CHAPTER 2

Glossing Restitution

Walter Schwarz and Re-forming the Practice of Law

Berlin, 1950s. newly arrived back in Germany after escaping from the NS regime, a Jewish lawyer called Dr Walter Schwarz settles back in Berlin. He opens a law practice assisting clients who are making private restitution claims. But Dr Schwarz was not only a passionate lawyer, he was also a writer: a jurist. His writings from this time, in the form of 'glosses', are the focus of this chapter. I argue Schwarz's glossatorial writings provide a parallel jurisprudence of restitution. The writing of the gloss emerges as a way for Schwarz to intervene in the conduct of the restitution programme – an institutional legal process – through the practice of a unique style of commentary situated in the margins of law and literature.

This chapter is divided into five interconnected parts. To begin, I introduce the German legislative restitution regime, including the Journal *Rechtsprechung zum Wiedergutmachungsrecht* (Jurisprudence in Restitution Law) where Schwarz published his glosses and I provide a short history of the gloss as a genre.[1] I begin my analysis in Section 2.1, focusing on selected glosses Schwarz wrote in the style of a case note, arguing Schwarz aims to teach and critique through his re-writing of these cases. Part three draws on Schwarz's biography in order to contextualise his use of pseudonyms in his writing practice. This is followed by further translations of selected glosses, contending that an ethos of restitution emerges from Schwarz's glosses regarding the

[1] Abbreviated to *RzW* in German, I refer to it as the *RzW Journal* throughout this chapter. All translations from the German are my own, and, to the best of my knowledge, none of Schwarz's glosses have previously been translated into English.

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conduct and language of the legal restitution regime. I conclude with a discussion of Schwarz's audience. Ultimately, I contend Schwarz uses the threshold genre of the gloss as a way to gain readership in the legal profession, offering an account of restitution which aims to rebuild the practice of law in Germany in the aftermath of the NS regime and the Holocaust.

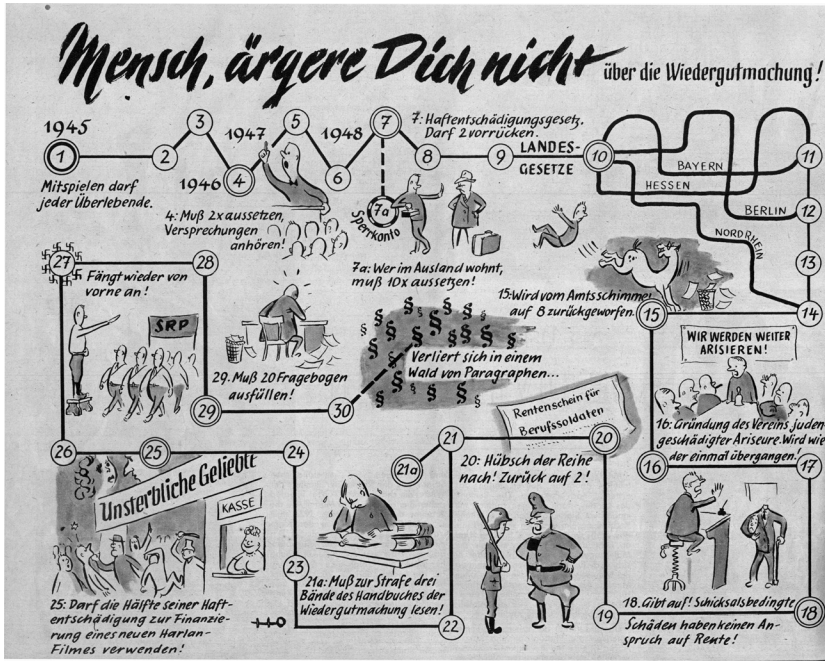
2.1 SETTING THE SCENE

I begin with a cartoon (Figure 2.1). A genre of commentary which makes us notice how style can make a message heard; a lesson on how words and their form are in collusion. This cartoon from the *General Weekly Newspaper for Jews in Germany* parodies the *Wiedergutmachung* processes. Riffing on the title and the structure of the classic German board game *Mensch, ärgere Dich nicht* (Man, don't get annoyed), it begins in 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 thirty, with a player disappearing: 'lost in a forest of [legal] paragraphs'. I offer the cartoon as an analogy for my argument: it offers an insight into the way form matters to the effect of a message.

[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 overseas 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*. There are also notable political mentions – such as #16 –'Creation of the Organisation of Aryanisers who were Injured by Jews' means you miss a turn; or #27, depicting the Nazi salute and a banner of the SRD (*Streifendienst*, Patrol Service of the Hitler Youth) means that you must go back and start again at the beginning.

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2.1 Peter Holstein, 'Mensch, ärgere Dich nicht über die Wiedergutmachung!' *Allgemeine Jüdische Illustrierte (Beilage zur Allgemeinen Wochenzeitung der Juden in Deutschland)* Vol. 1, Issue 10, 1 June 1951, p. 16

2.1.1 THE JURISPRUDENCE IN RESTITUTION LAW JOURNAL.

In Germany, the legislative process of restitution referred to in this cartoon – the *Wiedergutmachung*[3] – began in the post-war period with

[3] As discussed in the introduction to this book, *Wiedergutmachung* encompasses both an idea of 'restitution' as the restitution of property and 'compensation' in the sense of personal compensation claims. For a relatively recent and incisive overview of the field, see 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* (Bundeszentrale für Politische Bildung, 2010) 9. See also Ludolf Herbst, 'Einleitung' in Ludolf Herbst and Constantin Goschler (eds), *Wiedergutmachung in der Bundesrepublik Deutschland* (R. Oldenbourg, 1989) 7; Constantin Goschler, *Wiedergutmachung: Westdeutschland und die Verfolgten des Nationalsozialismus (1945–1954)* (Oldenbourg, 1992); Hans Günter Hockerts, Claudia Moisel and Tobias Winstel (eds), *Grenzen der Wiedergutmachung. Die Entschädigung für NS-Verfolgte in West- und Osteuropa 1945–2000* (Wallstein, 2006); Arnold Lehmann-Richter, *Auf der Suche nach den Grenzen der Wiedergutmachung: die Rechtsprechung zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (BWV Verlag, 2007). A comprehensive historical overview which

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Allied laws concerning the return of property introduced at the end of the 1940s,[4] while legislation allowing compensation for personal harm was passed by the Bundestag in the early 1950s.[5] During the 1950s and early 1960s, there were repeated amendments.[6] By 1965 there was a call for the end of restitution payments and the implementation of the 'final' restitution legislation – the *Schlussstrich*.[7]

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*

discusses the legal regime, personnel, places, conflicts, criticisms, opponents, and public atmosphere of *Wiedergutmachung* is: Tobias Winstel, *Verhandelte Gerechtigkeit, Rückerstattung und Entschädigung für jüdische NS-Opfer in Bayern und Westdeutschland* (De Gruyter, 2006).

[4] Different laws were enacted for different zones of the occupation. Walter Schwarz – the main protagonist of this chapter – wrote a book on the history of the Allied legislation regarding restitution of identifiable property, which was the first volume of the seven-volume compilation he edited with the Ministry of Finance: Walter Schwarz, *Rückerstattung nach den Gesetzen der Alliierten Mächte* in Bundesministerium der Finanzen and Walter Schwarz (eds), *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Gesamtwürdigung in Einzeldarstellungen* [Vol. 1] (Beck, 1974).

[5] See a comprehensive overview and timeline of restitution programmes in English published by the German Ministry of Finance: Federal Ministry of Finance, 'Compensation for National Socialist Injustice. Indemnification Provisions' (April 2019) <www.bundesfinanzministerium.de>; Federal Ministry of Finance, 'Measures to Compensate for National Socialist Injustice. A Timeline. Statutory Provisions, Non-Statutory Provisions and Guidelines Pertaining to Compensation for National Socialist Injustice' (October 2019) <www.bundesfinanzministerium.de>. See also a collation of laws in English by Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer, 2014), chapter 4, including a useful table of legislation on 107. For an overview of the German restitution programme in the context of international law, see Ana Filipa Vrdoljak, 'Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims' in Lyndel V. Prott, Ruth Redmond-Cooper and Stephen Urice (eds), *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Institute for Art and Law, 2012) 163.

[6] *Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* [Additional Federal Act for Compensation for Victims of National Socialist Persecution] 18 September 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) 29 June 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] 19 July 1957, BGBl. I 1957, 734 ff. ('BrüG').

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

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(Jurisprudence in Restitution Law) 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 relevant judicial decisions.[8] 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'.[9] Notably, this also includes 'illustrative and critical observations, for instance regarding individual questions or certain publicised decisions'.[10] From 1951 onwards it became a separate journal and was published until 1981.

2.1.2 EX LIBRIS: BERLIN. I was curious about the *RzW Journal*, which is not easily accessible in Australia. 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 is an institution with a complicit history.[11] 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 programme to identify the provenance of books in their collection and then to try to find their original owners, to try to give them back.[12]

Once reading the *RzW Journal*, my attention was caught by a shift in the typescript on one of the pages: a small, italicised paragraph.

[8] Rechtsprechung zum Wiedergutmachungsrecht, 'Geleitwort [Foreword]' (1949) 1 *Rechtsprechung zum Wiedergutmachungsrecht* 1.

[9] Ibid.

[10] Ibid.

[11] 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 the Second World War another sorting through occurred in order to identify all media that was of an NS or military nature.

[12] See the website regarding provenance research and restitution: <https://provenienzforschung.zlb.de/en/>.

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

The purpose of this chapter is to elevate these glosses out of the margins and into the spotlight. My aim is to pay close attention to this minor form, focusing on a selection of glosses written by one author, Walter Schwarz. Describing himself as a *Testamentsvollstrecker* (executor of the will) of the Jewish people in his autobiography,[13] Schwarz was a prolific writer. These glosses are only one account of restitution among several that he has written; he also wrote a PhD thesis on a restitution and compensation law topic,[14] numerous other legal essays, a collation of his glossatorial writings[15] as well as editing and contributing to a large-scale multi-volume account of the legal restitution regime in collaboration with the Ministry of Finance.[16] Nevertheless, the legal restitution regime in Germany has

[13] Walter Schwarz, *Späte Frucht: Bericht aus unsteten Jahren [Late Fruit: Report from the Unstable Years]* (H. Christians, 1981) 144.

[14] Walter Schwarz, *Rückerstattung und Entschädigung: eine Abgrenzung der Wiedergutmachungsformen* (Beck, 1952).

[15] 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).

[16] Bundesministerium der Finanzen and Walter Schwarz, *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Gesamtwürdigung in Einzeldarstellungen* [7 Vols.] (Beck, 1974–2000). Schwarz was the author of *Rückerstattung nach den Gesetzen der Alliierten Mächte* (Beck, 1974) and 'Schlussbetrachtung zum Gesamtwerk – Beilage' in Hugo Finke, *Entschädigungsverfahren und sondergesetzliche Entschädigungsregelungen* (Beck, 1987). Christian Pross is extremely critical of this work as he argues it became political and the Ministry censored contributions which were critical of the process: 'The federal Ministry of Finance had something to hide. It attempted to infuse its version of the history of reparations into a multivolume monument, intended for generations to come, when no one would be around who remembered the facts.' Christian Pross, *Paying for the Past: The Struggle Over Reparations for Surviving Victims of the Nazi Terror*, Belinda Cooper (trans) (JHU Press, 1998) 15.

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been only dealt with on a small scale in legal and historiographical texts,[17] and Schwarz's glosses, if given a glancing mention, appear in footnotes as ostensibly colourful opinions. I contend the genre of the gloss (and his use of the persona of the glossator and pseudonyms) enabled Schwarz to go beyond his work as a restitution lawyer and take responsibility for restitution in a different way. These glosses were a practice of legal/literary writing that enabled a unique interpolation into the standard tone and texture of commentary on restitution at that time.

2.1.3 THE GLOSS AS GENRE. 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'.[18] In continental Europe, medieval scholars used the Roman Law Digest as the key text for legal teaching in the Middle Ages (alongside canon law)

Schwarz's book (volume 1) was positively reviewed in English: 'It will be hard to match the standard set by Dr Schwarz in the best book written to date on a subject about which there is still a great deal of sensitivity throughout the world': Benjamin B. Ferencz, 'Rückerstattung nach den Gesetzen der Alliierten Mächte' (1975) 23(2) *The American Journal of Comparative Law* 374, 377. Ferencz also reviewed the collection (up to volume 6) and concluded: 'The West German model, well described in the volumes cited, erected an enormous, complicated and costly legal structure that sought to squeeze unparalleled moral obligations into a complex, inadequate and ultimately inappropriate legal frame from which the heart was missing.' Benjamin B. Ferencz, 'Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland' (1990) 84(4) *The American Journal of International Law* 999, 1000.

[17] German history professor Constantin Goschler, a pioneer in this area of research, writes that 'until recently the topic of *Wiedergutmachung* led a strangely island-like existence', which he ascribes to the fact that historians regarded it as an ongoing process and therefore writing history on this topic was 'premature'. Constantin Goschler, *Schuld und Schulden: die Politik der Wiedergutmachung für NS-Verfolgte seit 1945* (Wallstein, 2005) 17. Research has also been hindered by access to files due to privacy reasons. See Brunner, Frei and Goschler, 'Komplizierte Lernprozesse', 20. This is despite the fact that there have been at least 5 million applications for compensation since the 1950s; see Tobias Winstel, 'Die Testamentsvollstrecker. Zur Rolle von Anwälten und Rechsthilfeorganisationen' in Norbert Frei, José Brunner and Constantin Goschler (eds), *Die Praxis der Wiedergutmachung: Geschichte, Erfahrung und Wirkung in Deutschland und Israel* (Bundeszentrale für Politische Bildung, 2010) 533, 533.

[18] Elias Dietz, 'The Cistercians and the Glossa Ordinaria: A Status Quaestionis' (2015) 50(2) *Cistercian Studies Quarterly* 131, 131.

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with the scholars specialising in these practices termed 'glossators'.[19] 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 point to other fragments.[20] The ancient practice of a glossator was a tradition of iteration and restriction, tied up with authority.[21] However, in this chapter, 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 story 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

[19] 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 persona 'commentators' referring to law teachers. Ullmann contends the commentators were markedly different to the glossators, with 'different style, technique, interpretative conceptions, and originality in the tackling of legal problems'. He writes that 'the commentators extended the sphere of legal science and studies from the mere interpretation of individual legal rules to the investigation and presentation of the fundamental principles, notions and sources of the law'. Walter Ullmann, *The Medieval Idea of Law, as Represented by Lucas de Penna: A Study in Fourteenth-Century Legal Scholarship* (Barnes & Noble, 1946) 1. Schwarz describes himself as a 'glossator' so I use this terminology throughout the chapter. However, considering the originality and style of his work, the term 'commentator' may even be a better legal historical fit.

[20] These traditions of reading, writing and teaching form the fundamental basis of the modern civil law. Peter Goodrich emphasises the glossatorial 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.

[21] This is also the case in the context of literature, where the gloss was also a form of restriction and authority; see, for example, Mark L. Barr, 'The Forms of Justice: Precedent and Gloss in *The Rime of the Ancient Mariner*' (2011) 78(4) *ELH* 863. Common law also has a history of commentary. In the common law tradition, Plucknett's historical survey of professional legal literature introduces *Glanvill* (1187) as an 'outburst of legal writing' which 'settled the method of legal writing for centuries to come'. This was, in effect, the writing of a commentary on a writ. See Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed (The Lawbook Exchange, 2010) 256. See also Marett Leiboff's recounting of the history of early law reporting in: Marett Leiboff, *Towards a Theatrical Jurisprudence* (Routledge, 2019) 40ff.

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brothers, August Wilhelm and Friedrich.[22] It was a method of presenting works which were deliberately partial, or isolated.[23] In succeeding epochs, for example in modernist poetry, fragments were expressions of discontinuity, emphasising slippages or shared spaces through form.[24] 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'.[25] 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'.[26] 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 discourse, a minor form of writing and a marginal textual practice'.[27] This short prose form is also given the label 'urban miniature',[28] 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 commentary or also just everyday musings in the Feuilleton section.[29]

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

[23] 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*, Peter Edgerly Firchow (trans) (University of Minnesota Press, 1991) 45.

[24] See, for example, David Perkins, *A History of Modern Poetry: From the 1890s to the High Modernist Mode* (Harvard University Press, 1976) 309.

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

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

[27] Ibid 20.

[28] See Andreas Huyssen, *Miniature Metropolis* (Harvard University Press, 2015).

[29] For a discussion of the current use of the gloss in German as a stylistic principle in journalism: Jakob Wetzel, 'Satire – Das unbekannte Stilprinzip' (2012) 45(3) *Communicatio Socialis* 276, 280–281.

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The contents page of the *RzW Journal* specifically lists the short prose texts discussed in this chapter as *Glossen* (plural form of gloss). 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 history of fragmentation and marginalia as forms which destabilise the concept of genre itself. The glosses in the *RzW Journal* are printed in Roman font, in italics, with a bold heading, and almost always in the top right-hand corner of the page. Surrounded by a borderland space of white, outside of the dominant text, their interpolation into a page 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 mean that there is a visual distance between the glosses and the rest of the content of the journal – and gives the text of the gloss a sense of visual coherency and completeness. The glosses almost become small, self-contained memorials – framed and entombed on the page – which fits with their history as a fragment or *Denkbild* discussed earlier.[30]

The choice of typesetting in Germany for a legal journal in the 1950s is a significant one. Printed text from the fifteenth century until after the Second World War 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 it was typeset in a form of *Antiqua*, Roman type. The choice of typesetting moved from being a convention (Latin texts in *Antiqua*, German texts in *Fraktur*) to reflecting religious and political differences.[31] Typesetting became an ideological battleground during the Weimar Republic and, for instance, in the Bauhaus

[30] These terms also have close resonances. In German, a *Denkbild* is a 'thought-image'. A *Denkmal* is a 'memorial'. For a discussion of *Denkmal*, see later in Chapter 5 on memorial restitution.

[31] '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. For a historical overview of the various Antiqua/Fraktur debates (1800s, 1900s) as well as the font debate in the Third Reich, see Susanne Wehde, *Typographische Kultur: Eine zeichentheoretische und kulturgeschichtliche Studie zur Typographie und ihrer Entwicklung* (De Gruyter, 2000) 213–340.

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period, modern, non-*Fraktur* typefaces were created to match the functionality of Bauhaus designs.[32] During the Third Reich, however, the use of *Fraktur* was promoted as being the 'true' German script. It was the dominant typeface in use in newspapers and institutions. 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.[33] 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. As will be explored in the rest of this chapter, the commentary in the glosses has a different texture from the legal language which they join, and their typesetting visually embodies this shift.

Commonly used to give special emphasis or for specialised titles, italic fonts have been used since the sixteenth century, where they were originally used to set entire texts but later 'were increasingly used to distinguish parts of a book other than the main text'.[34] As Genette remarks, 'typographical choices may provide indirect commentary on the texts they affect […] there are cases in which the graphic realization is inseparable from the literary intention'.[35] Visually, this choice of typesetting lends the words a uniformly skewed orientation, reflecting their sideways glance across the page at the restitution cases and processes they are commenting on. There is also a traditional link between cursive handwriting and italics. As will be explored later, 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 of his texts moves from the standardised

[32] The Bauhaus letterform theorists were in favour of sans serif as a typographical expression of the modern age. Separate to this, the German typographer Paul Renner (1878–1956) rejected Gothic-style script and designed 'Futura' in 1927. See further: Jeremy Aynsley, *Graphic Design in Germany: 1890–1945* (Thomas and Hudson, 2000).

[33] See further: Friedrich Beck, '"Schwabacher Judenlettern" Schriftverruf im Dritten Reich' in Botho Brachmann et al (eds), *Die Kunst des Vernetzens: Festschrift für Wolfgang Hempel* (Verlag für Berlin-Brandenburg, 2006) 251.

[34] Gordon Campbell, 'Italic' in *The Oxford Dictionary of the Renaissance* (Oxford University Press, 2005).

[35] Gérard Genette, *Paratexts: Thresholds of Interpretation*, Jane E. Lewin (trans) (Cambridge University Press, 1997) 34.

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Roman font to the italicised version. This is a more personal, handwriting font style that matches the shift in tone, purpose and form.

2.2 'CASE NOTE' GLOSSES

To begin, I translate a selection of Schwarz's glosses which are written in the style of a 'case note'. To include case notes in any form is unusual in a German law journal, where the 'case note' does not have a significant history.[36] The *RzW Journal* did include summaries of recent decisions: short, neutral statements of the findings of an upper-level court regarding a restitution claim. Schwarz's case note glosses – which re-read and re-write a recent decision – were often printed in italics 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 that are given to the claimants by the various restitution laws themselves, with claimants mostly referred to, for instance, by their job or their age, depending on which role or part of their identity is important for the claim.

2.2.1 LAYERS OF LEGAL STORIES. There are two effects from my handling of this material. On one level, these are commentaries which are evaluating judicial decision-making, giving an opinion on the outcome of a recent case, and so I describe *how* Schwarz writes the glosses and his rhetorical moves. On another level, there are glimpses of the factual scenarios with descriptions of experiences, places, people and events, which resurface through the layers of commentary. A side effect of the translations is that these details can be heard anew. These are events which have been, of course, told by the claimants in a format legible to the court and produced to match the requirements of the restitution claim system.[37] These fragments of experience have been

[36] 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.

[37] 'In order to take on the role of a claimant, [Holocaust survivors] had to learn the language of the Federal Compensation Act [*Bundesentschädigungsgesetzes*]. However, this

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re-described by Schwarz and are translated and reproduced here. My aim is that their continual recitation functions in a small way as a form of preservation, an archival gesture.[38]

To this end, I present a selection of eight glosses in chronological order, layering them anew. Representative of the different types of claims which were being made, these particular glosses give a demonstration of Schwarz's rhetorical flair.

Flophouse or The Lower Depths (1959) [Sagittarius]

In this gloss, Schwarz describes how a doctor's wife, who was being hounded, 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.[39] 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 (*Federal Compensation Act*)'.[40]

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

created its own legal reality, which often didn't correspond to the experience of the survivors. The language of the BEG was not a neutral medium of negotiation; it was weighed down by interpretations, hierarchies, inclusions and exclusions, which the survivors had to adjust to in order to be recognised as claimants.' Brunner, Frei and Goschler, 'Komplizierte Lernprozesse', 28.

[38] This also fits with viewing the glosses as memorials. Note that Fritsche and Paulmann draw attention to how the files relating to *Wiedergutmachung* are important sources for other areas of historical research. For example, they contend that it makes sense to research questions of Aryanisation and *Wiedergutmachung* together. Christiane Fritsche and Johannes Paulmann, '"Arisierung" und "Wiedergutmachung" vor Ort: Perspektiven auf die Vernichtung der wirtschaftlichen Existenz deutscher Juden und die Entschädigung nach 1945' in Christiane Fritsche and Johannes Paulmann (eds), *'Arisierung' und 'Wiedergutmachung' in deutschen Städten* (Böhlau Verlag, 2014) 7, 31.

[39] 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 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* (5 October 1984) <www.zeit.de/1984/41/nachtasyl>.

[40] Ibid.

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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![41]

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.'[42] 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.[43]

Being Too Sharp Leads to Jagged Edges (1960) [Sagittarius]

This next 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.[44] The appellant was denied part compensation due to the fact that 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

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Walter Schwarz [Sagittarius], 'Allzu scharf macht schartig [Being Too Sharp Leads to Jagged Edges]' (1960) 11(7) *Rechtsprechung zum Wiedergutmachungsrecht* 295.

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time and described the conduct of the parents as 'over-anxiousness'.[45] However, the Court overrules 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 ten 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.[46]

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'.[47] 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*.'[48]

Pension Paradise? (1961) [Sagittarius]

In contrast, this gloss applauds the decision of the Bundesgerichtshof (Federal Court of Justice) that sits in Karlsruhe, even though it had the effect of denying compensation.[49] The case had the effect of preventing the drawing of two pensions – one from private wealth and one from the state under the *Federal Compensation Act* (BEG). Schwarz writes: 'The feeling for justice, which so often had occasion to rise up against the findings of the Fourth Senate in Karlsruhe, implores here a round of

[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Walter Schwarz [Sagittarius], 'Rentenparadies? [Pension Paradise?]' (1961) 12(12) *Rechtsprechung zum Wiedergutmachungsrecht* 539.

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applause.'[50] His final line is: 'Whoever wants justice, has to also want it where – and especially where – it denies a benefit based on the law.'[51]

Of All Places, Israel (1963) [Sebaldus Steinbrech]

In most of the case-note style glosses, Schwarz refers to the claimants as *der Verfolgte* (the 'Persecuted'). However, in this gloss, he reproduces the first name of the claimant – Susanne – which gives his comments even more of an emotive effect. This gloss begins with a narrative description of events in 1939 and the use of *Kindertransport* (child transportation) for Jewish children, recounting the story of fourteen-year-old Susanne alone over the sea and through Denmark and Sweden, and then after the war to (what was then called) Palestine to find her sister, her only surviving relative.[52] Three instances of the judicial process have denied her compensation for the health problems she suffered during that final leg due to the fact that she travelled to Israel. After outlining this scenario, Schwarz begins his rhetorical commentary – using short sentences and strong, repetitive language:

> Here one takes a deep breath. There is a family completely being wiped out. Two siblings survive […] they want to be reunited. They want to be a family again. They want, despite death and the devil, to begin a new life in a new country.[53]

Schwarz describes Susanne's final journey in 1946 as 'the last, conciliatory chapter of a tragic history, which had its beginning in Summer 1939 in a Berlin railway station. It was directed, first chapter to last, by the Third Reich'.[54] His final line is an emotive rhetorical question to the decision to deny her compensation on a technicality: 'Hand on heart: didn't the feather scratch a little as the words "of all places, Israel" were put down on the paper?'[55]

[50] Ibid.
[51] Ibid.
[52] Walter Schwarz [Sebaldus Steinbrech], 'Ausgerechnet Israel [Of All Places, Israel]' (1963) 14(6) *Rechtsprechung zum Wiedergutmachungsrecht* 253.
[53] Ibid.
[54] Ibid.
[55] Ibid.

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The Open Door (1964) [Sebaldus Steinbrech]

This gloss, however, forms a counterpoint to Susanne's story, as it is highly critical of the actions of a persecuted woman, who, in Schwarz's opinion, was trying to claim more than what she was entitled.[56] The woman is only described as an 'office supervisor' who was deported. She claimed that when she was deported, she wore a corset into which 2 kg of gold coins were sewn as well as a small pouch with 150 gold coins around her neck. Due to the loss of the gold coins, she asked for compensation. She wasn't satisfied with the offer of compensation for ninety coins and so her case went to court. With a play on words relating to the gold coins, Schwarz states that the most unbelievable thing is not her story, but the willingness of the judges to believe her at face value – *für bare Münze* – literally translated as 'for the bare coin'.[57] He includes further statements arguing that generosity and blind confidence are not far apart, finishing with: 'With a stone in the breast, *Wiedergutmachung* cannot be conducted, but certainly also not with blue-sky naiveté.'[58]

Two Miracles (1965) [Sebaldus Steinbrech]

In contrast, another gloss which narrates the story of a woman, only described as a former legal secretary, describes two marvels.[59] The woman escaped to England but after hearing that her family had all been murdered, she attempted suicide two times. The second time her legs needed amputation from the knees, and she was left 'vegetating' in a Mental Health Unit – 'a wreck of persecution'.[60] The first miracle is that there is a surviving brother, who is able to track her down in England and engage a lawyer for her to try to get some compensation regarding her loss of employment. The second miracle is that the 'feared legal complications'[61] do not happen and she does receive some

[56] Walter Schwarz [Sebaldus Steinbrech], 'Die offene Tür [The Open Door]' (1964) 15(6) *Rechtsprechung zum Wiedergutmachungsrecht* 245.
[57] Ibid.
[58] Ibid.
[59] Walter Schwarz [Sebaldus Steinbrech], 'Zwei Wunder [Two Miracles]' (1965) 16(4) *Rechtsprechung zum Wiedergutmachungsrecht* 153.
[60] Ibid.
[61] Ibid.

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compensation. These enable the relocation of 'the patient'[62] to Israel, where she is mentally and physically coming to life again near her family. Schwarz's last line is again the strongest, concerning the redemption of the conduct of the administration in this case: 'On the scales of justice this human life, already believed to be lost, will weigh heavier than the many sins of the much maligned administration.'[63]

In a Wooden Shed (1967) [Sebaldus Steinbrech]

Finally, I analyse this gloss which 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.[64] It is a poor farm, and the children cannot sleep at night in the house, so they 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).[65] 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 children feel who are locked out of the house at night like vagrants and dogs and must sleep alone in a wooden shed?[66]

[62] Ibid.

[63] Ibid.

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

[65] *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.

[66] Schwarz [Sebaldus Steinbrech], 'Im Bretterverschlag [In a Wooden Shed]' 483.

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Schwarz continues in this vein, calling on a sense of indignation and surprise that such attitudes remain: '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?'[67] 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.'[68]

2.2.2 THE GLOSSATOR. 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, to publish 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 do not only offer a method of reading but also another narrative of what happened on the street during the NS regime and in the courtroom in the aftermath. By lining them up, one after another, I attempt to demonstrate their relentless presentation of fragments of legal stories. They therefore leave legacies of different forms, including a mode of documenting and reproducing the first-hand experience of a legal process.

In a gloss by another writer known as 'Audiatur' (not Walter Schwarz),[69] there is mention of the 'honourable office' of the glossator – the *nobile*

[67] Ibid. Note here the use of the term 'befell' by Schwarz, which points to the suffering of the German people during World War II.

[68] Ibid.

[69] Apart from 'Sebaldus Steinbrech' and 'Sagittarius', 'Audiatur' is the other main glossatorial author in the *RzW Journal*, with glosses from 'Audiatur' appearing regularly from 1961 to 1981. However, it is unlikely Schwarz is also the author of the 'Audiatur' glosses. They share a similar style and tone; however, there is no evidence to prove this authorship. Schwarz only published the glosses by 'Sagittarius' and 'Sebaldus Steinbrech' in his book collection. The 'Audiatur' glosses were not included, although they were published during the same time period. Lehmann-Richter asserts that 'Audiatur' is Walter Schwarz, but the page numbers which he refers to in the *RzW Journal* do not mention 'Audiatur', only 'Sagittarius' and 'Sebaldus Steinbrech'. Cf. Lehmann-Richter, *Auf der Suche nach den Grenzen der Wiedergutmachung* 55, FN 109.

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officium.[70] This concept of an 'honourable office' is an important insight into this writing practice of the gloss. These 'case note' glosses contain a sense of inherent care and respect. This relates not only to the human person but also to 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 expansion, an attempt to loosen a reliance on the (perceived) strictness and procedure in restitution law decision-making.

2.3 SCHWARZ AND HIS PSEUDONYMS

In translating the glosses earlier, I have reproduced the two pseudonyms (Sagittarius and Sebaldus Steinbrech) 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. The question of biography is linked to a consideration of his choice of form but also a consideration of his audience.

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

[70] Audiatur calls on the Compensation Office to act on a basis of *nobile officium* in: 'Kronzeugen der Vergangenheit [Chief Witnesses to the Past]' (1961) 12(10) *Rechtsprechung zum Wiedergutmachungsrecht* 439. Audiatur then follows up a later gloss where he states it is, in turn, a '*nobile officium* of the glossator, who very seldom finds out if and in what way a gloss has had an effect, to note and recognise this': 'Anti…' (1962) 13(6) *Rechtsprechung zum Wiedergutmachungsrecht* 247, 247. This is not to be confused with the *nobile officium* in Scots law, which is a type of equitable remedy.

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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, whom he had to leave behind, was later murdered in 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 transmissions 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 and settled in Berlin in 1952.[71] The historian Winstel describes him as the 'Nestor of federal German *Wiedergutmachung*'.[72]

2.3.1 WRITING UNDER A PSEUDONYM. Schwarz uses various fictional personae to publish the glosses in the *RzW Journal*. He defends his decision, stating: 'The 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.'[73] Initially all the glosses were published under the pseudonym 'Sagittarius' (1957–1962) until there was a gloss with the title *Exit Sagittarius* in 1962, with the author's name underneath the gloss given as 'Walter Schwarz'.[74] 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, which melds legal analysis with polemical twists, philosophical musings and literary styles. Sagittarius is also usually depicted with a bow and

[71] See his autobiography: Schwarz, *Späte Frucht*.

[72] Winstel, *Verhandelte Gerechtigkeit* 49.

[73] Schwarz, *In den Wind gesprochen?* X.

[74] Walter Schwarz, 'Exit Sagittarius' (1962) 13(5) *Rechtsprechung zum Wiedergutmachungsrecht* 201.

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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 a compound noun formed by the word 'stone' and a derivative of 'break'. It therefore has metaphoric force, alluding to the rocky terrain of restitution. It also links back to Schwarz's use of 'stone' as a metaphor in the glosses excerpted earlier – his repeated concept of 'a stone in the breast' while conducting *Wiedergutmachung*.[75] Schwarz gives the explanation that 'the glossator saw himself as an archer, and also thought to be breaking hard stone'.[76] In later years, also published among these glosses under pseudonyms, there are glosses published in the *RzW Journal* with the 'real' names of the authors, mainly lawyers and officials,[77] while other writers follow Schwarz's tactic and use a pseudonym.[78]

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 conflicted with their daily one'.[79] One analogous example of a literary author from the legal field is Walter Scott who didn't sign his book *Waverley*. He wrote in a letter:

[75] See Schwarz [Sagittarius], 'Allzu scharf macht schartig [Being Too Sharp Leads to Jagged Edges]' 295; Schwarz [Sebaldus Steinbrech], 'Die offene Tür [The Open Door]' 245.

[76] Schwarz, *In den Wind gesprochen?* X.

[77] See the glosses with the following by-lines in the *RzW Journal*: Erhard van den Bergh, Wiesbaden (1965); Prof Dr Dr H. C. Ernst J. Cohn, London (1965); Lawyer Dr Walter Lewald, Frankfurt (1968); Dr Walter Brunn, Berlin (1970, 1971, 1972); Lawyer Dr Alfred Schüler, Frankfurt am Main (1971, 1972); Lawyer Dr Otto Küster (1974), Dr Dietrich Reimar, Köln (1975, 1976, 1978).

[78] 'Judiculus' contributes a rhyming poem of six stanzas concerning constitutional legal changes: Judiculus, 'Der Gesetznehmer [The Law-Taker]' (1966) 17(2) *Rechtsprechung zum Wiedergutmachungsrecht* 55. Also, there are glosses by the pseudonyms 'Pupugi' (1967); 'Inquit' (1971) and several glosses by 'Observer' (1972, 1973, 1974, 1975).

[79] Robert J. Griffin, 'Anonymity and Authorship' (1999) 30(4) *New Literary History* 877, 885. See also Marcy L. North, *The Anonymous Renaissance: Cultures of Discretion in Tudor-Stuart England* (University of Chicago Press, 2003); Victoria Smith Ekstrand, 'The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law' (2013) 18 *Journal of Technology Law & Policy* 1.

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> In 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.[80]

This concern with Scott regarding the 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 offered 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 […])'.[81]

His use of pseudonyms gives his work a certain lightness of touch despite the serious subject matter, while the deliberate use of emotional language is an 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 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 a 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.

2.4 AN ETHOS OF RESTITUTION

Schwarz takes responsibility for the restitution regime through writing a parallel jurisprudence of restitution in 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

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

[81] Genette, *Paratexts* 50.

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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.[82]

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.[83]

In this section, I discuss a further selection of glosses from this period of 1957–1967, when the restitution legislation was often amended by the legislature and in constant flux. However, for reasons of space, my analysis does not attempt to transplant these glosses back fully into their legal, political, economic and social surroundings. My account below, therefore, describes *how* he was writing about restitution and what restitution meant to him – commenting on his commentary – in this era of fundamental change. To do so, I pattern the quotations in this section throughout; like the case note glosses, my analysis again envelopes Schwarz's voice in description.

His glosses offer insights into three key themes that demonstrate how Schwarz views restitution: it should be timely and conducted with respect towards all parties, the process of lodging restitution documents should be streamlined and care must be taken in the use of language by the legislature and the courts. These three themes are examined in turn.

[82] Walter Schwarz [Sagittarius], 'De patria bene meritus [Outstanding Services to One's Country]' (1959) 10(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 337.

[83] Walter Schwarz [Sebaldus Steinbrech], 'In den Wind gesprochen [Spoken Into the Wind]' (1967) 18(12) *Rechtsprechung zum Wiedergutmachungsrecht* 602, 602–603.

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2.4.1 CONDUCT: SLOWNESS AND THE ROLE OF PARTIES TO PROCEEDINGS. 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 '[a]nd the robins call from the rooftops that in this way it will take decades until the last files are wrested out of their slumber'.[84] 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?[85]

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, in the gloss entitled *Why It Takes So Long* (1958),[86] he uses wordplay and repetition of the term 'why it is taking so long' to rhetorical effect. It is noticeable that he has strong words for the conduct of the persecuted here in causing delays; he appeals to organisations representing the persecuted to lead by example in this area.[87] In *Aut Caesar aut nihil*, he references s 179 BEG, the *Federal Compensation Act*, which states that restitution is to be completed as quickly as possible. Sagittarius finds this an example of a legislative provision that is so far away from being realistic that it has been drained of life, even without any sort of formal repeal. He argues the conduct of the persecuted here is also important, suggesting that claimants should save administration time by researching their case themselves and that properly completed applications should morally qualify for preferential treatment.[88] Schwarz takes this even further in

[84] Walter Schwarz [Sagittarius], 'Ars boni et aequi? [The Art of Goodness and Equity?]' (1957) 8(10) *Rechtsprechung zum Wiedergutmachungsrecht* 303.

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

[86] Walter Schwarz [Sagittarius], 'Warum es so lange dauert [Why It Takes so Long]' (1958) 9(5) *Rechtsprechung zum Wiedergutmachungsrecht* 165.

[87] Ibid.

[88] Walter Schwarz [Sagittarius], 'Aut Caesar aut nihil [All or Nothing]' (1958) 9(6) *Rechtsprechung zum Wiedergutmachungsrecht* 209.

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the gloss *On False Compassion*. Here he argues against always complaining about the conduct of the bureaucracy, as that only leads to more delays in determining claims:

> Every day of unnecessary delay creates more hardship for them and prolongs their suffering. […] The persecuted don't desire compassion, but justice. But such justice is implemented by people made of flesh and blood. […] In order to decide 'when', Justitia does not wear a blindfold in front of the eyes, and that is the way it should be. If anyone, compassion is due to those who have been waiting patiently and silently for years.[89]

By 1960 he entitles a gloss *On the Way to Wetzlar* – alluding to the Reichskammergericht (Imperial Chamber Court), which was an infamously slow court of the Holy Roman Empire that last sat in Wetzlar. He laments:

> it is not impossible that in 1970, courts will have to decide about events that happened over thirty-five years ago, which no one from those involved – either judge, lawyer or party – have experienced, whose witnesses are long dead, and the decision which leaves the heirs or even the heirs of heirs of those who have been wronged thoroughly cold.[90]

Later in the year (1960) he continues regarding further changes to the BEG legislation:

> the *Wiedergutmachung* degenerates, if it through the passage of time becomes weakened in its moral core and sinks down to pecuniary debates between non-persecuted heirs and heirs of heirs.[91]

Further examples demonstrate how his categorisation of *Wiedergutmachung* and the problem of time continue throughout his writing career. For instance, in 1965:

[89] Walter Schwarz [Sagittarius], 'Vom falschen Mitleid [On False Compassion]' (1959) 10(1) *Rechtsprechung zum Wiedergutmachungsrecht* 7.

[90] Walter Schwarz [Sagittarius], 'Auf dem Weg nach Wetzlar [On the Way to Wetzlar]' (1960) 11(1) *Rechtsprechung zum Wiedergutmachungsrecht* 13.

[91] Walter Schwarz [Sagittarius], 'Änderungen und kein Ende? [Changes and No End?]' (1960) 11(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 351.

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> Today, more than thirty years after the breakdown of the Fascist regime, not only the If and How-Much but also the When is important. What no longer reaches the survivor, is, if not lost, then in any case devalued. Who has suffered can make their peace. Their heirs only cash in. The wholly immaterial, but also very real gift of gratification for the soul must not be gambled away if restitution is not to turn into a dismal business.[92]

2.4.2 CONDUCT: BUREAUCRACY AND BUREAUCRATIC PROCEDURE. The second main area of agitation for Schwarz 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.[93] 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.'[94] 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'.[95]

Further, he reminds the reader that the *RzW Journal* gives a distorted view as the majority of cases don't make it to court, they are a last resort:

> The law doesn't begin to take shape only in the words of the judge, but already in the conduct of the parties towards one another. Applicants and departments are the parties in restitution. Their conduct towards one another creates the reality of the law, and only the 'sick' cases require the courts.[96]

[92] Walter Schwarz [Sebaldus Steinbrech], 'Die Hand am Zapfhahn [The Hand on the Tap]' (1965) 16(9) *Rechtsprechung zum Wiedergutmachungsrecht* 395.

[93] 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.

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

[95] Ibid 55.

[96] Ibid.

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Schwarz finishes this gloss critical of both sides, stating their conduct would 'create a bad atmosphere for *Wiedergutmachung*; it creates bitterness and rips open the trenches that others are trying to level out'.[97] In other glosses, he highlights the role of the case officers.[98] He is worried about the phenomenon of the good and talented case officers leaving. In this vein, he refers directly to the character needed to make these decisions, arguing you need more than routine, you need a 'sense of proportion and passion'.[99]

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 thirty to forty files for the average (individual) compensation claim. Then, '[t]he real game begins'[100] 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 really this last chapter of restitution fall victim to helplessness and bureaucratic lethargy?'[101] He also turns to metaphor, recounting how an entire 'forest of files'[102] 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'.[103] 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:

[97] Ibid.

[98] For example, he writes: 'whether the courageously and initiated with hope act of *Wiedergutmachung* will be respectfully completed doesn't depend so much […] on the interpretation of the laws by the judiciary, but rather by the people who apply and interpret the laws'. Walter Schwarz [Sagittarius], 'Der menschliche Faktor [The Human Factor]' (1960) 11(3) *Rechtsprechung zum Wiedergutmachungsrecht* 103.

[99] Ibid 103. For an insight into the work and lives of the bureaucrats working on compensation claims in one governmental district (Münster), see Julia Volmer-Naumann, *Bürokratische Bewältigung: Entschädigung für nationalsozialistisch Verfolgte im Regierungsbezirk Münster* (Klartext, 2012).

[100] Walter Schwarz [Sagittarius], 'Parkinsoniana [On Matters Relating to Parkinson]' (1961) 12(8/9) *Rechtsprechung zum Wiedergutmachungsrecht* 353, 353. Parkinson discovered growth laws for bureaucracy.

[101] Schwarz [Sagittarius], 'Parkinsoniana [On Matters Relating to Parkinson]' 354.

[102] Ibid 353.

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

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'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.'[104]

Alongside this, a common theme of the glosses is to protest 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 Fairy Tale* (1959).[105] It uses the conventional beginning 'once upon a time…' and fairy-tale 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 sheet and nothing else. At the same time the well-fed files that are full of documents lie idle […].[106]

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 liked 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

[104] Schwarz, *Späte Frucht* 144–145. In another gloss he discusses a BGH case regarding an incorrect file number (made the 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 [Sebaldus Steinbrech], 'Quod licet Jovi [What Is Permissible for Jupiter]' (1966) 17(1) *Rechtsprechung zum Wiedergutmachungsrecht* 7.

[105] Walter Schwarz [Sagittarius], 'Ein Märchen [A Fairy Tale]' (1959) 10(6) *Rechtsprechung zum Wiedergutmachungsrecht* 245.

[106] Ibid 245.

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instead, and the gloss ends. I urge you to recall the circumstances of publication: this gloss is italicised and framed by the black line but still situated in and among the otherwise conventional legal analysis and case summaries of the *RzW Journal*. It amounts to a remarkable interpolation.

It also demonstrates the importance that was placed by the victims on stating your claim 'in person' – interceding bodily into the process and being physically there to confront and apprehend the decision maker. This is a sensibility that was common in restitution claims. Even in the early stages of restitution claims in 1958, there was an influx of people from overseas who wanted to state their claims 'in person'. In the gloss, *Sense and Nonsense Travels*, Schwarz argues this clogs up the system but also empathises with this impulse to break through the persona of the anonymous file number:

> It is completely human to believe personal contact would be more capable than the dry paper to break through the wall of anonymity and let the human being arise out of flesh and blood, who has been persecuted, and now has been waiting several years for justice to be done. Therefore, it is so hard to convince these people that they don't help themselves and hurt others when they fulfil the wishes of their hearts and go in person to the authorities. […] It does not have to be the case that the corridors of the authorities turn into a *salle de pas perdus* every summer.[107]

2.4.3 CONDUCT: LEGAL LANGUAGE. Schwarz is also acutely sensitive to the language used in the restitution court processes. In 1968, he mocks the excessively complicated legal sentences delivered by the court, in the aptly named gloss *Juristic Baroque*. After quoting a complicated statement from the court, he finishes with the short, sarcastic line: 'there is nothing like a language of the judge that is close to the people'.[108]

To conclude, it is important to mention one of Schwarz's final glosses, entitled *Eichmann's Language* (1973), which, instead of using

[107] Walter Schwarz [Sagittarius], 'Fug und Unfug des Reisens [Sense and Nonsense of Travelling]' (1958) 9(7) *Rechtsprechung zum Wiedergutmachungsrecht* 247, 247.

[108] Walter Schwarz [Sebaldus Steinbrech], 'Juristenbarock [Juristic Baroque]' (1968) 19(5) *Rechtsprechung zum Wiedergutmachungsrecht* 197, 197.

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a pseudonym, was printed as being written by W. S.[109] This gloss takes explicit issue with the language of the BGH – the *Bundesgerichtshof* (Federal Court of Justice). He focuses on the use of the word *Verschubung* by the BGH to mean moving a prisoner from one concentration camp to the other. *Verschubung* is a technical legal term for the transport/transfer of a prisoner, but it is derived from the word *verschieben*, which literally means 'to push on' or 'to remove' in the sense of spatial movement. He lists other alternatives that the court could have used: 'relocation, transport, conveyance, take-over, admission, transferral'. 'No, it had to be *Verschubung* (pushed on).' He then emphasises his point: 'A *Schub* (batch) of prisoners was *abgeschoben* (pushed onwards). A pile of tattooed numbers was *verschubt* (pushed on). A *Verschubung* (pushing-on) happened.' He criticises this language: 'short, sober, precise, ice-cold. The language of Eichmann. In a decision of the BGH in the year of 1973. One does not want to believe it.'[110] The lawyer Otto Küster, in a response published in 1974 entitled *Once More: Eichmann's Language ('Verschuben')* (1974)[111] takes issue with Schwarz's attack on the language of the BGH in this case:

> In the language of Eichmann as documented in the Wannsee Protocol, no one was killed. One dropped out through natural reduction […]. Even the expression *sonderbehandelt* (specially treated) was perceived inelegant.[112]

He argues that the language of Eichmann was characterised by 'euphemism' [*Beschönigung*] and 'disguise' and that no one was actually murdered. The official terms were 'transport' and 'guided through'.[113] Küster finds that in the language of the BGH, Jews are killed and if they used the language of criminal law to say that they were transferred beforehand, then that is fine. He argues that, in reality, using the criminal law term

[109] Walter Schwarz [W. S.], 'Eichmanns Sprache [Eichmann's Language]' (1973) 24(10) *Rechtsprechung zum Wiedergutmachungsrecht* 371.

[110] Ibid 371.

[111] Otto Küster, 'Nochmals: Eichmanns Sprache ("Verschuben") [Once More: Eichmann's Language ("Verschuben")]' (1974) 25(1) *Rechtsprechung zum Wiedergutmachungsrecht* 10.

[112] Ibid 10.

[113] Ibid.

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for these types of transport is an improvement on the facts – if they had looked for a really suitable term, they could have used some of the private language of Himmler and Eichmann: there the Jews were 'dispatched'.[114] Küster finishes with the point that by using the technical term, the BGH had perhaps even made a point relevant to the amount of compensation as *Verschubungstage* 'transportation days' ('push-on' days) are counted as a day in the concentration camp for compensation purposes.[115]

Primarily the glosses serve as a vehicle for rhetorical commentary. Schwarz, however, often takes this one step further. Apart from the gloss following the form of the fairy tale, there are also glosses which use extended metaphor.[116] 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*'.[117] 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 outside 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.[118]

[114] Ibid.

[115] Ibid.

[116] 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?* 6. This gloss is written in a humorous but critical tone which categorises the continuous urge to apply for restitution as a sickness. In using humour in a provocative way, Schwarz is again drawing attention to the problems involved and the conduct of the victims as part of the restitution process. Schwarz writes in his autobiography that there was an angry response from the Jewish readership in New York to the gloss: 'The effect of the gloss was shocking. Foaming protests from the majority hailed down.' Schwarz, *Späte Frucht* 142.

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

[118] Schwarz [Sagittarius], 'Die Sintflut [The Deluge]' 127.

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2.4.4 TAKING RESPONSIBILITY. 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 Offices as well as the legislature and the courts. The material technologies of law played a physical and psychological role – paperwork, files and case numbers – which often had the effect of disembodying 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 obfuscation of language of the NS regime 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 glossatorial writing offers an ethos of restitution in form as well as content.

2.5 ADDRESS AND AUDIENCE

Schwarz was writing for a small audience: the readership of the *RzW Journal*. This includes fellow restitution practitioners, the Compensation Offices as well as members of the judiciary (one of the judges even responded to a published gloss).[119] The German judicial system and

[119] Hansjürgen Radloff, 'Postglossatorisch [Postglossatorial]' (1974) 25(5) *Rechtsprechung zum Wiedergutmachungsrecht* 131. His title is given as: Judge at the *OLG* [Upper Regional Court] Frankfurt (Main). He is responding to the gloss: Walter Schwarz [W. S.], 'Der

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civil service went through various programmes of de-Nazification,[120] but Schwarz's glosses show his opinion regarding the continuation of a character and attitude displayed by some judicial decision-makers as well as the bureaucracy in the proceedings. Schwarz cloaks this critique in the rhetorical satire of the gloss.[121]

Reflecting on the role of a glossator, Schwarz muses:

> 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.[122]

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

Balken im eigenen Auge [The Beam in One's Own Eye]' (1974) 25(2) *Rechtsprechung zum Wiedergutmachungsrecht* 35.

[120] See, for example, Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, Joel Golb (trans) (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).

[121] 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 Lehmann-Richter, *Auf der Suche nach den Grenzen der Wiedergutmachung* 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.' Brunner, Frei and Goschler, 'Komplizierte Lernprozesse' 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. Pross is highly critical of the bureaucracy at this time, particularly the involvement of Ernst Féaux de la Croix, who was in the Finance Ministry and contributed to the Ministry of Finance's multi-volume work (edited with Schwarz). Pross writes: 'In the 1950s and 1960s, it was not remarkable for a former Nazi official to be placed in charge of reparations in the federal Ministry of Finance. In those years, former Nazis could be found everywhere in the Bonn government bureaucracy.' Pross, *Paying for the Past* 18.

[122] Schwarz, 'Exit Sagittarius' 201.

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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 by any measure it appears that Schwarz, even if disguised as Sagittarius, is also an 'insider' – he is editing the main professional journal, and he is attracting high-profile clientele to his practice. However, his use of this wording reminds us that this accomplished Jewish man living in Berlin may have still felt like an 'outsider'.

The power of this glossatorial form as a device that enables readership is striking. Schwarz's often disarming style of writing functions as a diagnosis but also a *disguise* for the lessons he is attempting to pass on to his colleagues. His glosses, therefore, are written versions of a cartoon like the one which began this chapter – 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 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 while everything else would be just thumbed through.'[123]

2.5.1 SPOKEN INTO THE WIND? To conclude this chapter, 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 left his legal practice in Berlin in 1967 to move to Switzerland. However, he stayed active in the field, still writing glosses for the *RzW Journal*, as well as editing the collection on the restitution regime with the German Ministry of Finance.[124] Demonstrating the complexity and scale of the enterprise, this collection ends up being a

[123] Otto Küster, 'Walter Schwarz' in: *Juristen im Portrait. Verlag und Autoren in 4 Jahrzehnten. Festschrift zum 225jährigen Jubiläum des Verlages C. H. Beck* (C. H. Beck, 1988) 667, 680.

[124] Due to his partnership with the German government, this project was controversial in Jewish circles, see the nuanced reading in: Daniel Siemens, 'Lawyers Writing History: The Politics of the Past of the United Restitution Organisation (URO) from 1948 to the 1980s' (2023) 21(3) *Journal of Modern European History* 343.

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seven-volume work. In 1981, Schwarz was awarded a German Order of Merit Officer's Cross, 1st class. He died in 1988 in Zurich.[125]

After moving to Switzerland, he published a selection of the glosses in 1969 as a book with the title *Spoken Into the Wind?*[126] 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.[127]

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

[125] There was controversy in the 1980s due to final statements by Schwarz regarding 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. Oldenbourg, 1989) 33, 54. Schwarz had a strong reaction to a critical newspaper article about the *Wiedergutmachung* regime. See Dörte von Westernhagen, 'Wiedergutgemacht?' *Die Zeit* (5 October 1984) 33–36 and Schwarz's response to Westernhagen: 'Replik' *Die Zeit* (26 October 1984) 40. 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 to Otto Küster, 29 October 1984, cited in: Goschler, *Schuld und Schulden* 299, see also 306. See also Winstel, 'Die Testamentsvollstrecker' 547.

[126] 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).

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

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> 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.[128]

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',[129] 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'.[130] He notes further: 'the apparent dryness of the material is a defensive mechanism 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.'[131]

Hirsch contends that Schwarz's glosses did have 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*'.[132]

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 deals with one of the murkiest chapters

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

[129] Ibid VI.

[130] Ibid.

[131] Ibid.

[132] 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.

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of German history'.[133] Schwarz notices 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 are composed in a form which is accessible to a layperson, but which is nevertheless intended to be true to the dictates of legal tidiness. 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.[134]

This 'reconsider' is a neat encapsulation of Schwarz's methodology of glossatorial reading and writing – a way of re-writing as a material practice of undertaking 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 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.[135]

2.6 CONCLUSION: GLOSSING RESTITUTION

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 interpolation 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.

[133] Walter Schwarz, 'Einführung' in: *In den Wind gesprochen? Glossen zur Wiedergutmachung des nationalsozialistischen Unrechts* (Beck, 1969) IX–X, IX.
[134] Ibid.
[135] Ibid X.

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Offering an ethos – a method of conduct – Schwarz returns a human passion to an intensely bureaucratic system.[136]

My approach in this chapter has been one of mirroring. Translating, excerpting and describing these glosses through the focus on genre and language has also been an implicit way to emphasise the importance placed on genre and language within the glosses themselves. I did not have the space to fully immerse the glosses back within the legislative and other contextual strata with which they are in dialogue. I also did not evaluate the court's decisions or Schwarz's recommendations, which he hoped would lead to a form of 'justice' in these scenarios. I confined my task to translating and reading the glosses closely: an attempt to try to excavate the outline of their layers to see what sort of story they tell within and of themselves, and of their author and their audiences.

As mentioned, I first began this task in the City Library in Berlin. To enter the main part of this library, one walks through the *A-Portal* art work 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 art work 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 chapter, I showed that forms are not only conduits but also hold histories within them. The gloss is particularly rich in this regard: it holds histories of interpretation and commentary, histories of philosophical inquiry and histories of humour and narrative flights. My aim was to bring this marginal, literary form of jurisprudence into the centre of the page. In addition, for Schwarz, I suggest that choosing a genre was about making a judgment, choosing limits. Schwarz,

[136] Schwarz attended the Mommsen High School in Berlin Charlottenburg, and I agree with Helmut Buschbom when he argues that the motto of Theodore Mommsen '*historiam puto scribendam esse et cum ira et cum studio*' (I maintain that history should be written with anger and enthusiasm) permeates Schwarz's writings. See Buschbom's obituary for Schwarz: Helmut Buschbom, 'Walter Schwarz' (1989) 19 *Neue Juristische Wochenschrift* 1208.

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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 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 'making-good-again'. Read against the backdrop of a Berlin being reconstructed out of rubble, Schwarz, using a dynamic textual genre and his human imagination, also attempts to rebuild: he offers the building blocks for a different ethos and practice of law.

This opening chapter has set out the structure and terms of the book threaded through the example of Walter Schwarz and the glosses. It shows how persona and place matter to questions of responsibility, it demonstrates the way form and genre matter to questions of restitution. It also links but does not subsume literature with law and enacts the way my methods of research connect into my modes of writing jurisprudence. These concerns are all taken up again in Chapter 3, which also examines modes of writing. This time, I read texts written by literary personae to examine the way their practices of writing become methods of making-good-again.

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