

**Rapoport Center
Working Paper Series**
2/2021

**An Ethos of Restitution:
Walter Schwarz and the Gloss**

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The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice
The University of Texas at Austin



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ISSN 2158-3161

Published in the United States of America
The Bernard and Audre Rapoport Center for Human Rights and Justice at The
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
<https://law.utexas.edu/humanrights/>

<https://law.utexas.edu/humanrights/project-type/working-paper-series/>

ABSTRACT

Berlin, 1950s. Newly arrived back in Germany after escaping from the NS regime, a Jewish lawyer called Dr Walter Schwarz settles in Berlin. He opens a law practice assisting clients who are making private restitution claims. But Schwarz is not only a lawyer; he is a passionate writer: a jurist. This paper focuses on his writings in the professional journal of restitution, which are in the form of “glosses.” Generally appearing in the margins alongside neutrally worded case notes, these glosses are short, rhetorical commentaries, which often take literary forms. Schwarz uses the gloss, literally situated in the margins of law, as a genre which can return a human dimension to what became a rigid and bureaucratic process. Through his performative language and attention towards the conduct of legal practice, I argue Schwarz’s glosses offer a different ethos of restitution in the aftermath.

KEYWORDS: law, restitution, gloss, literature, rhetoric, Germany

An Ethos of Restitution:
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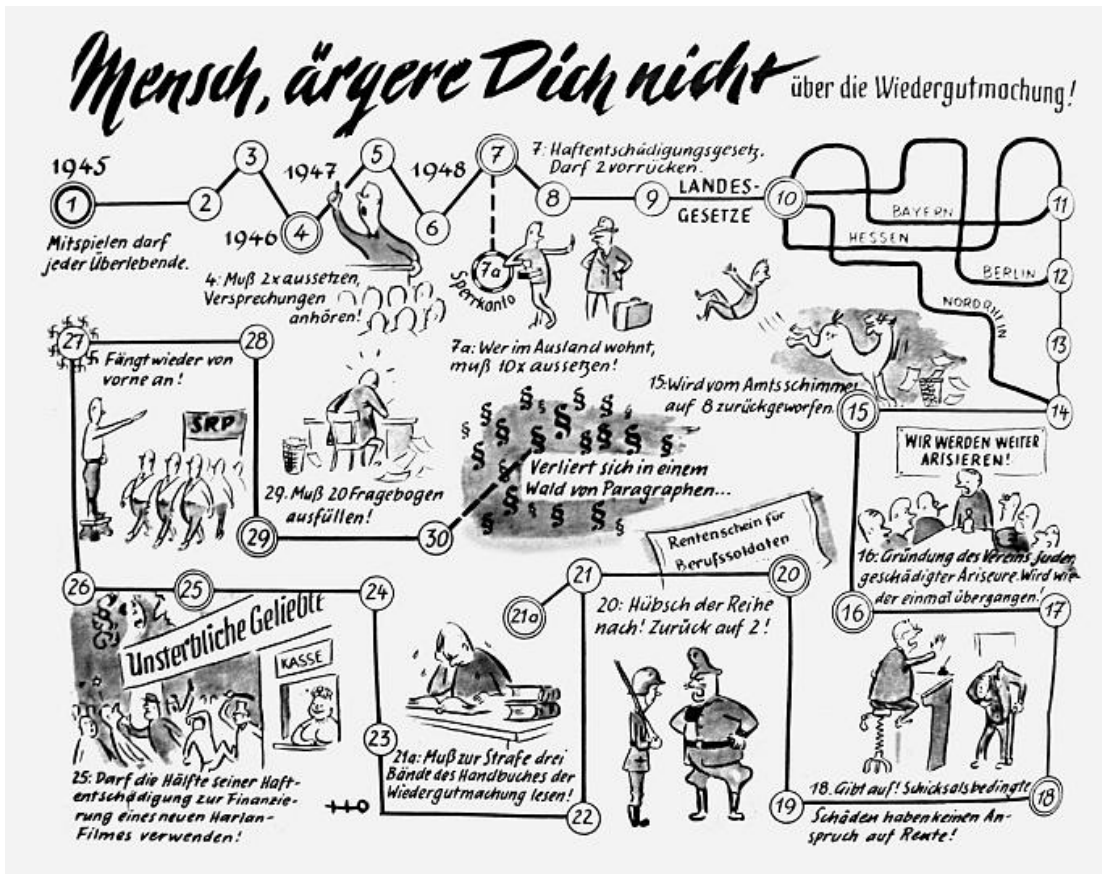
Laura Petersen

In the 1950s, a Jewish lawyer called Dr Walter Schwarz returned to Berlin after escaping the NS regime. He soon opened a law practice to assist clients making private restitution claims. Schwarz was not only a lawyer, but also a passionate writer: a jurist. His writings from this period, in the form of ‘glosses’ published in a legal journal, are the focus of this paper. I argue that Schwarz’s glossatorial writings provide a parallel jurisprudence of restitution. The literary gloss emerges as a way for Schwarz to intervene in the conduct of the restitution program—an institutional legal process—through the practice of a unique style of commentary situated in the margins of law and literature.

This paper is divided into five interconnected parts. To begin, I introduce the German legislative restitution regime, including the journal *Rechtsprechung zum Wiedergutmachungsrecht* (Decisions of Restitution Law)¹ where Schwarz published his glosses. I provide a short history of the gloss as a genre. I begin my analysis in the next section, focusing on three glosses in the style of a case note, arguing Schwarz aims to teach and critique through his re-writing of these cases. Next, I contextualise his use of pseudonyms in his writing practice. This is followed by further translations of selected glosses and a discussion of Schwarz’s audience. My argument is that these glosses offer an ethos of restitution regarding conduct and language. Ultimately, I contend Schwarz uses the threshold genre of the gloss as a way to gain readership in the legal profession. He offers an account of restitution which aims to rebuild of the practice of law in Germany at that time.

¹ Abbreviated to *RzW* in German, I refer to it as the *RzW Journal* throughout this paper. All translations from the German are my own.

1. Setting the scene



(Man, don't get annoyed about restitution! Cartoon published in: *Jüdische Illustrierte*, Nr. 10, June 1951)

I begin with a cartoon. A genre of commentary which makes one notice how style can make a message heard; a lesson on how words and their form can be in collusion. This cartoon from the *General Weekly Newspaper for Jews in Germany* parodies *Wiedergutmachung* (restitution) processes in 1950. Riffing on the title and the structure of the classic German board game *Mensch, ärgere Dich nicht* (Man, don't get annoyed) it begins at 1945, stating that 'every survivor is allowed to play'.

To win *Mensch, ärgere Dich nicht* you must push other players off the field to benefit yourself. Here the joke is that you need to have this mindset as a Jewish claimant seeking restitution payments in Germany in the 1950s, and that also you 'shouldn't get annoyed' at the

labyrinthine process which has been ostensibly designed for your benefit.² An exaggeration of events and the barriers placed before claimants, in the cartoon it is clear this is a game which cannot be won, but simply ends, on number 30, with a player disappearing: ‘lost in a forest of [legal] paragraphs’. I offer the cartoon as an analogy for my argument: it provides an insight into the way form matters to the effect of a message.

1.1 The Decisions of Restitution Law Journal

In Germany, the legislative process of restitution referred to in this cartoon began in the post-war period with Allied laws concerning the return of property introduced at the end of the 1940s, while legislation allowing compensation for personal harm was passed by the Bundestag in the early 1950s. During the 1950s and early 1960s there were repeated amendments.³ By 1965 there was a call for the end of restitution payments and the implementation of the ‘final’ restitution legislation—the *Schlusstrich*.⁴

If a Compensation Office denied an application for payment, a claimant had appeal rights. These appeal cases became a growing area of judicial decision-making. Lists of the main cases in restitution law began to be published in the *Rechtsprechung zum Wiedergutmachungsrecht* ‘Decisions of Restitution Law’ Journal in 1949 as a Supplement to the established *Neue Juristische Wochenschrift* Journal. The first edition in an opening preface represents itself as a collection of

² For example, the cartoon depicts all sorts of barriers along the way that might hinder progress and send a player back or to miss a turn, such as if you land on #7a – ‘Living Abroad means you have to sit out 10 times’; #15 – ‘Red tape means you have to go back to #8’; and as a punishment given the complicated state of legal regulation at the time, landing on #21a means you have to read three volumes of the *Handbook of Restitution*.

³ *Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* [Additional Federal Act for Compensation for Victims of National Socialist Persecution] (Germany) September 18, 1953, BGBl. I 1953, S. 1387 ff. (‘BErgG’); *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* [Federal Act for Compensation for Victims of National Socialist Persecution] (amended BErgG, effective retroactively Oct 1, 1953) June 29, 1956, BGBl. I 1956, S. 559 ff. (‘BEG’); *Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reiches und gleichgestellter Rechtsträger* [Federal Law regulating the Restitution for Appropriated Property] July 19, 1957, BGBl. I 1957, 734 ff. (‘BrüG’).

⁴ *Bundesentschädigungsschlussgesetz* [Federal Compensation Final Law] (effective retroactively Oct 1, 1953) September 14, 1965, BGBl. I 1965, 1315 ff. (‘BEG-SG’).

relevant judicial decisions.⁵ The aim was not to follow ‘any sort of tendencies, but to follow the pure scientific task of an objective reportage about the development of the judicial decision-making.’⁶ Notably, this also includes ‘illustrative and critical observations, for instance regarding individual questions or certain publicised decisions.’⁷

Ex Libris: an aside to Berlin

I was curious about the *RzW Journal*, which is not easily accessible outside of Germany. On a research trip I ordered up the volumes, one by one, from the bowels of the *Berliner Stadtbibliothek* (Berlin City Library) to be perused in the Reading Room in Mitte. Like many public institutions in Germany, this an institution with a complicit history.⁸ The day I went there was an exhibition open in a small turret room in the older part of the library complex, which was titled *NS-Raubgut* (National Socialist Stolen Goods). The tiny but elegant room replicated a home library with brass lighting and wooden bookcases on two levels, crammed full of old books. These had belonged to Jewish families or other organisations during the Nazi period. The exhibition was part of the ongoing restitution program to identify the provenance of books in their collection and then to try to find their original owners, to try to give them back.⁹

Once reading the *RzW Journal*, my attention was caught by a shift in the typescript on one of the pages: a small, italicised paragraph. At first glance, it seemed to be arguing against the bureaucracy of *Wiedergutmachung*, and the costs of a stamp. In the next issue, there was another small paragraph, similarly italicised in the top right-hand corner, similarly argumentative—another

⁵ Rechtsprechung zum Wiedergutmachungsrecht, ‘Geleitwort [Foreword]’ (1949) 1 *Rechtsprechung zum Wiedergutmachungsrecht* 1.

⁶ Ibid.

⁷ Ibid.

⁸ For a month and a half in 1933, all of Berlin’s libraries were closed, to enable a sorting out of degenerate books: they were stored nearby in one of the buildings belonging to this library, the *Neuer Marstall* building. After WWII another sorting through occurred, in order to identify all media that was of a NS or military nature.

⁹ See the website regarding provenance research and restitution: ‘Provenienzforschung – Zentral-und Landesbibliothek Berlin’ <<https://www.zlb.de/fachinformation/spezialbereiche/provenienzforschung.html>>.

text seemingly out of place. I eventually left the library with a stack of these photocopied glosses, intrigued by their incongruity. I discovered there were approximately 130 glosses published in the *RzW Journal* between 1957 and 1981, mostly under pseudonyms.

The purpose of this paper is to elevate these glosses out the margins and into the spotlight. To the best of my knowledge, they have never been translated into English. My aim is to pay close attention to this minor form, focusing on a selection of glosses written by one author, Walter Schwarz. I contend the genre of the gloss (and his use of pseudonyms) enabled Schwarz to go beyond his work as a restitution lawyer. The glosses were a practice of legal/literary writing that enabled a unique interpellation of critique into the standard tone and texture of commentary on restitution at the time.

1.2 The genre of the gloss

*Annotatio: id est lex*¹⁰

The gloss has ancient religious, legal, literary, and philosophical traditions. As the Trappist Monk Elias Dietz argues, ‘the practice of glossing, that is, annotating a text around the margins and between the lines, is probably as old as the skill of writing.’¹¹ In continental Europe, medieval glossators used the Roman Law Digest as the key text for legal teaching in the Middle Ages (alongside canon law) with the scholars specializing in these practices termed ‘glossators’.¹² The visual dimension of their work meant that the law fragment was situated in the middle of the page, with the glossed explanations surrounding it, often attempting to resolve apparent contradictions or

¹⁰ Johannes Teutonicus, author of the *Glossa Ordinaria* to Gratian’s *Decretum*. Cited in: Laurent Mayali, ‘For a Political Economy of Annotation’ in Stephen A Barney (ed), *Annotation and Its Texts* (Oxford University Press, 1991) 185, 191.

¹¹ Elias Dietz, ‘The Cistercians and the Glossa Ordinaria: A Status Quaestionis’ (2015) 50(2) *Cistercian Studies Quarterly* 131, 131.

¹² See: Magnus Ryan, ‘Glossators and Post-glossators’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008) 503. Also relevant is the term ‘commentators’ referring to law teachers, see: *Ibid.* Schwarz describes himself as a ‘glossator’ so I use this terminology throughout this paper.

point to other fragments.¹³ The ancient practice of a glossator was a tradition of iteration and restriction, tied up with authority.¹⁴ However in the sections which follow, I demonstrate how Schwarz's glosses often have the opposite function—they open up and offer different readings of relevant moments of law.

There is also a parallel literary and philosophical history to the genre of the gloss. For instance, in the early Romantic period in Germany there was a shift to a deliberate form of fragmentary writing, headed by the philologist Schlegel brothers, August Wilhelm and Friedrich.¹⁵ It was a method of presenting works which were deliberately partial, or isolated.¹⁶ In succeeding epochs, for example in modernist poetry, fragments were expressions of discontinuity, emphasising slippages or shared spaces through form.¹⁷

At the same time, fragmentary traditions have a specifically German philosophical history in the form of the *Denkbild* (thought-image). In the *Denkbild*, aesthetic and conceptual concerns are merged, so that 'the *Denkbild* encodes a poetic form of condensed, epigrammatic writing in textual snapshots.'¹⁸ The *Denkbild*, as described by Adorno, is a way 'to shock through their enigmatic form and thereby get thought moving, because thought in its traditional conceptual form seems rigid, conventional, and outmoded.'¹⁹ However to slot the *Denkbild* into a 'genre' is not easy, as the *Denkbild* itself comments on the performance of genre—remaining 'a liminal form of

¹³ These traditions of reading, writing and teaching form the fundamental basis of the modern civil law. Peter Goodrich emphasises the glossarial approach: '[f]rom its very beginnings in the twelfth century, the science of law was to treat its object as an autonomous body of written doctrine which was to be philologically reconstructed and handed down by an elite group of juristic exegetes, the first lawyers of post-classical Europe.' Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1990) 34.

¹⁴ The gloss was also a form of restriction and authority in literature, see eg.: Mark L Barr, 'The Forms of Justice: Precedent and Gloss in *The Rime of the Ancient Mariner*' (2011) 78(4) *ELH* 863.

¹⁵ See further: Philippe Lacoue-Labarthe and Jean-Luc Nancy, *The Literary Absolute: The Theory of Literature in German Romanticism*, tr Philip Barnard and Cheryl Lester (State University of New York Press, 1988).

¹⁶ One of Schlegel's fragments: 'A fragment, like a miniature work of art, has to be entirely isolated from the surrounding world and be complete in itself, like a porcupine.' Friedrich von Schlegel, *Philosophical Fragments*, tr Peter Edgerly Firchow (University of Minnesota Press, 1991) 45.

¹⁷ See eg, David Perkins, *A History of Modern Poetry: From the 1890s to the High Modernist Mode* (Harvard University Press, 1976) 309.

¹⁸ Gerhard Richter, *Thought-Images: Frankfurt School Writers' Reflections from Damaged Life* (Stanford University Press, 2007) 2.

¹⁹ Theodor W Adorno, 'Benjamins One-Way-Street' in Rolf Tiedemann (ed), Shierry Weber Nicholsen (tr), *Notes to Literature (Vol. 2)* (Columbia University Press, 1974) 322, 323.

discourse, a minor form of writing and a marginal textual practice.’²⁰ This short prose form is also given the label ‘urban miniature’,²¹ a form connected to the rise of the Feuilleton texts in the newspapers. Still today in German language newspapers, a short text prose form (described as a *Gloss*) is a popular form used for satirical musings in the Feuilleton section.²²

The contents page of the *RzW Journal* specifically lists the short prose texts discussed in this paper as *Glossen* (plural form of gloss). My contention is that this choice of genre, therefore, enables Schwarz to merge these different histories. His texts continue a legal history of commentary, as well as following a cultural and literary history of fragmentation and marginalia as forms which destabilise the concept of genre itself.

1.3 The printed form of the RzW Journal glosses

The glosses in the *RzW Journal* are printed in italics, with a bold heading, and almost always in the top right-hand corner of a page. Surrounded by a borderland space of white, outside of the dominant text, their interpolation is marked by a black line. This black line forms a frame as well as a border between the gloss and the rest of the page. Therefore, the use of italics and the positioning of the glosses means that there is a visual distance between the glosses and the rest of the content of the Journal—giving the text of the gloss a sense of visual coherency and completeness. The glosses almost become small, self-contained memorials—enframed and entombed on the pages—which fits with their history as a fragment or *Denkbild*.²³

The choice of typesetting in Germany in the 1950s is a significant one. Printed text from the Fifteenth Century until after WWII took two forms. It was either typeset in so-called *Deutsche Schrift* (German script), one form of which is *Fraktur*, a style of black letter/gothic typesetting, or

²⁰ Richter, *Thought-Images* 20.

²¹ See: Andreas Huyssen, *Miniature Metropolis* (Harvard University Press, 2015).

²² For a discussion of the current use of the gloss in German as a stylistic principle: Jakob Wetzels, ‘Satire - Das Unbekannte Stilprinzip’ (2012) 45(3) *Communicatio Socialis* 276, 280–1.

²³ These terms also have close resonances. In German, a *Denkbild* is a ‘thought-image’. A *Denkmal* is a ‘memorial’.

it was typeset in a form of *Antiqua*, Roman type. Choice of typesetting moved from being a convention (Latin texts in Antiqua, German texts in Fraktur) to reflecting major religious and political differences.²⁴ During the Third Reich, the use of Fraktur was promoted as being the ‘true’ German script. It was the dominant typeface in use in newspapers and institutions.²⁵ The *RzW Journal* is printed in a form of Roman type. But the glosses themselves are printed completely in italics, which highlight their interpolation onto the page of text.

I contend the commentary in the glosses has a different texture to the legal language which they join and their typesetting visually embodies this shift. There is also a traditional link between cursive handwriting and italics. As will be explored below, the shift to italics matches the shift in persona for the author. As Schwarz moves from the persona of a restitution lawyer to taking on the pseudonymous role of the glossator, the typeface moves from the standard Roman font to the italicised version. This is a more personal, handwriting style of font that matches the shift in tone and purpose in the glosses.

2. The ‘case note’ glosses

To begin, I translate a selection of Schwarz’s glosses which are written in the style of ‘case note’. To include case notes in any form is unusual in a German law journal, where the case note as a genre does not have a significant history.²⁶ The *RzW Journal* did include summaries of recent decisions: short, neutral statements of the findings of upper level court regarding a restitution

²⁴ ‘Cultural ambiguity was forcibly reduced to unambiguity, and fraktur was used as an instrument to forge national identity for as long as it appeared opportune to those in power’. Yvonne Schwemer-Scheddin, ‘Broken Images: Blackletter between Faith and Mysticism’ in Peter Bain and Paul Shaw (eds), *Blackletter: Type and National Identity* (Princeton Architectural Press, 1998) 50, 56.

²⁵ In 1941, however, there was a Decree banning the use of ‘the so-called gothic typeface’ which was then denigrated for its (false) Jewish background. See: Friedrich Beck, ‘“Schwabacher Judenlettern” Schriftverruß im Dritten Reich’ in Botho Brachmann et al (eds), *Die Kunst des Vernetzens: Festschrift für Wolfgang Hempel* (Verlag für Berlin-Brandenburg, 2006) 251.

²⁶ A stand-alone ‘case note’ is, however, a standard, recognisable type of commentary for UK, American and Australian lawyers, however it is not usually transformed into the short, rhetorical form of a gloss. In Germany the key form of legal marginalia is the *Kommentar*, which is a handbook of commentary produced for each area of law.

claim. Schwarz's case note glosses—which re-read and re-write a recent decision—were often printed next to these neutral summaries.

Schwarz does not usually name the claimants and does not describe them more than necessary to set up the factual scenario. As a result, the glosses repeat a process of inscription of legal categories of the various restitution laws onto the identity of the claimants. The three glosses discussed below are representative of the types of claims which were being made at the time and demonstrate Schwarz's rhetorical flair.

2.1 Flophouse or The Lower Depths (1959) [Sagittarius]²⁷

In this gloss, Schwarz describes how 'a doctor's wife, hunted by persecutors'²⁸ spent many months in a poorhouse that she only dared leave when she sought out a friend who had hidden in a madhouse and so she moved in there. Schwarz highlights that 'the involvement of two courts was needed to convince the Department, that this ghastly milieu, that only Goya could have portrayed, was inhumane under para 47 of the BEG (the main federal compensation law).'²⁹

Schwarz's response to this scenario is in the third person which lends his criticisms a universal tone of outrage: 'One almost refuses to believe it. What is inhumane, if not this last indignity?' He describes with scorn the arguments from the bureaucracy:

The authorities [*Behörde*] countered that the refuge had been arranged and looked after by governmental authorities. They seem to have held the opinion that the bureaucratically mandated use of soap and Lysol lifts this place to be a dignified institution for everyone. This thought process is frightening. How low has the idea of human dignity sunk!³⁰

²⁷ Walter Schwarz [Sagittarius], 'Nachtasyl [Flophouse or The Lower Depths]' (1959) 10(12) *Rechtsprechung zum Wiedergutmachungsrecht* 576. *Nachtasyl* is the title of a Maxim Gorki play (*Ha dne / Na dne* - originally written in Russian) when it is translated into German. In English, the same title of Gorki's play is usually translated as 'The Lower Depths'. *Nachtasyl* means a kind of 'flophouse'. I have left both as possible translations. This gloss was also reprinted in the German weekly newspaper *Die Zeit* in 1984: Walter Schwarz, 'Nachtasyl', *Die Zeit* (online, 5 October 1984) <<https://www.zeit.de/1984/41/nachtasyl>>.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

Schwarz continues on in this vein, arguing: ‘Not that this is the worst, how one treated people—far worse is the destruction of the idea of the human being in human beings, for it still continues and no abundance can cover up those wounds.’³¹ The final statements reflect more broadly on German society at that time, and a persistent failing of character which he is trying to expose and challenge through his glossatorial re-writings:

The critic of *Wiedergutmachung* forgets too easily that there are things which one doesn’t learn, but rather carries within oneself, and that all the efforts from the legislators and all the good will from the bureaucracy are powerless, when someone doesn’t know the meaning of humane.³²

2.2 Being too sharp leads to jagged edges (1960) [Sagittarius]³³

This gloss describes the decision of the *Oberlandesgericht Stuttgart* (Higher Regional Court of Stuttgart) concerning an appeal regarding compensation for the wearing of the yellow Jewish star. The appellant was denied part compensation because at the time of commencement of the regulation, he had not yet reached the proscribed age of ten years old but was nine years old (even if he looked like he was ten). The relevant authority found that there wasn’t a legal obligation to be wearing the Jewish star at that time and described the conduct of the parents as ‘over-anxiousness’.³⁴ However, the Court overruled the decision to deny compensation.

In approving of this decision, Schwarz appeals to a sense of common dignity and an approach of ‘what would you have done?’ through rhetorical questioning:

Who would have, as the father of this child, taken the chance and argued to prove to those in the black uniforms that this child is not yet 10 years old? Which father or mother would have put the birth certificate of their child in their school bag to protect them from a bashing or worse? No, three times no.³⁵

³¹ Ibid.

³² Ibid.

³³ Walter Schwarz [Sagittarius], ‘Allzu Scharf Macht Schartig [Being Too Sharp Leads to Jagged Edges]’ (1960) 11(7) *Rechtsprechung zum Wiedergutmachungsrecht* 295.

³⁴ Ibid.

³⁵ Ibid.

He continues to argue that even if it is determined today that the thin legal façade had still held up at that time, ‘the fathers and mothers knew in their hearts that in the black uniforms the devil incarnate lurked, and in pinning that yellow star onto their nine year old, they acted as every father and every mother around the world would have done.’³⁶ The final line lambasts the original finding of fact from the case officer: ‘Whoever brought that evil word ‘over-anxiousness’ onto paper for the first time, should take a good look at themselves and go and find another field of work. With a stone in the breast one should not conduct *Wiedergutmachung*.’³⁷

2.3 In a wooden shed (1967) [Sebaldus Steinbrech]³⁸

This gloss describes the situation of two Jewish siblings, aged four and twelve, who were entrusted under false names and false papers to the care of a Polish farmer. It is a poor farm and the children cannot sleep at night in the house so have to spend the night outside in a shed made out of partition boards. The Compensation Office decided that these children (now adults) were to be denied compensation on the grounds of inhumane circumstances. The reasons given were that during the day they could move freely around the farm, they were not separated, and the farmer shared her meagre food with them. This was appealed through two instances until their compensation claim was heard by the *Bundesgerichtshof* (Federal Court of Justice).³⁹ Schwarz tells this judicial story in the first two paragraphs of the gloss, and then moves on to critique the approach of the Compensation Office and the judicial process by appealing to a sense of common dignity:

The men and women who played a part in the pre-rulings were once children and perhaps have their own children. It is then so incredibly hard to imagine, sitting at your desk, how

³⁶ Ibid.

³⁷ Ibid.

³⁸ Walter Schwarz [Sebaldus Steinbrech], ‘Im Bretterverschlag [In a Wooden Shed]’ (1967) 18(11) *Rechtsprechung zum Wiedergutmachungsrecht* 483.

³⁹ *Bundesgerichtshof* [German Federal Court of Justice], IV ZR 88/66, 5 July 1967. The appellants were not granted compensation but their case was sent back to be heard at a lower instance for clarification of facts.

children feel who are locked out of the house at night like vagrants and dogs and have to sleep alone in a wooden shed?⁴⁰

Schwarz continues in this vein, calling on a sense of indignation and surprise that such attitudes are possible: ‘How is it possible, after everything that befell the German people, that human beings in this country seriously maintain, contend and put down on paper that this existence was humane?’⁴¹ The last paragraph finishes his plea with a clever analogy: ‘It was possible. And depressingly one must conclude: No experience, no event, no misfortune is able to rip down the shabby shed partitions that surround a blunted heart.’⁴²

To be such a radical commentator and to take on this role of the glossator may be to take up an old legal tradition, but it is one that is not without risk. This writing has a righteous certainty and deploys an almost repetitive type of rhetoric appealing to a sense of humanistic endeavour. As a result, the publication of these case note glosses—these polemical re-readings of legal decisions—must be viewed as an extraordinary intervention into the *RzW Journal*. The case note glosses offer a method of reading, but also another narrative of what happened on the street during the Nazi period and in the courtroom in the aftermath. They therefore leave legacies of different forms, including a mode of documenting and reproducing the first-hand experience of a legal process.

Notably, these case note glosses contain a sense of inherent care and respect. This relates not only to the human person, but also for the legal process—which is often (in Schwarz’s opinion) being dishonoured through flabby and apathetic ‘bureaucratic’ or judicial readings of the law. But he does not take sides, with the claimants also lambasted for their improper claims or tactics. As a result, Schwarz’s case note glosses are a marginal, but powerful, writing practice which aims to teach and critique. Schwarz utilises the glossatorial form in a subversive way: it is a method of

⁴⁰ Schwarz [Sebaldus Steinbrech], ‘Im Bretterschlag [In a Wooden Shed]’ 483.

⁴¹ Ibid. Note here the use of the term ‘befell’ by Schwarz which points to the suffering of the German people during WWII.

⁴² Ibid.

expansion, an attempt to loosen reliance on the (perceived) strictness and procedure in restitution law decision-making.

3. Schwarz and his pseudonyms

In translating the glosses above, I have reproduced the two pseudonyms under which they were published. The pseudonyms are a persona: a form of mask which creates a different textual personality, and Schwarz's choice of names for these masks is unusual, drawing attention to their artifice.

In order to understand their use, it is important to understand some of the details of Schwarz's biography. Schwarz from 1952 to 1967 ran a successful legal office, working as a lawyer in Berlin on restitution cases, sharing an office with Gerhard Falk in Wilmersdorf. His client list included prominent singers, actors, the theatre director Max Reinhardt, the publisher Samuel Fischer as well as the philosopher Ernst Bloch. He had an administrative law role: he was involved in assisting clients who were putting in a claim for restitution under the compensation regime or appealing an unsuccessful restitution claim, and so his job was to process paperwork, liaise with the relevant Compensation Office and occasionally to appear in court.

Schwarz, however, was different from most of the other lawyers practising at that time in Berlin: he was Jewish. He had escaped Germany in 1938 on a ship to Palestine. His father, who he had to leave behind, was later murdered at Theresienstadt. Schwarz describes in his autobiography how he settled in Israel, married, and became admitted as a lawyer there as well. He then decided to volunteer as part of the British Air Force and was posted to North Africa where he spied on the radio transmission of German and Italian pilots. After the war ended, he practiced law in Haifa and was then sent in 1950 to Munich for the Jewish Agency to follow up on restitution payments. He and his wife then decided to move back to Germany permanently and settled in Berlin.⁴³ He was

⁴³ See his autobiography: Walter Schwarz, *Späte Frucht: Bericht aus unstillen Jahren* [*Late Fruit: Report from the Unstable Years*] (H. Christians, 1981).

one of the founding editors of the *RzW Journal*. The historian Winstel describes him as the ‘Nestor of federal German *Wiedergutmachung*.’⁴⁴

Schwarz uses various fictional personas to publish the glosses in the *RzW Journal*. He defends this decision in his book that was published out of the glosses, stating: ‘[t]he glossator was not afraid to take responsibility for the glosses under his own name—he stands by every word even today. But the impression was to be avoided that the *RzW* was a sort of house-newsletter of the former editor.’⁴⁵

Initially all the glosses were published under the pseudonym ‘Sagittarius’ (1957-1962).⁴⁶ The image of Sagittarius is based on the centaur Chiron, who is half human and half horse. It is a fitting choice for these glosses that are also a mutant beast in their form, melding legal analysis with polemical twists, philosophical musings and literary styles. Sagittarius is also usually depicted with a bow and arrow and so is a messenger, a pointed symbol of transmission and transfer through the genre of the gloss.

The other pseudonym claimed by Walter Schwarz is ‘Sebaldus Steinbrech’. Like Sagittarius, it is a name which also conjures up an image: the hermit. This derives from St Sebaldus of Nuremberg, who according to legend was a hermit and a missionary. The surname ‘Steinbrech’ is a type of flower, but also compound noun formed by the word ‘stone’ and a derivative of ‘break’. It therefore has metaphoric force, alluding to the rocky terrain of restitution. Schwarz gives the explanation that ‘the glossator saw himself as an archer, and also thought to be breaking hard stone.’⁴⁷

Schwarz uses the pseudonym as a strategic cover. As Robert Griffin asserts, authors have chosen to write anonymously for a wide range of reasons, including ‘that their authorial persona

⁴⁴ Tobias Winstel, *Verhandelte Gerechtigkeit, Rückerstattung und Entschädigung für jüdische NS-Opfer in Bayern und Westdeutschland* (De Gruyter, 2006) 49.

⁴⁵ Walter Schwarz, *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts [Spoken into the Wind? Glosses on the Restitution of National Socialist Injustice]* (Beck, 1969) X.

⁴⁶ Walter Schwarz, ‘Exit Sagittarius’ (1962) 13(5) *Rechtsprechung zum Wiedergutmachungsrecht* 201.

⁴⁷ Schwarz, *In den Wind gesprochen?* X.

conflicted with their daily one.’⁴⁸ One analogous example of a literary author from the legal field is Walter Scott who didn’t sign his book *Waverley*. He wrote in letter, ‘[i]n truth I am not sure it would be considered quite decorous for me as a Clerk of Session to write novels[.] Judges being monks [.] clerks are a sort of lay-brethren from whom some solemnity of walk & conduct may be expected.’⁴⁹

This concern with Scott regarding the ‘walk and conduct’ of the clerk implies that he viewed his literary work as incompatible with the decorum required by his legal work. However, perhaps Schwarz felt the pseudonym offers a way around this. Genette, in his seminal study of *Paratexts*, views the pseudonym functioning for the reader as one of differentiation, as the reader ‘distinguishes within his image or idea the figure of the author from the figure of the private man (or of the author in a different public role[.]’.⁵⁰

Schwarz’s use of pseudonyms gives his work a certain lightness of touch despite the serious subject matter, shielding the deliberate use of emotional language and the attempt to provoke an affectual response from these glosses. It is clear the subject matter of the glosses is often controversial and pushes particular (possibly unpopular) points of view. Using a pseudonym enables Schwarz to critique the institutions and parties to the *Wiedergutmachung* process—the legislature, the bureaucracy, and even his own clients—with whom he relies upon for his income but also has significant working and social relationships. It is understandable how Schwarz felt he could only offer this account of restitution which promotes certain form of conduct—an ethos—through taking on the pseudonymous persona of the glossator. The pseudonymous persona is a mask which enables Schwarz to write.

4. An ethos of restitution

⁴⁸ Robert J Griffin, ‘Anonymity and Authorship’ (1999) 30(4) *New Literary History* 877, 885.

⁴⁹ Walter Scott, Letter 14 July 1814, cited in: Jane Millgate, *Walter Scott: The Making of the Novelist* (University of Toronto Press, 1987) 60, 204n3.

⁵⁰ Gérard Genette, *Paratexts: Thresholds of Interpretation*, tr Jane E Lewin (Cambridge University Press, 1997) 50.

Using a further selection of glosses, I examine how Schwarz writes a parallel jurisprudence of restitution through the form of the gloss. My emphasis is on noticing how Schwarz was in the unique position of being a witness to and a participant in the development of a new area of law in Germany; his glosses are both a recording of this process as well as a means of trying to influence it. As Schwarz writes in a gloss referring to the main federal compensation law (BEG) in 1959:

The BEG is not the ripe fruit of judicial thought of centuries but the attempt—sure to fail—to bring the shape of order to a legal chaos. [...] Parliament no longer has the time nor opportunity to do better. [...] The expectation is that behind the word of the law the pulse of the human heart will be felt.⁵¹

However, ten years later in 1967, his tone has shifted:

It is not slanderous to say that a legislative experiment fails. In restitution every step for the legislature is a step into the unknown; there is, after all, no historical precedent. [...] For the current young generation the events of the Third Reich are a piece of history which was hushed up at school. And for the heirs or even heirs of heirs of the victims, money means nothing more than money.⁵²

One of the key areas of agitation for Schwarz as a glossator is regarding the timing and speed of the restitution process. With uncanny foresight, he writes ‘And the robins call from the rooftops that in this way it will take decades until the last files are wrested out of their slumber’.⁵³ Often he invokes the image of Chronos: ‘How often does it have to be repeated that here—like nowhere else—the time factor is the most important part of the payment? [...] Doesn’t anyone see that the highest of all judges is Chronos with the unrelenting hourglass?’⁵⁴

Writing pseudonymously also enables Schwarz to critique the conduct of the persecuted—his past, current, or future clients in his restitution practice—in the form of the gloss. For example,

⁵¹ Walter Schwarz [Sagittarius], ‘De Patria Bene Meritus [Outstanding Services to One’s Country]’ (1959) 10(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 337.

⁵² Walter Schwarz [Sebaldus Steinbrech], ‘In den Wind Gesprochen [Spoken into the Wind]’ (1967) 18(12) *Rechtsprechung zum Wiedergutmachungsrecht* 602, 602–603.

⁵³ Walter Schwarz [Sagittarius], ‘Ars Boni et Aequi? [The Art of Goodness and Equity?]’ (1957) 8(10) *Rechtsprechung zum Wiedergutmachungsrecht* 303.

⁵⁴ Walter Schwarz [Sebaldus Steinbrech], ‘Scherbenhaufen? [Pile of Broken Shards?]’ (1966) 17(3) *Rechtsprechung zum Wiedergutmachungsrecht* 103.

in the gloss entitled *Why It Takes So Long* (1958),⁵⁵ he uses wordplay and repetition of the term ‘why it is taking so long’ to rhetorical effect. He has strong words for the conduct of the persecuted here in causing delays and appeals to organisations representing the persecuted to lead by example in this area.⁵⁶

The second main area of agitation for Schwarz is relates to the process of making claims. Schwarz’s work as a legal practitioner in this area involves daily interactions with the Compensation Office and ultimately court action if the claims of his clients are denied. Writing these glosses also is a way to reform the standards of conduct of this bureaucracy.⁵⁷ In the gloss entitled *Concerning the Climate* he reflects upon how the conduct between applicants and departments creates the ‘atmosphere’ for the proper conduct of restitution. ‘But laws one can create; climate one cannot; it has to emerge. The ground out of which it can blossom is human behaviour.’⁵⁸ He uses the form of the gloss to call for a certain attitude on both sides towards legal appeals, as the ‘point of restitution [...] is not a tournament, but a joint struggle for justice.’⁵⁹

Connected to Schwarz’s statements regarding conduct is a broader issue concerning the laborious process of lodging complaints. In the gloss *Parkinsoniana*, Schwarz outlines in detail the filing system, noting there are 30–40 files for the average (individual) compensation claim. Then, ‘[t]he real game begins’⁶⁰ as the files become shuffled and handed around the departments. He is critical of this circulation of paper and the effacement of the human dimension through this process: ‘Does it have to be said again and again that this paper decides the fate of people? Should

⁵⁵ Walter Schwarz [Sagittarius], ‘Warum Es So Lange Dauert [Why It Takes so Long]’ (1958) 9(5) *Rechtsprechung zum Wiedergutmachungsrecht* 165.

⁵⁶ Ibid.

⁵⁷ Schwarz uses an image of an enormous cart to recognise the crucial role of the administration, acknowledging that it is ‘not laws and not courts that decide fate of restitution but the people who get the thousand wheels of the cart of the administration moving daily.’ Walter Schwarz [Sagittarius], ‘Vom Sparen [On Saving]’ (1958) 9(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 289.

⁵⁸ Walter Schwarz [Sagittarius], ‘Zum Klima [Concerning the Climate]’ (1959) 10(2) *Rechtsprechung zum Wiedergutmachungsrecht* 55.

⁵⁹ Ibid 55.

⁶⁰ Walter Schwarz [Sagittarius], ‘Parkinsoniana [On Matters Relating to Parkinson]’ (1961) 12(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 353, 353.

really this last chapter of restitution fall victim to helplessness and bureaucratic lethargy?’⁶¹ He also turns to metaphor, recounting how an entire ‘forest of files’⁶² can emerge out of one single piece of paper and titling a gloss *The Deluge* which laments how he is ‘flooded by oceans of paper’.⁶³ This careful attention to the material side of legal practice is also described in his autobiography, where he notes the different sections of his file folders that he uses, emphasising: ‘In my office the files were not left to stew, because I heard how they called out to me. It was to do with people’s fates’.⁶⁴

Alongside this, a common theme of the glosses is a protest against the legal persona of the ‘file number’—the anonymous reference used by the Compensation Office and the legal system. The most striking example of this is the gloss entitled *A Fairytale* (1959).⁶⁵ It uses the conventional beginning ‘once upon a time...’ and fairytale motifs such as the quest and the dream sequence. Fitting to the choice of form, Schwarz uses conjunctions to begin sentences and this gives a sense of continuity within the narrated time of the gloss. It tells the story of a man who decides to ignore the legal procedures and goes to try to apply for his restitution payments in person. The night before he has a dream. In the dream he is his own file number and he is in a big hall with all the other file numbers. But there are so many file numbers that the Case Officers stick their sharpened pencils into the ground, wring their hands and say:

Now the party is over, the travel time has begun, due to the numbers of visitors one cannot get any work done. [...] [B]ut when one wants to know, where are the documents, they have no answer, and between the covers of the file, thin and small, there is only the cover

⁶¹ Ibid 354.

⁶² Ibid 353.

⁶³ Walter Schwarz [Sagittarius], ‘Die Sintflut [The Deluge]’ (1958) 9(4) *Rechtsprechung zum Wiedergutmachungsrecht* 127, 127.

⁶⁴ Schwarz, *Späte Frucht: Bericht aus unsteten Jahren [Late Fruit: Report from the Unstable Years]* 144. In another gloss he discusses a BGH case regarding an incorrect file number (made application void) and incorrect publication date on the judicial decision (did not make the application void). His conclusion: ‘File numbers and dates are the only navigational aides on the paper sea of justice; if even one of them is wrong, then that sailing document must be seen as lost—unless the mistake is corrected with help of common sense.’ Walter Schwarz [Sebaldu Steinbrech], ‘Quod Licet Jovi [What Is Permissible for Jupiter]’ (1966) 17(1) *Rechtsprechung zum Wiedergutmachungsrecht* 7.

⁶⁵ Walter Schwarz [Sagittarius], ‘Ein Märchen [A Fairytale]’ (1959) 10(6) *Rechtsprechung zum Wiedergutmachungsrecht* 245.

sheet and nothing else. At the same time the well-fed files that are full of documents lie idle [...].⁶⁶

At the same time the man sees an old file in the corner belonging to an old woman, she has no one left in the world, and she is waiting and waiting and in her eyes it was written—I would have just like to have experienced it, have sympathy. The man wakes up, feels ashamed, decides not to travel in person to state his claim and takes his family to the mountains instead. Recall the circumstances of its publication: this ‘fairytale’ gloss is italicised and framed by the black line but still situated in and amongst the otherwise conventional legal analysis and case summaries of the *RzW Journal*. It is a remarkable interpellation.

Even though the glosses primarily serve as a vehicle for rhetorical commentary, Schwarz often takes their literary dimensions one step further. In addition to the gloss following the form of the fairy tale, there are also glosses which use extended metaphor.⁶⁷ Notable is the characterisation of the process as a tragedy, for instance the comment: ‘[t]he role of the litigious Treasury does not fit well into the tragedy of *Wiedergutmachung*.’⁶⁸ An important part of a tragedy is the role of catharsis. In this excerpt from the gloss *The Deluge*, metaphor and repetition are brought together to amplify Schwarz’s conclusion about generational responsibility and renewal, bringing in the image of a bombed Berlin from out his window:

One thing above everything else should never be forgotten: the brown deluge of devastation was immeasurable, immeasurable is also the field of rubble which it has left behind. It is good that this image of the horror of this generation stands in front of the eyes of those to which the burden as well as the good fortune of catharsis has fallen.⁶⁹

⁶⁶ Ibid 245.

⁶⁷ The most extensive example of metaphor is in *Compensation Damage* which was published in *Aufbau* magazine in New York by Schwarz (Issue 2, 1958) and in his published book of the glosses (but not in the *RzW Journal*), see: Walter Schwarz, ‘Der Entschädigungsschaden [Compensation Damage] [1958]’ in *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts [Spoken into the Wind? Glosses on the Restitution of National Socialist Injustice]* (Beck, 1969) 6.

⁶⁸ Walter Schwarz [Sagittarius], ‘Streitbarer Fiskus [Litigious Treasury]’ (1962) 13(4) *Rechtsprechung zum Wiedergutmachungsrecht* 153, 153.

⁶⁹ Schwarz [Sagittarius], ‘Die Sintflut [The Deluge]’ 127.

As a result, Schwarz's collection of glosses forms a unique record of the relations between institutions and the actors in the restitution law process over this period; one which captures and critiques the practice and experience of law. His constant and often shrill lament is that the process became incredibly slow and frustrating; it degenerated into an ungainly shuffle of paper between claimants, lawyers, the Case Officers and the Compensation Office as well as the Legislature and Courts. The material technologies of law played a physical and psychological role—paperwork, files, and case numbers—which often had the effect of disembodiment and disheartening claimants to such an extent that they constantly wanted to show their faces and intercede bodily into the process. In that sense, it appears the restitution regime reinstated a machinery of identification and categorisation, creating definitions and catalogues of harm that worked to exclude as often as they led to a just outcome. Schwarz's glosses are constantly pushing against this, not only through his exhortations to remember the human behind the legalese, but also through the form of his writings.

Alive to the deliberate obfuscatory language of the Nazi period and acutely attentive to the power of terminology, Schwarz's choice of genre means a change in words, in tone and in focus away from a neutral mode of legal argumentation. In this way, Schwarz uses the genre of the gloss to try to make others pay attention to the material effects of form and language in the experience and practice of law. Schwarz's glosses are designed as commentary but also reform. His practice of glossarial writing offers a parallel jurisprudence—an ethos of restitution in form as well as content.

5. *Spoken into the Wind?*

Schwarz is writing for a small audience of the readership of the *RzW Journal*. This includes fellow restitution practitioners, the Compensation Office as well as members of the judiciary (one of the judges even responded to a published gloss).⁷⁰ The German judicial system and civil service went

⁷⁰ Hansjürgen Radloff, 'Postglossatorisch [Postglossatorial]' (1974) 25(5) *Rechtsprechung zum Wiedergutmachungsrecht* 131. His title is given as: Judge at the *Oberlandesgericht* [Upper Regional Court] Frankfurt

through various programs of de-Nazification,⁷¹ but Schwarz's glosses make it clear his opinion regarding the continuation of a character and attitude displayed by some judicial decision makers as well as the bureaucracy to the proceedings. Schwarz cloaks this critique in the rhetorical satire of the gloss.⁷²

Reflecting on the role of a glossator, Schwarz writes:

A word from outside helps sometimes to find the right path. If this happened only one single time, then the work of the glossator was worth it. His arrows were never intended to injure anyone; they were only the feathered messengers of thoughts which were aimed at the joint concern of restitution.⁷³

Looking at this passage closely, we can see how Schwarz defines his persona of the glossator and his choice of genre. He sees this role as being 'outside', rather than speaking from within the legal institution. He also emphasises that it has a normative function— 'to find the right path' and to hit the target of 'the joint concern of restitution'. Fitting his choice of pseudonym as Sagittarius, he writes that the glosses were only the 'messengers of thoughts'. For him, the effect would be that the gloss works as a conduit to transport these ideas from the 'outside' to 'inside' of the legal institution which is represented by the *RzW Journal* and its professional readership. This is a bit disingenuous, as it could also seem that Schwarz, even if disguised as Sagittarius, is also an 'insider'. Apart from representing his clients, he is editing the main professional journal, and he is

(Main). He is responding to the gloss: Walter Schwarz [W.S.], 'Der Balken im Eigenen Auge [The Beam in One's Own Eye]' (1974) 25(2) *Rechtsprechung zum Wiedergutmachungsrecht* 35.

⁷¹ See eg. Norbert Frei, *Adenauer's Germany and the Nazi Past: the Politics of Amnesty and Integration*, tr Joel Golb (Columbia University Press, 2002); Edith Raim, *Nazi Crimes against Jews and German Post-War Justice: The West German Judicial System during Allied Occupation, 1945-1949* (De Gruyter, 2015).

⁷² Note the BEG did have a provision that one of the judges deciding compensation matters should come from the persecuted group: BEG § 208 (3); see: Arnold Lehmann-Richter, *Auf der Suche nach den Grenzen der Wiedergutmachung: die Rechtsprechung zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (BWV Verlag, 2007) 42. However it seems this was a provision not easily fulfilled: 'As was well-known, judges who had this qualification in the young Federal Republic were not in abundance.' José Brunner, Norbert Frei and Constantin Goschler, 'Komplizierte Lernprozesse. Zur Geschichte und Aktualität der Wiedergutmachung' in Norbert Frei, José Brunner and Constantin Goschler (eds), *Die Praxis der Wiedergutmachung: Geschichte, Erfahrung und Wirkung in Deutschland und Israel* (Bpb, Bundeszentrale für Politische Bildung, 2010) 9, 29. Walter Schwarz argued that this provision, when followed through, actually led to a negative effect on the claimants as the judges were not objective, and too strict: see Winstel, *Verhandelte Gerechtigkeit* 137.

⁷³ Schwarz, 'Exit Sagittarius' 201.

attracting high profile clientele to his practice. However, his use of this wording makes us realise that this accomplished Jewish man living in Berlin may have still felt like an ‘outsider’.

The power of this glossarial form as a device that enables readership is striking. Schwarz’s often disarming style of writing functions as diagnosis but also a *disguise* for the lessons he is attempting to pass on his colleagues. His glosses, therefore, are written versions of a cartoon like the one which began this paper—they distil an important message and cloak it in satire or rhetoric as a method to hook in and interest a reader. It is therefore also more effective—or, at least, this strategy meant that his critique, interpolated into the *RzW Journal* in this way, was actually being read. For instance, Otto Küster, a contemporary legal practitioner of Schwarz’s, remarks in a profile of Schwarz: ‘More than one reader admitted that they opened each issue to the gloss; they read the gloss whilst everything else would be just thumbed through.’⁷⁴

5.1 Final years

To conclude this paper, I pay attention to Schwarz’s final years and his publication of the glosses in a separate, stand-alone book. Retiring from working as a restitution lawyer, Schwarz leaves his legal practice in Berlin in 1967 to move to Switzerland. However, he stays active in the field, still writing glosses for the *RzW Journal*, as well as editing a book on the restitution regime with the German Ministry of Finance. Demonstrating the complexity and scale of undertaking, this collection ends up being a seven-volume work.⁷⁵ In 1981 Schwarz was awarded a German Order of Merit Officer’s Cross, 1st class. He died in 1988 in Zurich.⁷⁶

⁷⁴ Otto Küster, ‘Walter Schwarz’ in *Juristen im Portrait. Verlag und Autoren in 4 Jahrzehnten. Festschrift Zum 225jährigen Jubiläum des Verlages C. H. Beck* (Verlag C. H. Beck, 1988) 667, 680.

⁷⁵ Bundesministerium der Finanzen and Walter Schwarz, *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Gesamtwürdigung in Einzeldarstellungen* [7 Volumes] (Beck, 1974 - 2000).

⁷⁶ Note there was controversy in the 1980s due to final statements by Schwarz regarding his overall positive view of the restitution regime. See a re-worked version of a speech by Schwarz from 1986 where he finishes with the lines: ‘This hardly comprehensible and highly complicated process, without example in history, has to be viewed as a whole. Only in this way it will gain its historical status as a lasting achievement of the Germans in the Federal Republic. In my opinion, a German would have the right to be proud of *Wiedergutmachung*.’ Walter Schwarz, ‘Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Ein Überblick.’ in Ludolf Herbst and Constantin Goschler (eds), *Wiedergutmachung in der Bundesrepublik Deutschland* (R.

After moving to Switzerland, he published a selection of the glosses in 1969 as a book with the title *Spoken into the Wind?*⁷⁷ Such a choice of title demonstrates a sense of despair for the state of *Wiedergutmachung* and for the effects of his glosses, a despair which is moderated only by the hopeful question mark, left dangling at the end of the phrase. *Spoken into the Wind?* brought Schwarz's texts out of the pages of an obscure legal journal and to a broader general audience.⁷⁸

Martin Hirsch, at that time a federal constitutional judge on the German Constitutional Court, writes in the foreword to the book about the importance of Schwarz's turn to the form of the gloss, reiterating my initial response in the Berlin library to the *RzW Journal*'s dry, complicated legalese:

The editor of the *RzW*, Walter Schwarz, must have realised what sort of danger the dryness of the content of his journal signalled. [...] The lack of popularity of the whole of the compensation law as an area in the judicial disciplines shows this with uncomfortable clarity. Such dryness is but only a symptom of an inevitable development, whereby the moral and political impetus which brought about the German enterprise to conduct compensation for NS crimes was quickly overlaid by the traditional structures of bureaucratic rule applicability and compliance.⁷⁹

Hirsch continues, remarking upon the way people involved in *Wiedergutmachung* attempt to view it as 'a simple special discipline of the liability of the state',⁸⁰ which makes its trauma easier to handle on a day-to-day basis. But, he argues, this also 'robs it of its true political, historical and moral worth'.⁸¹ He notes further, 'the apparent dryness of the material is a defensive mechanism

Oldenbourg, 1989) 33. Goschler quotes from a letter from Schwarz to Küster: 'The *Wiedergutmachung* is finished, even though people will be dealing with it still for many years to come. What matters now is the image of *Wiedergutmachung*. It has not yet started to enter history and even now the historical misrepresentation has begun.' Walter Schwarz an Otto Küster, 29.10.1984, cited in: Constantin Goschler, *Schuld und Schulden: die Politik der Wiedergutmachung für NS-Verfolgte seit 1945* (Wallstein, 2005) 299, see also: 306.

⁷⁷ Schwarz, *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts [Spoken into the Wind? Glosses on the Restitution of National Socialist Injustice]*.

⁷⁸ The book was positively reviewed by E. J. Cohn: 'Review: In den Wind Gesprochen?' (1970) 25(19) *JuristenZeitung* 624.

⁷⁹ Martin Hirsch, 'Geleitwort [Foreword]' in *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts* (Beck, 1969) V–VII, V.]

⁸⁰ *Ibid.* VI.

⁸¹ *Ibid.*

and a poison at the same time. Walter Schwarz must have seen this danger when he decided to bring “Sagittarius” and later “Sebaldus Steinbrech” to his side.’⁸²

Hirsch contends that Schwarz’s glosses had an effect on the behaviour of parties involved, with ‘the clearly functional effect of these glosses is undoubtable, even if it were grounded only in the fact that the fear of the sharp pen of Sagittarius made reading the *RzW* as “urgently-incidental” for some as it was, years ago, for bureaucrats and politicians to read *Spiegel*.’⁸³

Schwarz himself writes in the Introduction that it was important to publish this book so he could bring the activity and critique of *Wiedergutmachung* to other audiences and to provide a way to ‘look into a sphere of state activity, which is conducted by practically shutting out the public, even though it dealt with one of the murkiest chapters of German history.’⁸⁴ Schwarz discusses how his glosses meld together traditions and are aiming for reflective responses:

The glosses are not jurisprudential efforts in the strict sense. They are more the thoughts of a jurist regarding processes in one of the areas of legal life which until today remain closed and unknown to the public. [...] They want to take a certain case out of the sea of specific cases, shine a light on it and show its fundamental meaning. They want to help to once more reconsider what was done or not done.⁸⁵

This ‘reconsider’ is a neat encapsulation of Schwarz’s methodology of glossarial reading and writing—a way of re-writing as a material practice of responsibility for restitution. He finishes with the thoughts:

Has it all really been spoken into the wind? Or did at least something find its way into the heads and hearts of those it affected? The work on this stony field is far from finished. The theme of these glosses will stay relevant still for a long time. Therefore, this collection is not only a look backwards, but also an encouragement for those who are taking on this

⁸² Ibid.

⁸³ Ibid. See also the positive opinion of Karl Heßdörfer, who was the President of the Bavarian State Compensation Office (*Bayerischen Landesentschädigungsamtes*), who remarks that Schwarz’s ‘Glosses were not only read, they also were effective.’ Karl Heßdörfer, ‘Die Entschädigungspraxis im Spannungsfeld von Gesetz, Justiz und NS-Opfern’ in Ludolf Herbst and Constantin Goschler (eds), *Wiedergutmachung in der Bundesrepublik Deutschland* (R. Oldenbourg, 1989) 231, 247.

⁸⁴ Walter Schwarz, ‘Einführung’ in *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts* (Beck, 1969) IX–X, IX.

⁸⁵ Ibid.

work in the years to come. Perhaps, hopefully, the glosses have not been in vain. That alone would be plenty and a rich reward for him, who has written them out of his soul.⁸⁶

Conclusion

Schwarz's glosses re-write the jurisprudence of restitution in Germany as it was being enacted in real-time. The case-note style glosses are a unique interpellation into the *RzW Journal*, straddling the line between legal and literary techniques and traditions, using the persona of the glossator to teach and critique. Other glosses by Schwarz focus on the proper conduct, the language used and the materiality of the process. Offering an ethos—a method of conduct—Schwarz returns a human passion to an intensely bureaucratic system.

As mentioned, I first read the glosses in the City Library in Berlin. To enter the main part of this library, one walks through the *A-Portal* artwork by Fritz Kühn (1965). It consists of a large door with 117 small metal squares, each one containing a variation on the letter A, each letter presented in a different typescript. Kühn was a well-known GDR artist, who in 1958 also completed the top of the bell tower memorial at Buchenwald. This artwork is a reminder about the role of text as a portal, a liminal space between inside and outside, placed on the threshold.

Fittingly, the form of the gloss also rests on the threshold. Throughout this paper, I showed that forms are not only conduits, but hold histories within them. The gloss is particularly rich in this regard: it holds histories of interpretation and commentary; histories of philosophical inquiry; histories of humour and narrative flights. My aim was to return this marginal, literary form of jurisprudence to the centre of the page. In addition, for Schwarz, I suggest that choosing a genre was about making a judgment, choosing limits. Schwarz, choosing the marginal genre of the gloss, invites contemplation of the edges and confines of disciplines, with these italicised glosses questioning their black borderlines in the *RzW Journal* and the arbitrary containment lines separating 'law' from other ways of writing. His glosses explicitly and implicitly critique the limits

⁸⁶ Ibid X.

of legal language and its effect, its accessibility. They are also concerned with inside and outside—not only as a question of content and form—but as regards the very real political question of the insiders and outsiders within the legal profession at that time.

Schwarz uses the space of the threshold to invoke and subvert traditions of writing and reading. Leading by example, he turns these practices into a productive method of restitution, of the literal translation of *Wiedergutmachung*, which is ‘making-good-again’. Read against the backdrop of a Berlin being reconstructed out of rubble, Schwarz, through the use of a dynamic textual genre and his human imagination, also attempts to make something: he offers the building blocks for a different ethos and practice of law.

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