observe the Decree on Registration. It protects us against infiltration by dark elements."

Complete commitment to a faith should not be limited to office hours. To demonstrate its close connection with the working class, the Lüritz judiciary in these years is expected to do its share of "*körperliche Arbeit*" (physical labor): the "people's judges" shall get callused hands by doing the people's work. Given the scarcity of labor power in the GDR, the help is needed. In 1958, the Lüritz court is praised for having overfulfilled its promise of 200 hours of production work by 396 hours and for having taken two acres of sugarbeets of a collective farm nearby "into personal care." In 1960, Judge Schmalz, always on the political cutting edge, accompanies the crew of a fishing trawler on one of its trips on the Baltic Sea. In the same fall,

33. The first East German legislation criminalizing absenteeism and work evasion was introduced by the VO über Aufenthaltsbeschränkung (Decree on Restrictions of the Right to Residence and Movement) of August 24, 1961, GBl.II 343.

34. § 361 and §42d of the old German Criminal Code of 1871 (which largely remained in force in the GDR until 1968) punished offenses such as vagrancy, begging, prostitution, or the refusal to take up work with arrest lasting up to six weeks and confinement in "work-houses" for a period of up to two years. These provisions stayed on the books in West Germany until 1959. They were used both in the early Nazi years and in the first decade of the GDR to prosecute drunks, vagrants, and other social misfits. In Nazi Germany, the confinement of Asoziale in "work houses" was increasingly replaced by their imprisonment in concentration camps. GDR law abolished the socialist equivalent of "work houses" (called "Arbeitserziehung"—education through work in special work-camps) in 1977; since then, "work-shy behavior" counts as a "crime against public order", with average penalties between one and two years in prison. See Ayaß, supra n. 10; Friedrich-Christian Schroeder, "Verschärfung der "Parasitenbekämpfung" in der DDR," 9 *Deutschland-Archiv* 834 (1976).

Frau Haas spends four—probably more useful—weeks harvesting potatoes.

Despite these efforts, the East German administration of justice often finds fault with its "people's judges." They were too quickly and indiscriminately recruited, are too untrained and too unaccustomed to office work not to give their superiors constant cause for criticism. In Lüritz, as elsewhere, regular inspection groups from Berlin and from the regional capital check up on the daily operation of the courts. The reports of these inspections usually mix praise and blame. Frau Rüter, especially, is faulted for insufficient knowledge of the law, and in 1954, an inspector comes once a week to supervise her work. Judges are taken to task for too short judgments, for not keeping track of fees and expenses, for wasteful work organization, muddled filing schemes, incorrect spelling, and time and again, for a lack of Party spirit. In 1953, Lüritz judges are rebuked for wearing dark clothing on the bench — it is too bourgeois. In 1955, Judge Haas is faulted for too lenient sentences, Judge Rüter for too harsh ones. Judicial policies are often shifting, and "people's judges" find it difficult to get things right. In 1958, Judge Haas is praised for her political enthusiasm, but of her colleagues, only a few are found to "truly think for themselves." The inspectors' report, sounding exasperated, speaks of "grossly indifferent political decisions" at the Lüritz *Kreisgericht*.

The Lüritz judges react to these reproofs as conscientious students react to a bad grade: by trying to do better the next time. When in 1957 the court is faulted for too many acquittals, it does its best to mend its ways and, indeed, by the next year, Lüritz acquittal rates are down. But I do not have the impression that changes like these are the result, or (to be more cautious) only the result, of blind submission. Some of the Lüritz judges may simply do as they are told; Judge Wapnewski, for example, who in the first years on the court seemed to grope around for the right judicial style, looked like a man with deep-seated prejudices but without much of a moral rudder. But the "people's judges" of the 1950s or at least those whom I know best — Frau Haas and Frau Rüter — seem different. They follow Party orders the way a religious person follows the advice of his priest: because they think that he is likely to be right. "I always imagined it like a pyramid," Frau Rüter once told me. "Those at the top could see much farther than I could." Her faith in the authority of the Party was a reflection of her faith in the Party's cause. Their belief in Socialism made many "people's judges" unthinkingly follow Party orders. But at the same time, it provided them with a stockfund of convictions on which to ground their work and thus gave them a moral honesty and, paradoxically, an occasional indepen-

dence, which many of the judges coming after them, in times far less obsessed with ideology, were lacking.[35]

Their political faith allowed Judge Rüter and Judge Haas to see a rosy future where others could detect no more than a bleak present. "The plaintiff will achieve real happiness in life only by engaging in productive work that is suited to her abilities," Frau Haas writes in 1951, rejecting the alimony claim of a divorced woman. As a widow who raises two children on her own, she clearly knows and believes what she says. Denying the rescission of a contract by which a farmer acquired someone's share in a collective farm, Frau Rüter writes in 1963: "The defendant should not allow himself to be unduly influenced by the current (highly unsatisfactory) conditions on the farm. He rather should actively engage in our program of completely restructuring our agriculture and thus soon become a beneficiary of everything that will be new in rural life."

Political convictions also allow these judges to assert their views in ways that occasionally get them into trouble. Both Judge Haas and Judge Rüter have recurrent run-ins with the Lüritz police whom they accuse of sloppy investigations and, on occasion, of beatings of those detained. Frau Haas has a long-standing conflict with the Lüritz prosecutor's office, again, over the insufficient investigation of criminal charges. In 1958 she sentences a women accused of "defamation of the state" — the defendant had told jokes about First Party Secretary Ulbricht — to six months in prison rather than the nine months demanded by the prosecutor. Not good enough, you might well say. Yes, but at the trial, Judge Haas also, as evidence, blithely recites all the jokes, unedited, that the defendant had been guilty of. Ten years later, in similar cases, the penalty might not necessarily be higher but the jokes themselves would only be discretely alluded to and never, ever told. The "people's judges" in the 1950s retained a straightforwardness and human optimism that gave them their peculiar strength. Over the years, that optimism gradually disappeared from Lüritz caselaw. In 1952, Lüritz judges deviated from the prosecution's suggested penalty in 49% of all criminal cases, almost always in favor of the defendant. By 1959, that figure had shrunk to 15% and, by 1979, to 9%.[36]

And while those in control often fault the Lüritz court for its ideological errors, the supervisors in these years also seem convinced

35. For reminiscences by early "people's judges" published in the last year of Socialism in the GDR, see "Erinnerungen an die Rechtspflege zur Zeit der Gründung der DDR," 43 *Neue Justiz* 410 (1989).

36. I have counted only major judicial deviations from the prosecutor's suggested penalties: suspended vs. non-suspended sentences, differences in the number of months a defendant would have to spend in prison under the prosecutor's and the judge's version of his sentence, and (extremely rare) acquittals. Differences between the prosecutor's and the court's approach to so-called "supplementary penalties" such as fines or residence restrictions are not included in my survey.

that political disagreement, while not desirable, is at least preferable to passive compliance. My Lüritz protagonists thus are criticized for being "inactive" and "unpolitical" and for failing to engage in "profound political discussions." For judges whose poor professional training made them particularly vulnerable to directions from above, the difference between thinking and unthinking obedience to the Party may not always have seemed worth the bother. Indeed, throughout the history of the GDR, inspectors and inspected usually found it easier to stick to the unreflective and safe rule of doing-as-told than to engage in political deliberations. But to my surprise, I also find that the judge whose work I respect most in these years — Frau Haas — is also the favorite of the revisors from Berlin and, as it seems, for reasons similar to mine: because of the carefulness of her decisions, their common sense, and the fact that their political fervor does not dull their author's individual self-confidence and human empathy. One of my most enlightening finds in the Lüritz archive are two letters from the Ministry of Justice to the Lüritz court — one from 1969,the other from 1988 — in which the Ministry outlines, for recruitment purposes, the most essential attributes for judges in the GDR. The 1969 guidelines name a host of qualities that would make their bearer an engaged and useful representative of a parental legal system — industry, drive, independence, decisiveness, good people skills — with "ideological position" just one of many other desirables on the long list. The 1988 directives, composed at a time when belief in Socialism was at an all-time low in the GDR, state as the very first criteria for the evaluation of socialist judges their "attitude towards the SED" and their "willingness to carry out Party resolutions." The differences between the two catalogues suggest a correlation between political faith and intellectual freedom that affected not only the judiciary in the GDR. A leadership that is convinced of its own goals and of the commitment of its followers can be more tolerant of disagreement than a leadership that no longer believes in its own sermons. Hence the much wider margin of permissible debate in these early years than in later, seemingly less ideologically intense and more settled, times.

Meanwhile, civil litigation rates in Lüritz are sinking. Whatever the boundaries of political discourse, Lüritz citizens seem to lose interest in the law at a rapid pace. In 1950, 788 civil plaintiffs had brought suit at the old *Amtsgericht*. By 1953, the new *Kreisgericht* registers only 328 civil plaintiffs, and by 1963, that number has gone down to 90. What has happened?

In part, the fall in civil litigation can be explained by changes in East German law. In 1951, with the introduction of special economic

courts,[37] all litigation between state-owned enterprises was removed from the jurisdiction of the civil courts, and in 1956, a new statute on domestic disputes transferred alimony and support claims from the civil law to the family law statistics.[38] But even if we subtract from the 788 civil claims filed in 1950 all economic and domestic maintenance disputes, we are left with more than 500 disputes between citizens that even under the new rules would have been adjudicated by the Lüritz *Kreisgericht*. That is more than five times the court's civil caseload of 1963.[39] Why does civil litigation under Socialism seem so much less attractive to the citizens of Lüritz than litigation in the unsettled and impoverished immediate post-war years?

I do not think that it was fear of socialist authorities that kept prospective Lüritz plaintiffs out of court. Those cases that are brought do not smell of political subservience. It is rather that the law's usefulness to individuals seems to be shrinking in a society in which production is determined by the Plan, wages and prices are set by the state, tenants can only rarely be evicted, employees for all intents and purposes cannot be fired, and money is not worth very much. People sue to enhance their choices and to enlarge their elbow-room. But with every advance of Socialism in the GDR, the citizens of Lüritz lose room to maneuver. And so, together with their shrinking territory, the usefulness of law that could have helped its subjects to explore and defend that territory, shrinks as well.

3. *Consolidation*

In November 1965, the first professional jurist becomes director of the Lüritz *Kreisgericht*. It is Herr Krahl, a difficult and brooding man, quite different, it seems to me, from the activist and forward-looking "people's judges" who preceded him. For another decade or so, old and new judges serve together on the Lüritz bench, but the populist old guard steadily loses influence to the better educated recruits from East Germany's new socialist law faculties. By 1976,

37. Verordnung über die Bildung und Tätigkeit des Staatlichen Vertraggerichts (Decree on the Establishment and the Tasks of the State Contract Court) of Dec. 6, 1951, GBl. I p. 1143 (1951).

38. Eheverfahrensverordnung (Decree on Marital Procedure) of Feb. 7, 1956, GBl. I p. 145 (1956).

39. The 1963 introduction of *Schiedskommissionen* (Dispute Commissions)—lay courts staffed with local citizens that adjudicated simple civil law disputes (primarily between neighbors and co-tenants in apartment houses)—came too late to explain the rapid drop of civil litigation in the GDR, and affected it too little. In 1983, Dispute Commissions resolved 9.9% of all civil disputes in the GDR; with the rise of litigation in the 1980s, that percentage dropped to 7.2% in 1989. See Rechtspflege-Erlaß (Decree on the Administration of Justice) of April 4, 1963, GBl. I p. 21; Schiedskommissions-Richtlinie (Guideline on Dispute Commissions) of Aug. 21, 1964, GBl. I p. 115; Krug, "Das zivilrechtliche Wirken der Schiedskommissionen – Konzept und Ergebnisse," in Rainer Schröder, (ed.), *Zivilrechtskultur der DDR*, vol. I at 245 (Berlin 1999).

Frau Rüter is the only "people's judge" left on the Lüritz bench. She stays until her retirement in 1980, respected and like by all, but playing a bit the role of a kibbutznik in modern Israel: a representative of a heroic age that still provides the myths to which one can appeal on national holidays but whose daily struggles, thank God, have become a matter of the past.

Frau Haas had left the Lüritz court already in February 1965. It would be more accurate to say that she had vanished. The files suggest that she became embroiled in one of her disagreements with the prosecutor's office; I find her sending back indictments for incomplete investigation and complaining in letters to the Regional Court of shoddy prosecutorial work. Then, suddenly, it is no longer Frau Haas but someone else who signs the weekly reports that the Lüritz *Kreisgericht* (and every other trial court in the country) sends to its superior court. Frau Haas' round and distinctive signature never shows up again. I ask Frau Rüter for an explanation. Yes, her colleague had quarreled with the local prosecutors. But that was not the only reason for her disappearance. Frau Haas' sixteen year old son, a proud and headstrong boy who served as an apprentice with the East German merchant marine, on one of his trips passing the Gibraltar Strait had made use of the occasion, jumped ship, and drowned while trying to swim ashore. As the mother of a "fugitive of the Republic," even if dead, Judge Haas could stay no longer on the Lüritz court.

I am outraged but also puzzled by the story. It is at odds with what seems to me a changing political climate at the court. By 1965, the Lüritz *Kreisgericht* appears to have lost much of its missionary fervor. The Berlin Wall of 1961 had stopped the flood of disenchanted citizens fleeing West and had brought a dull sense of stability and permanence to the GDR. Lüritz judges are becoming increasingly professional in training and demeanor. No more "physical labor" campaigns for everyone under fifty; the program is phased out in 1961. By the middle 1960s, the involvement of collectives in divorce suits, while not discontinued, has been significantly toned down and reduced in number. The language of the court becomes more lawyer-like.

This is least true for the area of criminal law, which until the end of the GDR remains a handy weapon for the containment of political opponents. But even in criminal law, the court, by and by, outgrows its Manichaean view of a world separated into light and darkness. Since the 1960s, the prosecution of open crimes against the State (such as diversion or sabotage) is gradually overtaken by the prosecution of more "normal" crimes against the community at large (such as theft or assault); the previous sharp ideological distinction between the violation of state and personal property begins to blur and then

disappears;[40] and the most harshly punished criminals are no longer enemies of the state but "a-social" citizens resisting integration at the workplace. Only in the very last years of the GDR, when growing political dissent began to threaten the survival of the system, would something of the paranoia of the 1950s appear again in Lüritz criminal decisions.

But in civil law disputes, the de-politicization of the courtroom in the 1960s and 1970s is undeniable. It is far more evident in the behavior of the court than in the legal strategies of its customers. When Lüritz plaintiffs and defendants wrote their briefs, they would, at all times, dip into political clichés as into a piggy bank with ready change if they believed that it would help their cause. "As far as our capabilities allow, we, too, are fighting for world peace," a couple trying to regain possession of their house might write in a 1951 landlord-tenant dispute. "One cannot dedicate one's labor to society without a comfortable home," another landlord, 25 years later, would argue in a very similar eviction suit. Phrases such as these are common in my Lüritz files, and they say less about their authors' political convictions than about their assessment of the judges and of the type of "arguments" that might persuade them.

In the 1950s, demonstrations of political loyalty in someone's brief did not look out of place. After all, the court's own language did not sound all that different. But by the middle 1960s, such announcements were more likely to annoy the court. When in 1961 the plaintiff in a housing dispute claims that his opponent, on national holidays, does not hang the GDR flag but her underpants out of the window, the court ignores the accusation. When in the 1970s a plaintiff's father tries to win the court's support for his son's tort suit by describing, in a lengthy letter to the court's director, his excellent relations with the District Party Secretary, it is not Herr Krahl who replies but the court's secretary who in a laconic note informs the writer that he lacks power of attorney for his son. In 1975, the Court of Appeals complains in a letter to the Ministry of Justice that parties in divorce suits often "try to achieve positive results by declaring, in hollow phrases, their own devotion to the socialist state and by accusing their spouses of religious affiliations." By now, such strategies meet with official disapproval. As far as I can tell, the few attempts to openly pull rank or to impress the court with one's political connections that I have found in the Lüritz civil files did not result in obviously biased judgments.

40. Unlike previous East German legislation on economic crimes, the new GDR Criminal Code of 1968 no longer sanctioned the theft or embezzlement of state property more severely that that of of personal property. While regulated in different chapters of the code, the penalties for both offenses were the same. See StGB/GDR, supra n. 8, §§ 161, 162, 180, 181.

That does not mean that by the 1960s civil litigation in Lüritz was immune to politics. But by the time a case had reached the court, the perfect moment for exerting political pull usually had been missed. I have the impression that, by now, Lüritz judges saw themselves as professionals and tried to guard the independence that their Constitution had promised them.[41] Unlike their Western colleagues, they interpreted their independence very narrowly, almost in territorial terms: they wanted to keep their courtroom clean. No Lüritz judge in, say, 1975 would have disputed the legitimacy of inspections and guidelines by the Ministry of Justice or the superior courts, the weekly Party meetings at the courthouse, the monthly "security conferences" in which the director of the *Kreisgericht* met with his colleagues from the Interior Department and the police to discuss public safety in the district, and all the other techniques by which the state insured the law's subservience to its political goals. But the immediate process of adjudication was different. Lüritz judges were positivists: they clung, as much as possible, to the written law. If that law clashed with the priorities of local politics, a Lüritz judge, rather than compromise legal rules, would try to transfer the conflict from his or her own jurisdiction onto the domain of other government or Party bodies.

Here is an example. In a 1976 private eviction suit against a woman whom the Party apparently wanted to see well-housed, Judge Krahl wrote to the Lüritz Housing Department to complain that the defendant had not yet been assigned an adequate alternative apartment. "If this does not happen soon, I will have to set a date for trial. In our conversation with Comrade L. from the District Leadership, we had agreed that I should wait awhile." Obviously, the plaintiff's claim to evict the Party's protege must have been supported by the law. Comrade L., trying to ensure her housing, had asked Judge Krahl to go slow and had ordered his colleague from the housing office to find the defendant comparable housing. But he had *not* told Herr Krahl to reject a legitimate eviction claim. Judge Krahl was willing to delay the case a bit but not to an extent that amounted to a denial of that claim. All three participants in the affair seem to agree that, while the Party must be able to protect its clients, law is law. The courtroom in this story appears as an enclave of legality in a world otherwise dominated by politics.

It could become this enclave because, by the 1960s, all politically touchy social issues had been removed from the court's jurisdiction. Economic disputes were handled by the contract courts[42] (semi-judicial bodies operating under interventionist rules of procedure), con-

41. Art. 96 Constitution of the GDR of April 6, 1968 in the version of Oct. 7, 1974, GBl. I 425.

42. Supra n. 37.

flicts between citizens and administration could not be brought to court but only be raised in informal complaint procedures,[43] and constitutional issues were in any case immune to judicial review. That left the courts with legal disputes among citizens and with those rare cases in which state-owned enterprises sued citizens, or, rarer still, in which citizens sued state-owned enterprises over consumer issues. In the 1970s and 1980s, about 70% of all civil cases handled by the Lüritz *Kreisgericht* involved litigation between individual people. The civil law, under Capitalism the all-important matrix of market interactions, in the GDR had been reduced to what East Germans themselves called "after-hours law" (*Feierabend-Recht*): a set of rules governing the personal relationships of men and women with no claim to riches, power, or influence. No wonder that the Lüritz judges could afford to keep this unimportant law relatively free from political interference.

The downgrading of civil law in the GDR also brought its democratization. In capitalist private law, the "haves" tend to sue the "have-nots", or plaintiffs with money tend to sue defendants who cannot pay their bills, and usually win.[44] In Lüritz, the hierarchical incline between plaintiffs and defendants was leveled: "have-nots" were suing "have-nots." Capitalist civil case files smell of money — my Lüritz civil case files smell of poverty. It is not just that the paper is so poor, the sums involved so low, that the plaintiffs and defendants so obviously are not people with big bank accounts but working men and women and often pensioners. In the 1970s and early 1980s, the civil suits themselves, in 40% to 45% of the cases, did not have sums of money as their objects (such as contract damages or tort claims) but challenged someone's bad behavior (such as the inconsiderate use of common spaces in apartment buildings) or asked for the return of objects (such as TVs, cellars, gardens, and the like). And even suits for money, in 60% to 70% of the cases, did not involve what I call market debts (that is, debts arising from the commercial sale of goods or services) but personal debts, arising from a one-time interaction between private actors (a private loan; a sale between neighbors or acquaintances).

For the participants, these disputes were not less important because they involved objects of little value. On the contrary: in a narrow world, fights over boundaries of individual territory may gain great importance and some of the favorite objects of these fights reflect the parties' longing for more space and for a more independent lifestyle. Many legal quarrels deal with keys to entry halls, attics,

43. On East German complaint procedures, see Markovits, "Rechtsstaat oder Beschwerdestaat? Verwaltungsrechtsschutz in der DDR," 31 *Recht in Ost und West* 265 (1987).

44. Galanter, "Why the "Haves" Come Out Ahead," 9 *Law & Society Review* 95 (1974).

cellars, and the like that Lüritz tenants often had to use in common with their neighbors; with allotment gardens on the outskirts of the city (the average East German's cherished place of refuge); or with cars (the most escapist object of desire under Socialism, and the most difficult to come by). But while these lawsuits mattered greatly to the litigants, they mattered not at all to the economy at large. Civil law in the GDR did not help to keep prices low, quality high, business practices fair, or to assist the flow of goods on the market. It had, in fact, been privatized — an ironic result in a legal system that despised everything private and disliked the very word so much that the term "private law" was deemed improper and was consistently replaced by "civil law."

Together with the personal character of civil litigation came a "warmer" way of disputing. I have put the word in quotation marks because much of this warmth was make-believe. Are family quarrels "warmer" than fights between strangers? Because, indeed, much of the civil litigation happening in Lüritz looked like family feuds. In capitalist legal systems, parties to civil suits tend to be socially distant and friends or acquaintances sue each other only if they are sufficiently estranged not to care if the lawsuit ruptures the social bond between them. But in Lüritz, citizens seemed to sue each other not in spite of, but because of their human proximity. In 1982, 43.8% of all civil parties and 61.5% of all parties in lawsuits between individual citizens were either related to each other, had once been married or co-habited, or lived in the same house. People sue in Lüritz because they have to share space or possessions that they would rather use alone. They seem to live too close for comfort.

The atmosphere of civil trials, too, is close—often, artificially close. About twice as many civil disputes in the GDR as in the Federal Republic ended in in-court settlements:[45] to a legal system that wants to unite its citizens in collective peace, a judgment, that is, the imposition of a verdict from above that is not equally accepted by both parties, must indeed appear to be a pedagogic failure.[46] In Lüritz, civil law judgments dropped from about 48% in 1946 to 17.6%

45. In 1985, 8.3% of all first-instance civil suits before West German Amtsgerichte ended with in-court settlements; see *Statistisches Jahrbuch für die Bundesrepublik Deutschland 1988*, Statistisches Bundesamt, (ed.) (Stuttgart 1988) at 331. In the same year, 43.3% of all civil cases processed by the Lüritz Kreisgericht were settled in court.

46. In the Federal Republic, too, settlements are most frequent in those first-instance civil law disputes which in their simplicity and in the parental atmosphere in which they are decided most closely resemble a typical civil law suit in the GDR: cases which do not require an evidentiary hearing (that is, relatively uncomplicated cases), which are decided by a single judge (rather than a more formal and distant panel of judges), and in which both parties are private citizens who are personally present at the trial and can speak for themselves. See Hubert Rottleuthner et al., *Rechtstatsächliche Untersuchungen zum Einsatz des Einzelrichters* (1992) at 132, 142.

in 1985.[47] Settlements were encouraged by the law (court costs were halved if the parties settled)[48] and the courts seems to have leaned on parties to agree: in part, to look good at the next review of their performance, and in part, I suspect, to save the judges the trouble of writing a reasoned decision. The judges must, at times, have leaned quite heavily. One of the citizens' complaints found in the wood cellar is from a plaintiff who reproaches the court of first pressuring him into a settlement and, then, of refusing to include the fact that he had objected to the pressure in the trial record. The judge had been so rattled by this bellicose behavior that he had reported the incident to the Court of Appeals.

Occasionally, the court pushed for a settlement even in cases in which the law was clearly on one party's side. Take this 1974 case of a young man who, for 150 marks, bought a used bicycle from an old lady who had advertised it in the want-ads. He had inspected the bicycle, paid for it, and brought it home but, when his wife was unimpressed by the new purchase, regretted it, returned the bicycle to the seller's house, left it standing in her courtyard, and now sued to get his money back. The old lady, understandably, refused to pay: "Our sale was perfect and Herr W. can state no reasons for disputing it." But at the trial, Herr Krahl talks the seller into returning 25 marks to the purchaser and closes the case with a "settlement." As the case illuminates, it was no accident that East German law replaced the traditional German term for "settlement" (*Vergleich* — literally: "comparison") with "*Einigung*" (agreement). The law cared less about the process of comparative give-and-take than about the hopefully resulting outcome: social harmony. To this legal system, even a grudging peace or pretended harmony seemed better than a zero-sum solution which left the parties disconnected by their win or loss. As in the case of the old lady and her bike, much of the "harmony" in Lüritz settlements was fake. About a third of all "agreements" in my files happened in cases that, in fact, might just as well have been resolved by judgments, because no compromise between the parties softened the defeated party's loss—the winner took all. But after their decision in the dispute, the judges in these cases apparently persuaded the participants to clothe the all-or-nothing outcome of their fight in the more conciliatory garb of a settlement: to save themselves some work and the parties' court costs and to uphold the image of social harmony restored.

Over the years, Lüritz plaintiffs and defendants adjusted to a legal process more interested in collective peace than in the protection

47. In the Federal Republik, in 1985, 28.7% of all civil cases litigated at the Amtsgericht level ended in a contested judgment. See *Statistisches Jahrbuch*, supra n. 45, at 331.

48. Zivilprozeßordnung (Code of Civil Procedure; henceforth ZPO) of June 19, 1975, GBl. I p. 533, § 166 para. 3

of individual autonomy. At least that is what my files suggest. Away from the files, court users may have grumbled. More self-possessed and self-assertive people may have shunned the court and tried to pursue their interests in other ways, particularly those who had connections: there are very few intellectuals in my civil files and (apart from the divorce files) very few people whom you might call "middle class." But in my records, evidence of open protest against the court's parental and didactic manner (like that complaint against unwanted settlements) is very rare.

People learned to rely more on the court's good will than on their own combativeness. In 1979, 17.6% of civil litigants in Lüritz used a lawyer, down from 42.5% in 1946. Representation by counsel was even less common in criminal cases: in 1979, only 17 of 306 defendants in Lüritz (or 5.6%) faced their trial with an attorney by their side. Indeed, defense attorneys must have seemed somewhat out of place in a courtroom so saturated with affirmations (or at least pretenses) of community. Remember that in the early 1950s Lüritz judges deviated in almost half of all criminal cases from the prosecutor's suggested penalty. By 1979, judges concurred with the prosecutor's assessment of the crime in 91.3% of all trials. Faced with the united front of court and prosecution, most defense attorneys watched their step and only cautiously argued their client's case. Some simply joined the prosecutor's penalty suggestion. Others, rather than disputing the legal merits of the prosecution, contented themselves with pleading mitigating circumstances. "I've never understood what they got their money for," a former Lüritz judge once said to me about defense attorneys. That might have been unfair because a lawyer could help a defendant plan the most effective strategy without engaging in a rousing battle in the courtroom. But even clever and aggressive counsel often advised their clients of the benefits of true confessions[49] — they knew that socialist judges liked a defendant "who in the face of society accepted responsibility for his offense."[50] Most Lüritz criminals readily confessed, frequently even to portions of their crime that the police did not yet know about. And although East German law gave a testimonial privilege to spouses and close relatives not only in criminal[51] but also in civil trials[52], I found only two or three instances in my files where witnesses made use of their right not to testify. Most of my Lüritz protagonists seem

49. Such as the attorney Gregor Gysi who after the collapse of Socialism was to become the head of the East German Party for Democratic Socialism. See Gysi, "Aufgaben des Verteidigers bei der Belehrung, Beratung und Unterstützung des Beschuldigten im Ermittlungsverfahren," 39 *Neue Justiz* 416 (1985).

50. Beschluß des Plenums des Obersten Gerichts zu Fragen der gerichtlichen Beweisaufnahme of September 30, 1970, 11 *Entscheidungen des Obersten Gerichts in Strafsachen* 63 (1970).

51. StPO/GDR supra n. 8, § 26.

52. ZPO/GDR supra n. 47, § 56

to have found it more advisable to cooperate with the authorities than to openly resist them.

Parties to litigation also learned to rely on the court's help and solicitude in situations in which capitalist plaintiffs and defendants have to fend for themselves. For instance, the Lüritz court routinely provided the addresses of defendants that the plaintiffs had been too lazy to find out themselves; indeed, much of the court's administrative efforts were taken up with locating the employers of fathers owing child support. If plaintiffs failed to fill out some forms properly, the court would do its best not to let the omission spoil their case. When in 1984 a divorce plaintiff, for the second time, sends an incomplete application to initiate suit, the court's secretary returns the forms and writes: "I have used your previous communications to formulate the correct complaint. I am including the original and two copies in this letter. Please read the application carefully and, if I have accurately stated your reasons for seeking a divorce, sign all three copies and return them to the court." The prospective plaintiff does not bother to reply. In 1978, a woman writes "addressee will pay" on the unstamped envelope of her divorce complaint, and the court, indeed, does pay. When the judge invites her to discuss the case and suggests a time, she neither responds nor comes. Quite often, civil parties do not come at the appointed time, come late, or with the flimsiest of excuses ask for a change of date. The court is usually generous. It patiently reschedules hearings for parties wanting to go on holidays, for lawyers claiming business out of town, and for a prosecutor planning to celebrate his birthday on the date in question. Here is a note found in the record of a contract case from 1982: "Oral argument was scheduled for 11:00 a.m. As the court expected the defendant to be late, it waited until 11:30 to begin the hearing. Since the defendant had not shown by noon, the time for the announcement of the verdict is now set for 12:30." Incidentally, this verdict would not be a default judgment as we know it. East German civil procedure did not allow for decisions by default, since a judgment based only on the unilateral assertions of one party would neither uncover the real truth (or what Socialists called "the material truth") about a social dispute nor allow for a therapeutic airing of the conflict that might help to reconnect the former adversaries. Even if only one of the parties appeared at trial, the court had to investigate the merits of the case.[53]

My files reveal that Lüritz citizens grew lazy, maybe even comfortable, in the arms of a legal system that would neither let them go nor allow them to drop behind or fall between the cracks. They also, occasionally, got fresh. It is a calculated impudence, quite often

53. ZPO/GDR supra n. 47, § 67 paras. 2 and 3; see also *Kommentar zur Zivilprozeßordnung*, Ministry of Justice of the GDR, (ed.), § 67 ZPO note 3 (1987).

skirting the political but (except for the very last years of the GDR) always suggesting that the angry writer, if treated property, will remain a member of the fold. "If this kind of thing can happen in a social court, one truly begins to wonder about our entire legal system," a tenant writes in 1969, appealing the decision of a "dispute commission" to the Lüritz *Kreisgericht*. "I'm worse off here than someone unemployed is in the Federal Republic," a putative father proclaims in a 1978 paternity dispute, outraged, because the necessary blood tests take forever. "Valid complaint," a handwritten remark says on the folder of his case. "I am a free citizen of the GDR and can expect the Youth Agency to work as diligently as I am working," a mother announces in a child support suit in 1981, cleverly preempting any objection that the Agency might raise by characterizing it as a violation of her "freedom." Occasionally, parties threaten the court that if they do not get their due they may withdraw from collective life by not voting in the next elections or — a risky strategy — by slowing down or quitting work. One cannot imagine threats like these to ever have been uttered in a Nazi court. They made sense only in a legal system that, at least in theory, wanted to be all-inclusive. But inclusion came at a price. If there is a common denominator, a red thread running through all these records, it is the assumption of a silent bargain between citizen and state: submission for solicitude, adaptation for guidance, dependency for warmth. Even deviants were welcome if they were willing to return to the collective. This is why I find the story of Frau Haas' firing so disturbing. Was the contamination by her son's attempted "flight from the Republic" so shameful for the mother that it outweighed her own loyalty to Socialism? Or was it Frau Haas' troubled relationship with the prosecutors (who in East German legal culture ranked higher on the political pecking order than the judges) that cost her the job in Lüritz? By the system's own rules, a capable and committed judge, even if headstrong, deserved better than to be run out of town.

Over the 40 years of the GDRs existence, fewer East German judges lost their jobs for political reasons than one might have thought.[54] This was not due to political tolerance (of which the system had very little) but rather to the selection and self-selection of the GDR judiciary. Of the professional judges who survived the postwar de-nazification wave but who were critical of Socialism, many

54. A study of a sample of 60 disciplinary proceedings against East German judges that took place between 1953 and 1961 found that politics played a role in only eight cases (or 13% of the sample). Since the 1950s were politically more repressive than the post-Wall years (the majority of the eight cases arose in connection with the workers' rebellion of June 17, 1953), it is unlikely that the share of political dismissals of East German judges rose in later years. See Thomas Lorenz, Das Disziplinarrecht für Berufsrichter in der DDR von 1949 bis 1963, in: Rottleuthner, *ed.*, *Steuerung der Justiz in der DDR*, supra n. 4, at 397, 383.

fled West long before the Wall was built. The restructuring of the East German court system in 1952[55] provided the government with the occasion to rid itself of the remaining bourgeois judges[56] — this must have been the reason why Judge Wapnewski left the Lüritz bench in 1952. By 1957, 69% of all judges and prosecutors in the GDR were graduates of the new training courses for "people's judges":[57] all people likely to support the system. So were the graduates of the new law faculties. And, maybe most important, socialist judges were in short supply. Judicial salaries were kept intentionally low since judges were not supposed to be separated by their rank and income from the ordinary men and women whom they served.[58] Workloads, by socialist standards, were high. Recruitment was an eternal problem. A judge dismissed would almost always be difficult to replace. As a result, East German justice authorities tended to hold on even to unsatisfactory judges as long as possible.

Nevertheless, besides Frau Haas, I know of three other Lüritz judges who left the bench for other than innocuous grounds (such as retirement or relocation). All four departures could be called "political," though not because of the judges' own hostility to Socialism but because of some connection, often unintended, with the West that in the friend-foe mentality of this obsessive state made someone thus contaminated no longer suitable for public service. Still, in three of the four cases, political paranoia was softened by another feature of the system: parental concern for the welfare of each citizen. Frau Dahlmann, an early "people's judge," had to leave the Lüritz bench in 1953 because of her daughter's flight to West Berlin. She was given a new job as head of the Lüritz Youth Authority. Herr Sommer, one of the later judges, was kicked out in 1982 because his teenage son had sold some wristwatches, sent by an aunt in West Berlin, on the black market. The Party group at the Lüritz court had opposed his dismissal but was overruled by the Regional Court of Appeals. Herr Sommer was made legal counsel of the Lüritz Housing Agency. And finally, Herr Krahl, tired and disillusioned, left in 1984 at his own initiative, quite a feat for a judge in a legal system that equated giving notice with desertion. He owed his unopposed departure to the assistance of the Lüritz First Party Secretary, who also helped him find a new job as legal counsel of the District Hospital. All three judges, although officially disgraced, had been allowed to stay in Lüritz. All three had been provided with satisfactory new jobs.

55. Verordnung über die Neugliederung der Gerichte (Decree on the Restructuring of the Court System) of Aug. 28, 1952, GBl. p. 791 (1952).

56. By September 1, 1952, the GDR Ministry of Justice had dismissed a total of 104 judges, almost 10% of the country's judiciary. See Lorenz, supra n. 53, at 381

57. Reported by Amos, *Justizverwaltung in der SBZ/DDR*, supra n. 27, at 178.

58. Andreas Gängel, Richter in der DDR - Wunschbild und Realitätsausschnitte, in: Rottleuthner, *Steuerung der Justiz in der DDR*, supra n. 10, at 395, 407.

None, as far as I can tell from my records, was as faithful a Socialist as Frau Haas. Was it her own political loyalty that made her son's attempted flight look all the more offensive? Was it her stubbornness and independence that, given the right pretext, could make it easier for hostile administrators to get rid of her? "They could do that only to a woman," Frau Rüter had said when she told me the story. Frau Haas' opponents at the prosecutor's office had been men. Whatever the reason for Judge Haas' removal—by responding to a human tragedy with self-righteous rejection, Frau Haas' superiors had not only failed her but also betrayed their own humanist ambitions.

4. Disintegration

By the 1980s, grudging acceptance of life under Socialism in the GDR was beginning to wear thin and, with it, the legal system's claims (or pretenses) to collective harmony. The change of mood announced itself in the court statistics. Since the early 1970s, civil litigation rates in the GDR had slowly begun to climb; they rose more rapidly beginning in 1980.[59] The number of civil suits in Lüritz grew from 160 at the beginning of the decade to 228 in 1987 — far fewer, still, than in the early post-war years but enough to make local judges complain about excessive workloads. Litigation became more aggressive: in Lüritz, the share of judgments (that is, of those disputes fought out to the bitter end) increased from 12.5% of all civil cases in 1976 to 26.9% in 1988. Lüritz litigants began to use more lawyers: between 1979 and 1988, representation by counsel rose from 15.3% to 21.3% of all civil parties and from 5.6% to 16% of all criminal defendants. And money seemed to matter a little more: while in 1979, 56.6% of civil suits in Lüritz centered on monetary claims (rather than on objects or behavior), by 1988 fights over money had increased to 62.7% of the civil case load.

Lüritz attorneys, too, began to represent their clients more assertively. In 1984, a third lawyer was admitted to practice in Lüritz—a much needed addition, since it had become difficult to find representation locally and I had frequently encountered the names of out-of-town attorneys in my Lüritz files. One of the out-of-towners in particular had caught my attention: Herr Fuchs, who practiced in a little town not far from Lüritz, to whom those Lüritz clients seemed to flock whose cases were most desperate and who simply refused to play by the sedate and passive rules for lawyerly behavior under Socialism. I would eventually meet him in person: a small, flamboyant

59. In the GDR, the sum total of first instance civil suits rose from 31,820 in 1971 to 42,957 in 1979 (an increase to 135% of the 1971 case load) and to 66,999 cases in 1987 (an increase to 211% of the 1971 case load). See Statistisches Bundesamt, (ed.), *Sonderreihe mit Beiträgen für das Gebiet der ehemaligen DDR*, no. 10, Rechtspflege, Gerichte, Verfahrensstatistik 1971 - 1990 (Wiesbaden 1994) at 66 and 67.

man with a terrier's fighting spirit, rumored to be gay, someone who loved to walk a tightrope, and on more than one account an outsider not only under Socialism. It may have been the outsider's experience of difference that made Herr Fuchs resistant to the comforts of collectivism. His chutzpah shines through even the grey and mottled typescript of an East German trial record. In 1984, in the dismissal case of an enterprise director who had been accused of spreading jokes about First Secretary Honecker, Herr Fuchs demanded that all the jokes be entered, *verbatim*, into the record of the case so that the appellate court could assess their harmfulness. As I am sure Herr Fuchs anticipated, the court (unlike Frau Haas in 1958) did not comply with the request.

In the same year, Herr Fuchs won the appeal of a man accused of joyriding by advising his client to recant his original confession which, as Herr Fuchs could show, conflicted with other evidence presented by the prosecution. In East German criminal procedure, acquittals were even rarer than in Western legal systems.[60] But more indicative of the approaching change of weather in the law seems to me the fact that the acquittal followed the withdrawal of a confession. Since GDR law, like the law of other states in continental Europe, did not know guilty pleas, even confessions did not relieve the court of the investigation of a defendant's guilt.[61] But as religions tend to do, Socialism believed that confessions were good for the soul. They signaled a defendant's acknowledgment of communal norms and his desire to return into the fold. Recanting a confession thus meant more than just undermining a specific piece of evidence: it showed the defendant to recoil from the open arms held out by the parental state to its repentant sinners. The recantation sent a cold draft into the sticky warmth of an East German courtroom. To judge by the extraordinary rarity of withdrawn confessions in my files, most Lüritz criminal defendants must have sensed that it was not a good idea to alienate authorities on whose good will their fate depended. Herr Fuchs seemed not to mind.

In 1985 one of the three Lüritz attorneys follows Herr Fuchs' example and counsels a defendant to recant a previous confession. It is Herr Busch, a smart and conscientious man, more measured than Herr Fuchs, but always on the look-out for effective ways to serve his clients. From then on, I find a number of withdrawn confessions in the Lüritz files, sometimes accompanied by hints that the confessions

60. In my Lüritz sample, acquittals dropped from 7.4% of all verdicts in 1952 to less than 1% in the 1970s and 1980s.

61. The GDR Supreme Court, for decades, struggled with issues of evidence in criminal proceedings, in particular, with the truthfulness of confessions, and in three Resolutions from 1970, 1978, and 1988, set increasingly cautious guidelines directing trial courts' evaluations of confessions. See Jörg Arnold, *Die Normalität des Strafrechts in der DDR*, vol. II at 179 - 190 (Freiburg 1996).

were the result of undue pressure by investigators. "Violation of a defendant's right to counsel" is another novel charge that now occasionally crops up in my records, mostly on appeal. In 1988, in a case involving a messy arrest for "a-social behavior," Herr Busch goes so far as to raise accusations of police brutality. I find an outraged letter of the local prosecutor in the file suggesting that Herr Busch himself should be made the subject of a disciplinary investigation. Instead, the court at least addresses the charges of police misconduct at the trial even if it finds only minor errors of judgment by the officers involved.

As the case shows, the change in legal climate affected not only lawyers but the court as well. Lüritz judges are losing faith. They seem less hopeful than in earlier years that they can help to bring about that change in human nature that Socialism and its law were striving for. Some Lüritz figures of the 1980s suggest that the court's didactic efforts are slackening: suspension of divorce suits (to give the couple an impetus and time for reconciliation) down from 11% of all divorce cases in 1980 to 6.3% of all divorce cases in 1989; involvement of collectives in divorce trials (to link personal and communal interests in the marriage) down from 24.3% of all divorces in 1980 to 6% in 1989. But the decline in numbers reflects ideological tiredness rather than a conscious change of direction. I find less social optimism in the Lüritz records but still the same conviction that it is up to the state to guide its citizens towards their own and society's improvement. My Lüritz judges seem worried at the signs of change around them. Such worries, and a proposal for how to deal with them, show in a letter by which the director of the Regional Court of Appeals describes to the Ministry of Justice the 1981 visit of a group of Polish High Court judges in the Lüritz area. The Regional Court Director had invited the guests to dinner in her home "to talk more openly," as she explained in her long account of the meeting to the Ministry. It was, indeed, an open conversation. The Poles, one of them even a member of Solidarity, had spoken to their German hosts about the current political chaos in their country and about their hopes to restore normalcy through economic reforms. "I have the impression that the Polish comrades place insufficient emphasis on the need for tight leadership by the Party and the State," writes the German judge in her report, responding to disorder with the very German call for more discipline.

The Lüritz trial court judges probably would have agreed with her. In uncertain times it is important to close ranks. My court's relation with the prosecutor's office is a case in point. At least since the 1960s, Lüritz criminal trials had been dominated by what Herr Busch once described to me as the "unholy alliance" between judge and prosecutor, who in the GDR functioned neither as counter-

weights to one another nor as independent actors each following his or her own script but as collaborators, pursuing together the containment and reeducation of offenders. My Lüritz files contain no evidence of that "alliance's" weakening in the last decade of the court's existence. If, in 1979, the penalties meted out by Lüritz judges deviated from those suggested by the prosecution only in 8.7% of all cases, that figure in 1988 still is just 9%. Lüritz judges continue to cooperate with other agencies of State authority in the control of deviants by, for instance, informing the city's Department of Interior Affairs of "a-social" citizens requiring supervision and, occasionally, even by communicating suspicions of planned emigrations and the like to the Secret Police. When in the last two years before *die Wende*, would-be immigrants in Lüritz publicly begin to clamor for their exit visas, criminal law judges come down hard on the protestors. In 1988, a Lüritz crane driver who brings a rope to Town Hall and threatens to hang himself if his visa application is denied is punished with 14 months in prison for "interfering with the activities of state authority"[62] despite his lawyer's efforts to describe him as "a simple man." Several doctors who, on successive Sundays, clothed in black, stage silent "promenades" on the Lüritz market square to publicize their unsuccessful efforts to emigrate, after weeks in prison, are let off with some heavy fines — again for "interference." Cases like these are almost always tried in the regional capital to avoid political contagion and embarrassment in Lüritz. Until the end, socialist law tries to keep up appearances. That also holds for the appearance of social harmony. When, also in 1988, a junior judge at the Lüritz court, in a dispute over a garage, sues his opponent, the court's director simply removes his complaint from the docket. "A judge does not litigate," she informs her colleague. A parent does not quarrel in front of the children.

But the sense of political weariness that sets in in the 1980s, the loss of faith, the smell of change, even of decay, affects the different protagonists in my Lüritz story in different ways. The pupils of the law — Lüritz's ordinary men and women — react by becoming more disrespectful of the law's authority. Between the 1950s and the 1980s, East Germany had experienced little open political dissent: much less, for instance, than its Czech or Polish neighbors, and for a period lasting more than 30 years, I have found very few crimes of political disobedience in my Lüritz records. By 1987 that begins to change. The *Ausreiser* begin to populate my Lüritz files, in literal translation, "outbound travelers," though most of them are not allowed to travel in the direction they prefer and therefore, in one way or the other, run afoul of East German law: by publicly demanding the freedom to move guaranteed in the Helsinki Agreements, by en-

62. StGB/GDR, supra n. 8, § 214.

listing the help of Western authorities to underscore their claims, or by challenging demotions or dismissals which often followed someone's application for an exit visa. The number of political offenses committed in Lüritz but adjudicated in the regional capital is rising.[63] So is the number of "fugitives from the Republic."[64]

Even representatives of the unpolitical and until then, largely silent, majority in town no longer hide their disaffection. In my Lüritz records, civic discontent appears in many guises. Litigants (and often, officials, too) no longer fill out the numerous questionnaires that accompanied East German law suits by which the planners in Berlin tried to gather data that could help their social engineering efforts. Items number 21 and 22 of the East German questionnaire for divorce plaintiffs, for instance, asked for the names and addresses of collectives or their representatives who had been, or still could be, called upon to mediate a marriage conflict. "None, since I have not talked about my problems with anyone," is a reply in 1980. "None, I consider that useless!," someone else writes in the same year. "I do not want to wash dirty laundry, I only want a divorce," a plaintiff responds in 1985. By the late 1980s, the questions almost always are left blank.

Petitions to the court that in the past had only threatened social abstinence if their author's plea for help would not be met (such as the announcement that the petitioner would fail to vote) now openly declare that the applicant, if disappointed, might altogether turn his back on Socialism. In 1982, the defendant in a suit brought by the Lüritz public utilities company thus informs the court: "I have applied to the Department of Interior Affairs for permission to move" — he does not need to tell the court *where* he wants to move to. Even in the fall of 1989, an ex-husband, asking for assistance in a dispute with his former wife over the couple's old apartment, tells the court: "So many have left already. But I want to stay. If I get what I am entitled to. Please help me." And although open threats like these are fairly rare, there are many little signs by which those coming into contact with the law show that it does not rank very high on their scale of values: a woman gives false evidence because the interested party has promised to tile her roof; somebody else ignores the need to respond to litigation because "she is in the process of wallpapering

63. While in the 1970s and earlier 1980s, about 1%-3% of Lüritz criminal defendants were prosecuted in the regional capital, that figure rose to 5.5% by 1988. Most of those defendants either had tried to illegally leave the country or had contacted Western authorities—a crime called *Verbindungsaufnahme* ("establishing connections" § 219 StGB)—informing them about their arduous quest for exist visas.

64. On East German "fugitives from the Republic" see Hirschmann, "Exit, Voice and the Fate of the German Democratic Republic: An Essay in Conceptual History," 45 *World Politics* no. 2 (January 1993); Markovits, "Two Truths About Socialist Justice: A Comment on Kommers," 22 *Law & Social Inquiry* 849, 866 (1997).

her apartment." Usually, the court meets such excuses with surprising lenience.

But though the citizens of Lüritz seem less respectful of their legal system (or, possibly, just less fearful of the state), they still remain the products of an authoritarian society. Their loss of faith in Socialism has not transformed the men and women I encounter in my files into carbon copies of capitalist legal men. They are distrustful of their state, but they still expect it to look out for them. They rely on the court's help and advice as much as ever. Civil litigation in Lüritz still is something of a family affair. If, in 1982, 43.8% of all parties involved in civil suits were relatives or close acquaintances, that figure, by 1988, is 39.5%—not much of a drop. As I read the files, Lüritz people are still accustomed to collective warmth. They are as suspicious of outsiders as ever, whether over-ambitious go-getters or those who refuse to pull their load.

Their views on *Assis* or "a-social" citizens are a case in point. I know about those views from the post-mortems that the court arranged at a defendant's enterprise in cases in which someone's conviction could serve as a lesson to his fellow workers. The questionnaire (yet another questionnaire!) filled out on those occasions contained the item "How does the collective assess the outcome and impact of the trial?" To judge by their responses, work collectives felt far more sympathy for comrades convicted of assault and battery or drunk driving than for people sentenced for work evasion. "Too lenient," is the usual reaction to an *Assi's* penalty. "It probably won't help," is another standard comment. Fellow workers had reasons to be angry at an *Assi* because his absenteeism affected the performance of the collective as a whole and thus each member's bonuses. But they also seem contemptuous of an *Assis'* otherness: the irregular rhythm of his days, his lack of discipline, his dubious friends, his inability to lead an orderly and integrated life. "The collective discussion with colleague L. demanded by your agency will not take place," an enterprise flatly informs the Lüritz police in 1984 — those working by the rules are sick and tired of taking care of deviants. A 1987 trial of five Lüritz police officers who, legitimated by their uniforms, systematically had stopped vagrants, drunks, and other *Assi*-types for searches and seizures, had checked their pockets, ransacked their apartments, and had stolen whatever valuables they could lay their hands on, reveals how deep and wide-spread the contempt for *Assis* was among the upright folks of Lüritz. "We thought of them as a lower class of citizens," one of the policemen testified (behind closed doors, of course, because the public was excluded from the trial). Socialist law had taught him to think of *Assis* as "a lower class of citizen:" they were considered weak and selfish deserters from a common enterprise. The political disillusionment of the 1980s affected my

Lüritz citizen's respect for law. But it could not erase the habits and reflexes acquired in a lifetime under Socialism.

It strikes me as significant that at that 1987 trial of the five policemen the Lüritz judge no longer used the term "*Asoziale*" to describe their victims but spoke of "*Problembürger*"—"citizens with problems." By the middle 1980s, laymen and experts in the GDR had parted ways in their assessment of the *Asozialen* issue. Lawyers and social planners could no longer close their eyes to the fact that their reliance on criminal law to cajole and force truants and slackers into regular work had largely failed. *Asoziale* filled East German prisons[65] — in Lüritz in 1980, 19.2% of all defendants were sentenced for "asocial behavior" — but they did not emerge resocialized. Since "asocial behavior" described a lifestyle rather than a specific offense, recidivism among *Assis* was high and meant that many of them spent years of their adulthood behind bars. A 1983 study commissioned by the GDR Supreme Court revealed that 30% of all those sentenced for "asocial behavior" were so socially fragile and dependent that they could not, on their own, hold down a steady job.[66] By 1985, East German social planners were looking for non-punitive, therapeutic ways to deal with the socially weakest of the *Asozialen*.

Their problem was so crucial to East German thinking about law because it touched upon two central tenets of Socialism: its belief in work as a constitutive element of human dignity and its insistence on the educability of men. *Assis* did not work, and too many of them could not be rehabilitated. Their very existence showed that Socialism had been deluded about the powers and ambitions of its legal system. Hence the embarrassed secrecy of the GDR's legal *Asozialen*-policy: East German law reviews carried few *Asozialen* judgments and never listed actual penalties; since 1977, Supreme Court decisions (many of which dealt with *Asozialen* issues) were published "for internal use only";[67] debates about the failures of the criminalization

65. In 1988, *Asoziale* made up 24.5% of the East German prison population — two and a half times more than those convicted of "border crimes". Reported by Luther & Weis, "Zur Anwendung des Strafrechts in der Deutschen Demokratischen Republik," 34 *Recht in Ost und West* 289, 291 (1990).

66. The document is published in Jörg Arnold, *Die Normalität des Strafrechts in der DDR* vol. I (Freiburg 1995) at 725.

67. Until 1977, the GDR Supreme Court published its decisions in book form; see, *e.g.*, *Entscheidungen des Obersten Gerichts in Zivilsachen*, vols. 1 - 16. The practice was discontinued in 1977 when the Court, instead, began to distribute xeroxed collections of decisions that appeared six times a year under the title *Informationen des Obersten Gerichts* (Informations from the Supreme Court). The volumes were numbered (to trace their distribution) and until January 1988, were marked "*Nur für den Dienstgebrauch*" (for internal use only). In his introduction to the series, the then President of the Supreme Court asked the recipients of the volumes not to cite to them. As a former Supreme Court justice explained to me, the Court's decision to go private, so-to-speak, was made for two reasons: technical shortages had led to a too infrequent appearance of the volumes in book form, and the publication of opinions

of chronic work evasion took place behind closed doors;[68] and a 1985 decree introducing "special brigades" as sheltered work collectives for some of the socially most helpless *Asoziale* was neither published nor, as far as I can tell, commented on in the literature.[69]

The *Assis* were one of the reasons for East German jurists to lose faith in their legal system (the rising number of *Ausreiser* and fugitives in the 1980s,[70] for instance, was another). But *Asoziale* can serve nicely to show the relationship between political faith and law in East German legal history. While ordinary people reacted to the failed re-education of a-social citizens with cries for more state control, jurists reacted by becoming more finicky about the application of repressive rules to a social problem that seemed to be impervious to the criminal law. In the 1980s, the Supreme Court thus repeatedly instructed trial courts to be more careful in determining whether a truant's work evasion had indeed, as the law required, "impeded upon public order and security";[71] it insisted that trial judges carefully establish the exact number of days a defendant had missed at work,[72] and it warned judges not to glibly pass over the accused's own explanations for his absences but to evaluate and weigh the life situations and motives leading to his downfall.[73] Of twenty *Asozialen* cases included between 1977 and 1989 in the Supreme Court's case collection, eighteen came out in favor of the defendant. And there were other ways by which the Court and legal scholars in the 1980s tried to infuse greater precision into the legal diagnosis of a-social behavior: by refining the conditions under which *Assis* could receive heavier penalties as recidivists,[74] for example, or by limiting the trig-

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dealing with such unpleasant issues such as fugitives and *Asoziale* had become increasingly embarassing.

68. See, e.g., the documents published in the collection by Jörg Arnold, *Die Normalität des Strafrechts in der DDR*, vol. I, supra n. 67, p. 677-748.

69. I know of the existence of the decree from the Lüritz files and from a few reports on the work of the *Sonderbrigaden* in the East German legal literature; see Lothar Krause, Wiedereingliederung von Strafentlassenen in einer besonderen Brigade, 43 *Neue Justiz* 160 (1989); Kliche, "Gestaltung von Wiedereingliederungsprozessen in besonderen Brigaden," 43 *Neue Justiz* 291 (1989).

70. On the fluctuating numbers of *Ausreiser* and fugitives from the GDR to the Federal Republic see Ammer, "Stichwort: Flucht aus der DDR," 22 *Deutschland-Archiv* 1207 (1989) and Wendt, "Die deutsch-deutschen Wanderungen," 24 *Deutschland-Archiv* 390 (1991). In Lüritz, the number of arrest warrants for refugees rose from 14 in 1987 to 75 in 1988 and 111 in 1989. By 1989, 73% of those arrest warrants were for "illegal non-return", that is, for fugitives who had made use of temporary travel visas to West Germany or neighboring countries by not returning to the GDR.

71. Oberstes Gericht, decision of Nov. 2, 1982, *Informationen des Obersten Gerichts* (Informations from the Supreme Court; henceforth *OGI*) 1982 no. 2 p. 10 (1982); Oberstes Gericht, decision of Feb. 26, 1985, *OGI* 1985 no. 2 p. 43 (1985).

72. Oberstes Gericht, decision of May 7, 1981, *OGI* 1981 no. 4 p. 23 (1981).

73. Oberstes Gericht, decision of Dec. 16, 1982, *OGI* no. 2 p. 46 (1982); Oberstes Gericht, decision of May 16, 1989, *OGI* 1989 no. 5 p. 23 (1989).

74. See the Supreme Court documents reprinted in Arnold, vol. I, supra n. 65, at 657-712.

ger-happy arrest policy of local courts and prosecutors[75] that affected *Asoziale* more than any other group of criminal defendants in the GDR.[76]

There was a connection between East German jurists' loss of confidence in the transformatory powers of the law and their rising concern for legal formality and precision. If you no longer believe that your ideology can provide right answers to important social questions, you need to rely on formal rules to find them: doubt in the knowability of outcomes breeds trust in procedures. This is why capitalist law that, unlike socialist law, allows for disagreement about desirable outcomes, places so much greater faith in due process than Socialism ever could. It is our political agnosticism that makes us rely so heavily upon fair play. East German "people's judges" of the 1950s and early 1960s knew the right answers, or believed they did, and therefore had very little patience with procedural precision. It was only when courts no longer knew in advance which outcome to prefer that they had to be particular about the means by which they found their answers. My Lüritz data could be charted in a graph that shows the inverse relationship between political and legal faith as a steadily descending or rising curve depending on which of the two coordinates you picked as your independant variable. East German legal history began in the early post-war years with a strong belief in ideology and little trust in formal law. It ended, by the time the Wall collapsed, with little faith in ideological solutions and much more interest in the kind of answers found in legal rules.

The growth of legal professionalism in the GDR contributed to this development. The early "people's judges" knew very little law and, in a complex case, could not draw upon an arsenal of doctrine to steer them through confusion but had to fall back on their own beliefs and on instructions from above. Hence the curious mixture of simplistic law, heartfelt convictions, and political orthodoxy that I find in the early Lüritz files. By the 1980s, East German universities, internal scholarly debates (however cautious) and West German intellectual influences had bred a class of jurists interested in and capable of sophisticated legal argument. They were proud of their skills. And while in the final years of the GDR the pressure on East German jurists to demonstrate political conformity increased, the quality of their legal craftsmanship increased as well. Unlike the "people's

75. On Supreme Court attempts in the 1980s to restrain the issuing of arrest warrants in the GDR, see Birte E. Keppler, *Die Leitungsinstrumente des Obersten Gerichts. Unter besonderer Berücksichtigung von Richtlinien und Beschlüssen zum Recht der Untersuchungshaft* (Freiburg 1998) p. 313-37.

76. In Lüritz, defendants prosecuted for "a-social behavior" were more likely to be imprisoned prior to their trial than any other group of defendants. Thus, in 1980, 85% of all "a-social" defendants were in preliminary detention, compared to 74% of those defendants accused of border violations and 20% of those prosecuted for the theft of state property.

judges" of the 1950s, judges and prosecutors in the 1980s had a stock of legal convictions and techniques at their disposal that could serve to counterbalance the demands of politics. I don't want to suggest that it was common for the East German jurists of the 1980s to challenge or subvert the orders of the Party-state. They were still the servants of this state, were still used to bow to its authority. But the declarations of respect and loyalty for the Party that once seemed natural and legitimate must have become increasingly embarrassing to GDR lawyers as the years wore on. They now knew more and better. They were professionals. By the time the Wall collapsed, most of them, I suspect, liked the law better than the Party.

It is thus not surprising that the liberalizing influences in the last decade of East German legal thought and practice came from the most sophisticated and best-trained lawyers in the country: those at the Supreme Court, the Ministry of Justice, the universities. GDR law reform was driven from above. It was not a response to professional unrest at the local level. East German trial court judges of the 1980s were better trained and technically more fastidious than their predecessors. But the highly centralized and authoritarian judicial system in the GDR in which lower courts were tightly directed and supervised by superior courts had also taught them not to stick their necks out. As a result, trial court judges were politically and doctrinally more cautious than their higher-ups. They also were more enmeshed in local politics and closer to the people and therefore more likely to share the popular habits and beliefs bred by Socialism. When in the 1980s, the jurists in Berlin imposed more rule-of-law restraints on the work of lower courts, they were struggling with an ironic task: to teach judicial independence by commanding their subordinates to be less subservient to authority. No wonder that the recipients of these orders had difficulties complying. After 40 years of Socialism, East German law reformers were stumbling over obstacles of their own construction.

Again, my Lüritz data can provide examples. Despite high-level deliberations about the accuracy of confessions that began in 1978 and gained momentum after an erroneous conviction in 1982 set off a discussion on the rules of evidence among East German experts,[77] the number of withdrawn confessions in my Lüritz files remained minimal even after I encountered that first recantation by Herr Fuchs' client in 1984. Despite a decade of Supreme Court guidelines and decisions that warned against the undifferentiated criminalization of work evasion,[78] prison penalties for *Asoziale* dropped in Lüritz

77. The development is traced in Jörg Arnold, *Die Normalität des Strafrechts des DDR*, vol. II, Die gerichtliche Überprüfung von Geständnis und Geständniswiderruf im Strafverfahren (Freiburg 1996).

78. See supra nn. 70–72 and accompanying text.

no more than from an average of 18 months in 1980 to an average of 17 months in 1988. And it took campaign-style efforts by the Ministry of Justice to persuade local judges to no longer rubberstamp prosecutorial requests for arrest warrants but to carefully examine in each case whether an accused's pre-trial detention was truly warranted.[79] Between 1982 and 1985, Lüritz judges had denied only one out of 559 applications for arrest warrants by local prosecutors. After briefings at several "judge's conferences" in 1987 and 1988, the percentage of prosecutorial requests denied increased to 4% in 1987 and 5% in 1988 — a gain, but not a real victory for judicial independence.

By occupational temperament and political persuasion, my Lüritz judges stood between the more sophisticated high-court judges and the Lüritz man or woman in the street. They were positivists: both out of a professional sense of duty and because strict adherence to the letter of the law provided the best shield against potential interference by outsiders. Like their superiors in Berlin, my Lüritz judges respected the law and wanted to get their legal answers right. Like their Lüritz clients, my judges believed in the parental obligations of the State. Occasionally, they functioned as mediators between an increasingly more formal legal system and a public increasingly more cynical about the law. When in 1981 a group of angry citizens staged a "public forum" in the regional capital to ask for harsher penalties for *Assis,* local judges intervened to explain why the law chose to be less repressive than in earlier years. As a Lüritz judge once told me, she and her colleagues were quite pleased to be able to respond to popular complaints about excessive lenience (lenience?) towards *Asoziale* by blaming it on the Supreme Court's instructions. Her statement illustrates the mixture of convictions fueling her daily work: respect for legal rules and faith in the legitimacy of orders from above.

So who were the players in East Germany's legal system on the eve of its disintegration? A legal elite increasingly convinced of the need for law reform. Foot-soldiers of the law who believed in law but also in order and discipline. Consumers of the law with little use or respect for laws and courts. And among all protagonists, the faith in Socialism and its promises was dwindling. Some of the prerequisites for fundamental legal change were present in the GDR of 1989: rising professionalism and that distrust of utopian goals that makes us look for reliable procedural ways of solving conflicts. But other features of East German legal culture stood in the way of change: reliance on a parental state, intolerance of outsiders, and a need for public order and security that only in the last years of the GDR began to clash with new demands for individual autonomy. I have not even mentioned what may have been the biggest obstacle to rule-of-law

79. See supra n. 74.

reforms: one-party rule and a planned economy. Law needs self-determination, egotism, conflict, competition, choice, bargaining, and the universal usefulness of money if it is to flourish. No wonder that it never could gain real power under Socialism.

If there was one area of East German social life where rules of conduct resembled those for legal interactions in the West, it was the black market. In the black market, self-serving and autonomous individuals engaged in mutually beneficial deals. Money was important. You got what you paid for. As a Lüritz architect who did a lot of moonlighting in the days of Socialism once explained to me: "That was when an honest handshake still counted." Indeed, I should have listed the growing importance of the black market in the 1980s as one of the symptoms signaling the approach of legal change in the GDR.

Consider used car sales in Lüritz. Since it took between seven and fifteen years on a waiting list to buy a new car from a state distributor, most people looking for a car had to buy it used from a private owner. Private car sales were legal only if the price stayed within the limits of an official estimate of the car's value. Such estimates calculated the price of a used car as a fraction of the artificially low prices at which the state itself sold its new cars to those who had survived the trials of the waiting list. This official price bore no relation to the value set by supply and demand in the used-car market. Cars were extraordinarily scarce in the GDR. Prospective buyers gladly offered two or three times the official price for any car that looked like it might run. As a result, most private car deals violated price restrictions.

Under East German law, contracts that violated price restrictions were not void but valid at the officially permitted price.[80] If both parties to such a purchase had acted "in a morally offensive manner," the prosecutor could confiscate the excess price for the state treasury.[81] If only the seller was at fault, the buyer could keep the car and sue the seller for a refund of the excess price. In the 1970s, prosecutors frequently enforced the law against sellers whom they considered particularly offensive "speculators." But by the middle 1980s, law enforcement officers had largely resigned themselves to economic realities. It seemed absurd to call the sale of used cars at prices that reflected their value in a hungry market "morally offensive." Police no longer intervened in the illegal car fairs springing up everywhere in the GDR. At the Lüritz fair, on a big field behind the old city ramparts, prospective sellers would simply park their cars, roll down the window far enough to allow prospective buyers to drop in a slip of paper with their offers, and accept the highest bid.

80. ZGB, supra n. 22, § 68 para. II.
81. ZGB § 69 Para. II.

Many of these deals were sealed with "an honest handshake" and never came to the attention of the law. But as the fairs became more commonplace, the crypto-capitalist morality of the black market began to erode. Buyers, increasingly resentful of paying astronomic sums for old jalopies, began to use the court as a kind of sales insurance. If their newly acquired car did not live up to expectations, they brought it in for an official estimate and then sued the seller for a refund of his "excess gain," often 50% or more of the actual selling price. The court knew, of course, that in the GDR no reasonable man would part with as precious a possession as a car, however rackety, at the official price. But law is law, and Lüritz judges, positivists that they were, in "excess price" cases always sided with the buyer.

I find these cases intriguing because they reflect an open clash of legal cultures that in earlier years would have been unimaginable. On the one hand, there were the rules of the black market relying on the honesty, and often, just the instantaneous performance, of people cutting their own deals. On the other hand, there was the law, trying to keep everyone in line by punishing sellers for what officially was considered excessive greed and by protecting buyers against their own risky purchases. Lüritz citizens moved back and forth between both legal worlds as it suited their interests. Buying a used car under this mix of rules no longer meant that you had to be on your guard not to be saddled with a lemon. Most people in my files reached their decisions very quickly. Often, they did not even ask to test drive their prospective purchases. Maybe they did not dare to ask: this was a sellers' market and they may have feared alienating the seller with too many questions. In any case, most Lüritz car buyers eagerly consented to the asking price and paid it. Of those who later had regrets about their bargains, the more assertive (or maybe the more ruthless) went to court to sue the seller for the return of the illegal portion of his price. The number of "excess price" suits on the Lüritz docket rose. Some of these suits make the eventual reader of these files shake her head in wonder. Here is one of them. On a fall evening in 1989, a prospective buyer spots a 23-year old *Trabant* on the auto market. Since it is already dark, he examines it as best he can under a streetlamp, finds many faults, tries unsuccessfully to bargain with the seller who wants to go home, and finally, afraid to lose his chance to buy the *Trabi*, pays the asking price of 10,000 marks in cash. A few weeks later, an official valuation of the car establishes a "legal" value of 4,100 marks. Should the impatient buyer not bear the risk of his own stupidity? Not under the parental guidance of the Lüritz court. With the judge's approval, buyer and seller settle on an "agreement" under which the buyer receives a refund of roughly half of the "excess price." "Don't worry," the Lüritz judges seem to say to him and other people yearning for a car. "You don't have to look out for your own interests. We'll do it for you."

As used-car deals became more prone to be unraveled by a court decision, sellers tried to protect themselves by concluding *two* contracts with their buyers: a *written* one at the official price to use in court if the necessity should arise, and an *oral* one which set the price that the prospective buyer had to pay to get his car. Buyers countered that strategy by secretly posting witnesses in earshot of the parties' dealings who later could testify in court about the actual price the purchaser had paid. Sellers, suspecting the presence of hostile witnesses, brought strong friends along to the negotiations who could deal with them. Sometimes, buyers short-circuited the need for litigation by paying the asking price with envelopes supposedly stuffed with money of which only the "legal" price consisted of real bills with the illegal rest made up of paper padding. These and similar happenings increasingly filled the docket of the Lüritz court. Some people took the law into their own hands. If violence erupted at the Lüritz auto market, the police would often look the other way. Neither official nor unofficial rules seemed to be capable any longer of civilizing used-car sales in the GDR. Here is how a Lüritz buyer described the situation in his brief: "Anyone interested can see what happens when cars are changing hands at our auto fairs and elsewhere. These exchanges are governed by the laws of supply and demand and by enormous legal insecurity." And from the brief of a disappointed seller: "What kind of contracts are these? People use them any way it suits their purposes."

But in 1987, a surprising case reached the Lüritz *Kreisgericht*. The plaintiff was Herr Klemm, an enterprising man who made a living by buying and reselling used cars for a profit and in such numbers that even at this late date, the prosecutor could no longer ignore his business. Herr Klemm, accordingly, had recently been convicted of speculation on ten counts; his sentence included the confiscation of 71,800 marks of illegal profits which he was ordered to pay to the city of Lüritz. Where to find the money? With Herr Fuchs (whom else?) as his attorney, Herr Klemm decides to sue several of his own suppliers for refunds of those "excess prices" that he had to pay himself in order to obtain the cars that he would later sell to his black market customers.

The Lüritz judge is outraged: if such suits prevailed, a speculator could recoup the penalties that he owed the state and go, in fact, unpunished! She tries to persuade the prosecutor to apply for the confiscation of the "excess price" obtained by Herr Klemm's suppliers, but without success. She tries to convince the city government of Lüritz to expropriate the money under an applicable city ordinance but finds that nobody is interested. She finally dismisses Herr Klemm's suit. But he appeals, and Herr Fuchs persuades the Regional Court to approve of a settlement under which his client is com-

pensated for roughly half of the "surplus prices" he had to pay his own suppliers. The black market had entered a socialist courtroom. Official and unofficial morality had cut a deal. A private lawsuit had undermined the state's criminalization of market activities.

I would have liked to see the continuation of the story. It would have been interesting to watch whether East German law reform could, over time, have managed to extricate itself from the constraint of Socialism, and if so, how. But history intercepted that experiment. In the event, *die Wende* caught East Germans unprepared. Very few people were ready for a legal system built on self-interest and self-assertion. Ordinary people were too accustomed to a state that not only constrained but also sheltered them. East German legal professionals would have been most suited to a world in which formality and procedure mattered again. But given the prevailing mood in post-reunification Germany, they were also most likely to be condemned as servants of an evil state and therefore largely were excluded from positions of authority in the new *Rechtsstaat*.[82] Former black marketeers and people with energy and elbow seem to have done alright. And as the steep rise of litigation figures after 1990 suggests,[83] East German newcomers do make use of their new law. Whether they trust it, and how long it will take them to replace their cynicism from the waning years of Socialism with faith in as detached and difficult a civil religion as the rule of law is another matter.[84]

POSTSCRIPT

You may have noticed a fair amount of "it seems'" and "that must have been the reasons" in this essay. The past is a treacherous terrain, not any safer, really, than the future, and I worry about my many guesses and about the misinterpretations that I may have made along the road to tell my Lüritz story. But here is one mistake that it is not too late to rectify. Remember Frau Haas and her sudden disappearance from the Lüritz files? With Frau Rüter's help, I found another witness to her story: Frau Haas's surviving daughter who lives in a town a train-hour from Lüritz.

82. See Markovits, "Children of a Lesser God: GDR Lawyers in Post-Socialist Germany," 94 *Mich. L. Rev.* 2270 (1996).

83. In 1988, a total of 62,210 first-instance civil suits were filed in the GDR; see *Statistisches Jahrbuch der Deutschen Demokratischen Republik* 1989 p. 399. In the first three years after reunification, civil litigation in the five new East German states rose from a total of 76,800 new suits filed in 1991 to a total of 317,600 suits filed in 1994. Reported by Leutheusser-Schnarrenberger, "Wege zur Justizentlastung," 48 *Neue Juristische Wochenschrift* 2441 (1995).

84. Elisabeth Noelle-Neumann, Rechtsbewußtsein im wiedervereinigten Deutschland, 14 *Zeitschrift für Rechtssoziologie* p. 121, 123-25 (1995) reports on a 1995 opinion poll according to which 60% of East Germans older than 16 years are not satisfied with the state of law and the courts in the Federal Republic (West Germans: 36%), 72% of East Germans do not feel protected by the law (West Germans: 33%), and 53% of East Germans do not consider Germany to be a just society (West Germans: 28%).

I asked the daughter for an explanation of her mother's dismissal from the Lüritz court. Yes, Frau Haas indeed had often quarreled with the prosecutor's office. And her son's fatal attempt to flee the country contributed to the mother's problems at the Lüritz court. But as I listened to the daughter's account of her mother's life, I suddenly realized: I had gotten my dates wrong. I had missed a time-gap. Two and a half years had passed between Dieter Haas' death in the Mediterranean and his mother's departure from Lüritz. Yes, her superiors at the Ministry of Justice wanted to avoid the political embarrassment and the tensions among the legal staff in town that they feared would be caused by Frau Haas' continued presence at the *Kreisgericht*. But they did not want to lose a competent and loyal judge. It took two and a half years to find a suitable alternative position for Frau Haas: she became director of a larger trial court in another town. She died in the summer of 1989 of a heart attack, while sewing a dress that she had intended to wear at the Supreme Court's 40th birthday celebration when she and other worthy judges in the GDR were to be honored with a medal. That birthday celebration did not happen, either. Socialism did not live long enough to see its date: December 8, 1989. But it seems right to end an essay that has tried to connect the life of a legal system with the lives of people living under it by remembering one of them whose own life was marked by Socialism's hopes, its disappointments, its successes, and its blackest failure.