

Blind-spots and Spotlights

A Resurging Interest in Antisemitism in the German Judiciary?

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I. Introduction

Lately, blockbuster movies and popular TV series have placed a significant focus on topics related to Jewish identity politics and/or antisemitism.¹ The cinematic narrative chosen by contemporary film-makers reproduces important contemporary spotlights but also blind-spots.² Inadvertently, »Oppenheimer«

1 Apart from the final season of »The Marvelous Mrs. Maisel« there is *Tod Field's* »Tár«, through the memoirist films by *Steven Spielberg's* »The Fabelmans«, »Armageddon Time« by *James Gray*, *Greta Gerwig's* »Barbie« and *Bradley Coopers* forthcoming »Maestro«.

2 For some debates of these Jewish films see *Sarah Jae Leiber*, I'm Tired of Trying to Root for Midge Maisel, in Jewish Women's Archives from March 8, 2022, <https://jwa.org/blog/im-tired-trying-root-midge-maisel> (last accessed October 10, 2023); *Andrew Lapin*, Inside the surprisingly Jewish world of »Tár«, the New Movie about Classical Music that's Garnering Awards Buzz, in The Jewish Telegraphic Agency from October 22, 2022, <https://www.jta.org/2022/10/28/culture/inside-the-surprisingly-jewish-world-of-tar-the-new-movie-about-classical-music-thats-garnering-awards-buzz> (last accessed October 10, 2023); *David Suissa*, The Fabelmans: Steven Spielberg's Antidote to Jewish Victimhood, in The Pittsburg Jewish Chronicle from December 1, 2022, <https://jewishchronicle.timesofisrael.com/the-fabelmans-steven-spielbergs-antidote-to-jewish-victimhood/> (last accessed October 10, 2023); *Mira Fox*, »Armageddon Time« gets its Jewish story right — so why does the movie feel so wrong?, in Forward from November 3, 2022, <https://forward.com/culture/523019/armageddon-time-gets-its-jewish-story-right-so-why-does-the-movie-feel-so-wrong/> (last accessed October 10, 2023); *JTA/Shira*

(2023) *Christopher Nolan's* recent film, illustrates an interesting parallel between physicists and jurists during World War II (WWII): Just as National Socialism's deadly antisemitism deprived German physics of some of its most valuable researchers, so did it empty its law faculties and the German judiciary of its most influential jurists, because they were Jews,³ or individuals with Jewish »roots« or »Jewish background«.⁴ *Nolan's* movie challenges the audience to deal with crucial questions about Jewish and professional identities.⁵ First and

Li Bartov, Is Barbie Jewish? The Complex Jewish History of the Doll, Explained: From an astronaut to a doctor, Barbie can be anything. Even a Jew, in *Haaretz* from July 10, 2023, <https://www.haaretz.com/jewish/2023-07-10/ty-article/is-barbie-jewish-the-complex-jewish-history-of-the-doll-explained/00000189-4083-d765-ad-eb-4fe7c7c80000> (last accessed October 10, 2023); *Yair Rosenberg*, What Bradley Cooper's Makeup Can't Conceal: Hollywood can manufacture a Jewish nose, but can it tell a Jewish story?, in *The Atlantic* from August 24, 2023, <https://www.theatlantic.com/ideas/archive/2023/08/bradley-cooper-maestro-movie-leonard-bernstein-jewish/675106/> (last accessed October 10, 2023).

- 3 Whereas 18 per cent of all the teaching staff across the disciplines in German-Speaking universities (i. e. Germany, Austria, Switzerland and Prague) were Jews or had Jewish-origins, *Nolan's* movie mentions six of the eight leaders of the Manhattan Project who were Jewish (see more in *Shira Li Bartov*, The Jewish story behind Christopher Nolan's »Oppenheimer«, explained, in *The Times of Israel* from July 21, 2023, <https://www.timesofisrael.com/the-jewish-h-story-behind-christopher-nolans-oppenheimer-explained/> (last accessed October 10, 2023) <https://www.timesofisrael.com/the-jewish-story-behind-christopher-nolans-oppenheimer-explained/>). In the law faculties almost 20 per cent were Jewish or professors with Jewish heritage. This was representative of the high percentage of Jews in the German legal world. By 1893, 25 per cent of all private lawyers in Germany were Jews. These numbers remained fairly constant until 1930, when Jews accounted for less than one per cent of the German Reich's population. For more see in *Reut Yael Paz*, A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German Scholars to International Law (2012), pp 1–2.
- 4 Note that I refer to »roots« or »background« with much unease because it is still used in Germany, arguably to avoid the word »Jew«. When I am asked if I have a Jewish background or roots I answer: »No. I am a Jew«. It is also interesting to keep in mind the complicated relationship between Jewish roots (»jüdische Wurzeln«) versus rootless cosmopolitans (»wurzellose Kosmopoliten«).
- 5 *Nolan* frames the biographies of the two main and Jewish protagonists (*J. Robert Oppenheimer* and *Lewis Strauss*) with two inquisitions: *Oppenheimer's* infamous AEC hearing in 1954, which saw him lose his security clearance; and *Strauss'* 1959 grilling in the Senate, where he was denied confirmation as *Eisenhower's* secretary of commerce — largely due to his treatment of *Oppenheimer*. See more in *P.*

foremost, why is *Oppenheimer* as a Jewish scientist during WWII so appealing? And why now? Was it his scientific genius or the institutional support that helped him outmatch »Uranverein«, the Nazi Nuclear Weapons program, led by *Oppenheimer's* nemesis *Werner Karl Heisenberg* (1901–1976)?⁶ Or was it *Oppenheimer's* commitment to avenge the suffering of Jews? Or his socialist political leaning, restrained only by his American patriotism that as anticipated by *Albert Einstein*, he lived to regret? Conversely, could *Nolan's* »*Oppenheimer*« repetitive urgency to use physics to strike Germany be replicated by Jewish jurists, even if or especially because revenge/retribution has been historically debated concepts in the field of law and justice?⁷ Did the Manhattan Project hold more promise in terms of serious retaliation to Nazi atrocities for Jewish physicists, than any legal mechanism could have been for jurists? Furthermore, how complex, multi-layered and different can loyalties of Jews be, particularly in times of existential crises that implicate them directly? Likewise, does scientific research, achievement, genius and/or agency necessarily »wear« the identity of its originator?⁸ Can, in other words, science ever be impersonal?

Drawing on specific narratives, cinematic or otherwise, the following contribution revisits how German law – through individual agents and legal structures – addresses some of these issues before, during, and after the Holocaust. To do so, I first unpack several theoretical and methodological concerns about the Othering of Jews à la *Jean-Paul Sartre's* binary approach to both antisemitism

J. Grieser, At the core of »*Oppenheimer*«, a debate about how to be Jewish, in *Forward* from July 19, 2023, <https://forward.com/culture/554486/robert-oppenheimer-movie-nolan-lewis-strauss-jewish/> (last accessed October 10, 2023).

- 6 »We've got one hope«, *Cillian Murphy*, as *Oppenheimer*, says in the film, »antisemitism. Quantum physics«, *Oppenheimer* explains to Lt. General *Leslie Groves*, »was known as »Jewish physics.« Heisenberg's development was hobbled by Hitler's hatred, depriving him of some of the field's best minds. Germany's loss was America's gain.«.
- 7 Even if we keep in mind that law, especially criminal law is a domesticated form of vengeance, it was only later towards the end of the war and during its aftermath that humanitarian and individual human rights had become part and parcel of contemporary public international law. See more in *Eric D. Weitz*, *The Human Rights Surges of the 1940s and 1990s: A Commentary on Margaret E. McGuinness and William A. Schabas*, in: *Diplomatic History* (2011), pp. 793–796.
- 8 *Raphael Magarik/The Forward*, *Where did the Myth of »Jewish Success« Come from Anyway?*, in *Haaretz* from January 22, 2019, <https://www.haaretz.com/world-news/2019-01-22/ty-article/where-did-the-myth-of-jewish-success-come-from-an-again/0000017f-ea13-dea7-adff-fbfb322c0000> (last accessed October 10, 2023).

and Jewishness. I then move to examine a) how this plays out in German legal history by looking closely at German-speaking Jewish jurists and the agency they may have had in negotiating their status in German judiciary and b) how this was navigated through the legal prism in German-speaking law faculties with non-Jewish colleagues, many of whom were antisemites, both prior to and after the Holocaust. In the conclusion I try to uncover possible motivations behind the recent surge of interest in dissecting antisemitism as a present cultural phenomenon in both the German judiciary and academia, among other contexts.⁹

II. Unveiling »Synagoga«: Jewish »Whiteness« versus Jewish »Authenticity«

Today, within contemporary Western social narratives, Jews are mostly self-perceived and perceived by others as »white«.¹⁰ This stands in stark contrast to pre-Shoa times when Jews were »Othered« to the extreme in order to fuel the racialized Nazi worldview.¹¹ Jewish »whiteness« – that is arguably linked to modern nation-statism – remains fragile. It is still a negotiated and conditioned construct,¹² achieved only after and because of the Holocaust and

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- 9 This paper – just as this book project – is part and parcel of a new turn into antisemitism in the German judiciary today. *This* paper was delivered earlier this year to an audience composed of researchers in a project dedicated contemporary issues of antisemitism in the German judiciary, that I was also a part of creating, »AS Just« Jahrestreffen 2023, Berlin, <https://www.asjust.de> (last accessed October 10, 2023). »AS Just – Antisemitismus als justizielle Herausforderung«, a project dedicated to the way antisemitism is coped with in the German judiciary is only one of the 12 projects entitled »Aktuelle Dynamiken und Herausforderungen des Antisemitismus« that unpack the way antisemitism is confronted today in Germany financed by the German Ministry of Culture and Education (BMBF). See more in <https://www.fona21.org/> (last accessed October 10, 2023).
- 10 Carroll P. Kakel, »Racial »Othering«: »Manufacturing Difference«, in: *The American West and the Nazi East* (2011), pp. 46–76.
- 11 Here I have in mind the *Freudian* and *Lacanian* projection thesis to the relationship between the western, European, masculine, Christian, and white to »their Others«. This suggests that the former people, at least since the age of Enlightenment, projected everything their culture considered unacceptable onto the latter. (See more in *Frantz Fanon*, *Black Skin, White Masks* (1967)).
- 12 As *Yair Roseberg* describes it: »On the one hand, Jews have been discriminated against for centuries, including by white cultures from Nazi Germany to the

the establishment of Israel.¹³ Some claim Jews to be » white« only in their modern post-colonial post-European yet ethno-centric and hence Zionist version,¹⁴ whereas for others it is exactly the opposite: the true decolonized Jew can only be of an older diasporic/Yiddishe alternative.¹⁵ Evidently, although Jews remain a diverse, fluid and intersectional ethnic-religious-cultural-minority, their symbolic order of what they ought to be, is as important as what they are.¹⁶ In Germany, Jewishness is the opposite of the mainstream majority, which is assumed to be primarily perpetrator Christians.¹⁷ This is likely to change over the coming decades also due to the exponential growth of immigration.¹⁸

Jean-Paul Sartre articulated best the dynamics of prejudice against Jews by linking societal discrimination and perception of the non-Jew to the self-

United States. On the other, many Jews have attained a significant measure of acceptance, and many can often »pass« as white when not wearing traditional Jewish symbols.« (See more in *Yair Rosenberg*, »Jews will not replace us: Why white supremacists go after Jews.«, in *The Washington Post* from August 14, 2017, https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews/?undefined=&utm_term=.ab8c44946846&wpisrc=nl_most&wpmm=1 (last accessed October 10, 2022).

- 13 *Frank Stern*, *The Whitewashing of the Yellow Badge: Antisemitism and Philosemitism in Postwar Germany* (1991). See more in *Doris Liebscher*, *Sind Juden weiß? Wie Antidiskriminierungsrecht am Antisemitismus scheitert*, in *Völkerrechtsblog* vom 14.02.2018, https://voelkerrechtsblog.org/de/sind-juden-weis/#_ftn1 (last accessed October 10, 2023).
- 14 While American supremacists see diasporic Jews as an archtype enemy while the Jewish state is the embodiment of the ethno-state they wish to emulate (See for instance *Maya Shwayder*, *Where White Nationalists and Zionists Meet*, in *DW* from May 19, 2017, available at <https://www.dw.com/en/where-white-nationalists-and-zionists-meet/a-38873676> (last accessed October 10, 2023).
- 15 See more in *Daniel Boyarin*, *The New Jewish Question*, *The Cambridge Journal of Postcolonial Literary Inquiry* (2022) pp. 42–66.
- 16 As *Jacques-Alain Miller* explains, »Nothingness enters the world through language. You can say that in another way: reference is the void. But this void is created by language... A void would be unthinkable in the real if not for signifiers.«, *Jacques-Alain Miller*, *Lacan and the Subject of Language* (1991), p. 32.
- 17 *Judith Coffey/Vivien Laumann*, *Cojnormativität: Warum wir anders über Antisemitismus sprechen müssen* (2021).
- 18 For more on statistical data on immigration into Germany see https://www.destatis.de/EN/Themes/Society-Environment/Population/Migration-Integration/_node.html (last accessed January 26, 2024).

identity of the Jews as a marginalized group. His analysis is based on a two-fold dichotomy: On the one hand, the non-Jew is positioned in an antithetical dichotomy between the antisemite (who forsakes reason altogether) and the democrat (who adheres to Enlightened universal principles).¹⁹ Whereas the former denies the Jew's existence on the basis of zealous love to hate, the latter is blind to the Jew's difference and the true effects of antisemitism. The Jew, on the other hand, is situated in another dualism: She is either an inauthentic or an authentic Jew. To be an authentic Jew for *Sartre* »is to live to the full of his condition as Jew; inauthenticity is to deny it or to attempt to escape from it.«²⁰ Although, *Sartre's* argument is circular and falls under the impossibility of binarism – reality always challenges either/or positions – his approach is helpful because it focuses on relationality and negotiability between the Jew and the non-Jew.²¹

The main hypothesis here is that negotiating such dichotomous positions often depends on Jews' successful – i. e. their authentic – mirroring of the zeitgeist's needs. *Nolan's Oppenheimer* exemplifies the manner in which Jewish Othering works according to *Sartre's* dichotomous paradigm: He is an authentic Jew because he is successful and because his narrative changes together with the times demands. In brief, while *Sartre's* positions are initially abstract and impersonal, these then get contextualized through individual concessions. It is, in other words, usually when Jews fit in a specific argument/agency/theory etc. that they »earn« being spotlighted as the exceptional, authentic, gifted, unique »good« but also »bad« Jews. Importantly, before the Holocaust these negotiations never held the promise of whiteness or Jewish self-determination neither in theory nor in practice, today the oppositional dichotomy between

19 Whereas the antisemite abandoned reason and loneliness to embrace the passions of »bad faith« and shared hatred – because to be an antisemite »is something one cannot be alone« – the democrat finds refuge in Enlightened reason and the natural equality between citizens who share universal rights of humanity (see more in *Jean-Paul Sartre, Anti-Semite and Jew: An Exploration of the Etiology of Hate* (1995), p. 22.)

20 *Jean-Paul Sartre, Portrait of the Inauthentic Jew*, May 1949, available at <https://www.commentary.org/articles/jean-paul-sartre/portrait-of-the-inauthentic-jew/> (last accessed October 10, 2023).

21 Although *à la Sartre* »if the Jew did not exist, the antisemite would invent him,« it remains unclear if the antisemite could exist without the Jew. The Jew's existence therefore remains a solid constant. *Sartre* (fn. 19), p. 13.

»good« authentic versus inauthentic »bad« Jews is a flexible status that permits Jewish whiteness and nationalism, however fragile these remain for Jews.

III. The importance of being Spotlighted: When, How and Why?

Very little can be enough to commemorate but also understand the magnitude of the »Hole in Time« left by the almost twenty percent German speaking Jews who were educated in German speaking law faculties.²² Indeed, by 1933 twenty percent of the Judiciary in Germany consisted of individuals with Jewish »roots« or »Jewish background«, when Jews were less than one percent of the German population.²³ However, if the air around German legal history is really to be cleared, these scholars' lives and works need to be researched, upon all of their convoluted intricacies. For this to be done properly, it remains essential that we look beyond binary categories of in/authentic Jews and/or antisemitic/democratic gentiles, even if these are helpful in explicating relevant ambivalences. In the following I spotlight some concerns about possible ambivalences regarding Jewish authenticity through *Hans Kelsen* (1881–1973), the most prominent Jewish Viennese legal philosopher.

Like *Albert Einstein's* impact on physics, *Kelsen* revolutionized legal theory »at the stroke of a pen.«²⁴ *Kelsen* also revolutionized the idea of modern constitutional courts.²⁵ Both *Kelsen* and *Einstein* clearly avoided politics even if this risked their own legacies.²⁶ Without reducing *Einstein's* »Relativity« or *Kelsen's*

22 »A Hole in Time« is a concept I borrow from a conference by the University of Westminster called »The Hole in Time: German–Jewish Political Philosophy and the Archive«. There I presented a paper entitled »The Legal Transcendentalism of Hans Kelsen as a Hole in Time« that became an article: *Reut Yael Paz, Kelsen's Pure Theory of Law as »a Hole in Time«*, in: *Monde(s)* (2015), pp. 75–94.

23 For the precise statistics please see *Paz* (fn. 3).

24 As *Martti Koskenniemi* describes it *Kelsen* »redefined as ideology all the nineteenth-century historical and sociological theories that had sought to answer the question of the real nature of (Austrian/German) statehood as well as the attempt to derive international law from humanitarian morality or the sociology of inter-dependence.«, *Martti Koskenniemi, The Gentle Civilizer of Nations* (2001), p. 242.

25 *Sara Lagi, Hans Kelsen and the Austrian Constitutional Court (1918–1929)*, in: *Co-herencia* (2012), pp. 273–295.

26 *Einstein* even called *Oppenheimer* »Narr« a fool in Yiddish for loving the United States. For more on *Einstein's* relationship with *Oppenheimer* see *Dennis Overbye,*

»Pure Theory of Law« to their Jewish background only, it is important to note how both men's experience as prominent Jewish scientists with clear universalist and socialist tendencies led them away from all versions of state-nationalism.²⁷ While this was also part and parcel of understanding deeply the importance of their revolutionary scholarship, other outside pressures were detrimental too. Be it the claims made by radical right-wing extremists (later Nazis) that *Albert Einstein's* theories were »Jewish science«²⁸ or then the manner in which *Carl Schmitt* (1888–1985), a prominent adversary of *Kelsen* and »the crown jurist« of the Nazi regime, saw and detested *Kelsen's* Jewishness in both his legal theory and practice.²⁹ Be that as it may, while *Einstein* is the embodiment of the scientist in popular culture having numerous movies dedicated to him, be it feature-films, comedies, science-fiction, and/or documentaries,³⁰ no film has been produced about *Kelsen* to date. This is a cinematic blind-spot that needs remedying, even if *Kelsen's* jurisprudence may seem too complex in its neutrality or then too boring for the layperson to be filmed.

Christopher Nolan and the Contradictions of J. Robert Oppenheimer, in *The New York Times* from July 20, 2023, <https://www.nytimes.com/2023/07/20/movies/christopher-nolan-oppenheimer.html> (last accessed October 10, 2023). For more on *Kelsen's* need to keep his theory pure of the reality of politics and psychological ideology see *Paz* (fn. 3), pp. 218–230.

- 27 For more on the complex »chicken-egg-relationship« between these men's identity and science see *Steven Gimbel*, *Einstein's Jewish Science: Physics at the Intersection of Politics and Religion* (2013) and *Paz* (fn. 3).
- 28 *Gimbel* (fn. 28), p. 3.
- 29 The manner in which *Schmitt* explored the extent to which *Kelsen's* work (along with that of numerous other Jewish German scholars) is Jewish/alien to German legal traditions and hence needs to be eradicated was the theme of a two-day conference in 1936 Berlin titled »Judaism in Jurisprudence: German Legal Science in Opposition to the Jewish Spirit.« (»Das Judentum in der Rechtswissenschaft. Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936. Die Deutsche Rechtswissenschaft im Kampf gegen den Jüdischen Geist, 1936.) For more on the complicated relationship between *Carl Schmitt* and the Nazis, see *Raphael Gross*, *Carl Schmitt and the Jews: The Jewish Question, the Holocaust, and German Legal Theory* (2007).
- 30 If only to mention a few apart from »Oppenheimer«, there are »I.Q.« (1994), »Young Einstein« (1990); »Insignificance« (1950); »Einstein on the Beach« (1985); »The Extraordinary Genius of Albert Einstein« (2010) etc.

Like all of us, *Hans Kelsen* was many things. Reflecting his specific »zeitgeist« as the first born son of a strained middle-class Jewish family, he became a law professor who always regretted not studying mathematics.³¹ Arguably, math led his legal approach that powerfully obliterated the professional duality between the moral »ought« and the socio-psychological »is«, and created in his pure theory of law, a new path where the fundamental antinomy between realism and idealism disintegrates.³² His need for purity does not show anywhere else but his *Rechtswissenschaft* certainly not in his convoluted relationship with religion: *Kelsen* converted twice out of Judaism early in his life – first to Catholicism then with his wife to Protestantism.³³ His politics were equally cumbersome and his take on the end of WWII was challenging: *Kelsen* already in 1943 anticipated that the post-WWII indictment of war criminals by the victorious powers would only amount to »primitive law«. ³⁴ The Allies have not yet won the war and *Kelsen* was busy with moralistic »Luftgescheft«. His view remains valuable regardless how in/authentic it was. It certainly did not comply with that which was expected or politically needed at the time. He sides with legal science although it was hardly straightforward: It was not until the end of WWII – and as a direct consequence of the war and the clear evidence of the atrocious crimes by Nazi Germany – that the idea of individual human rights began to take a more substantial shape and form.³⁵ Ex post facto laws are generally considered unfair and contrary to the principles of justice and the rule of law. But apart from the illegality of ex post facto, for *Kelsen*, prosecuting Nazis by military courts is entirely counter-productive to the progress of democracy let alone to Positive Public International Law.³⁶ *Kelsen* remained loyal to the law also when it does not comply with his wholesome and »Pure« approach. This was so even when he, like other Jewish refugees, had his hands tied by the all too realistic expectations and uncertainties stemming from his new status as

31 For more on Kelsen's biography see Paz (fn. 22).

32 Paz (fn. 3), p. 219.

33 See *ibid.*

34 *Ibid.*, p. 280.

35 The most significant post WWII developments one only needs to mention the Nuremberg Trials (1945–1946); the Genocide Convention (1948); the Universal Declaration of Human Rights (UDHR) (1948) and the European Convention on Human Rights (1950) and its European Court of Human Rights (1959) that then influenced decolonialization and the Civil Rights Movement (1950s–1960's).

36 See more Paz (fn. 3), pp. 280–283.

an elderly European refugee in the United States.³⁷ Similarly to the few and the lucky Jewish refugees who managed to get away on time, *Kelsen* was hardly even neutralized as an American citizen at the end of the war. Such neutralization allowed some refugees to practice and teach law or at least enter law faculties as students again.³⁸ Others, like *Kelsen*, were still barred from the law. Needless to mention, the Israeli judiciary did not yet exist.³⁹ How authentic might it have been to stick to the law and not the zeitgeist's passions and political demands should remain an open question. Similarly, it still remains unclear why *Kelsen's* work has not received the attention it deserves. To be clear, *Kelsen's* legacy needs to be spotlighted to the general public primarily because his legacy is groundbreaking. There is much to learn about how his particular politics and identity are interwoven in his scholarship. It is only through such contextualization that we can understand both *Kelsen's* scholarship (that elsewhere I also term a »Hole in Time«⁴⁰) as well as his time's vehement antisemitic backlashes. After

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- 37 *Kelsen* managed to escape Europe at the age of 60. It was not until 1945 that he got full professorship. Although at Berkeley, *Kelsen* elaborated the field of international law ever so illustriously, yet he was never accepted as an »insider« in the United States. As *David Kennedy* puts it: »Kelsen has come to be treated as a leftover European philosophizer who could never quite get with the program in the United States after the war, and is remembered as much for his tin ear towards specific international legal issues as for his old worldly philosophical argument.« See more in *David Kennedy*, *The International Style in Postwar Law and Policy*, in: *Utah Law Review* (1994), pp. 7–118.
- 38 This mostly depended on the age of the specific refugee. For more on the history of these immigrants in general see Jack Beatson/Reinhard Zimmermann (eds.), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth-Century Britain* (2004); *M. H. Hoeflich*, *German Jewish Refugee Lawyers Abroad: The Bonn Conference of 1991*, in: *Syracuse Journal of International Law and Commerce* (1992), Article 2, <https://surface.syr.edu/jilc/vol18/iss1/2> (last accessed October 10, 2023); *Kyle Graham*, *The Refugee Jurist and American Law Schools, 1933–1941*, in: *American Journal of Comparative Law* (2002), pp. 777–818, <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1523&context=facpubs> (last accessed October 10, 2023).
- 39 For more on how Jewish German jurists impacted the establishment of Israel's judiciary see *Fania Oz-Salzberger/Eli Salzberger*, *The Secret German Sources of the Israeli Supreme Court*, in: *Israel Studies* (1998), pp. 159–192, <https://www.jstor.org/stable/30245717> (last accessed October 10, 2023); *David M. Sassoon*, *The Israel Legal System*, in: *American Journal of Comparative Law* (1968), pp. 405–415, <https://doi.org/10.2307/838665> (last accessed October 10, 2023).
- 40 See more Paz (fn. 22).

all, theories and ideas, even about universalism, have very specific and particularistic homes. Without unpacking these tensions, between our identity and our particular projects, but also if, how and when these may be spotlighted, much nuances about the human condition and the law is lost.

While we are still waiting for *Kelsen* to be properly spotlighted, a few films dedicated to a couple »authentic« Jewish jurists have been recently produced, and even this took approximately seventy years after the end of the Holocaust. Most German law students today would at least know *Fritz Bauer* (1903–1968), one of the few Jewish German jurists who helped Germany rebuild its judiciary.⁴¹ *Bauer's* self-sacrifice was only recognized after he was regarded as an enemy, a traitor and a slanderer well into post-war history. This explains to an extent why his relentless commitment to the Frankfurt Auschwitz Trials during the 1960's still remains more celebrated than his involvement in bringing *Adolph Eichmann* to trial in Jerusalem rather than in Germany.⁴² There is less cinematic interest in other »inauthentic sell-out Jewish returnees«, such as *Franz Neumann* (1900–1954), *Erich Kaufmann* (1880–1972),⁴³ or even *Hilde Benjamin* (1902–1989) who was »only« married to a Jew (*Walter Benjamin's* physician brother *Georg*) and became the Minister of Justice of East Germany between 1953–1967.⁴⁴ *Benjamin*, was obviously unkosher for many reasons. There are several biographical texts dedicated to her in German.⁴⁵ That she remains almost an orphan in legal history, particularly in international legal history, is a blatant disgrace. More needs to be told about this trailblazer woman who is

41 For more on these see Waldemar Zacharasiewicz/Manfred Prisching (eds.), *Return from Exile – Rückkehr aus dem Exil Exiles, Returnees and Their Impact in the Humanities and Social Sciences in Austria and Central Europe* (2017).

42 Be it the 2014 »Im Labyrinth des Schweigens« by *Giulio Ricciarelli*, *Lars Kraume's* 2015 »The People vs. Fritz Bauer« or the 2016 ARD movie »Die Akte General«.

43 As I argue elsewhere there is a clear methodological turn to history, especially in international law, which »is by now a ›trend‹ that is hard to ignore.« See more in *Reut Yael Paz*, *Between the ›Public‹ and the ›Private‹*, in: *European Journal for International Law* (2011), pp. 863–873.

44 Remarkably, about half of the first-generation female students who successfully earned their law degrees from German-speaking universities were of Jewish descent. For more on the first women in German law faculties see *Marion Röwekamp*, *Die ersten deutschen Juristinnen. Eine Geschichte ihrer Professionalisierung und Emanzipation 1900–1945* (2011).

45 See more instance *Volkmar Schöneburg*, *Hilde Benjamin – Eine Biographie*, in: *UTOPIE kreativ*, (1997), pp. 114–122; *Marianne Brentzel*, *Die Machtfrau. Hilde Benjamin 1902–1989* (1997) and *Andrea Feth*, *Hilde Benjamin: Eine Biographie* (1997).

still referred to as »Red/blood Hilde« or »Red Guillotine« because of her »many« prison sentences (fifteen life sentences and two death sentences during her four years as vice president of the Supreme Court of East Germany) even if these hardly resemble the horrific sentences passed by her comrades.⁴⁶ Obviously, as *Phillipe Sands's* »East West Street« (2016) novel proves, international interest in German legal history helps Germans too. This book has done wonders to both the international legal profession and a heightened awareness of numerous protagonists be it the Nazi *Hans Frank* (1900–1946) or then the works by the »good Jews« *Hersch Lauterpacht* (1897–1960), the father of »Crimes against Humanity«, and *Raphael Lemkin* (1900–1959) the inaugurator of »genocide«.⁴⁷ Alas, there is simply too little that is told about many others, regardless of the numerous valuable scholarly efforts.⁴⁸

In order to grasp the context of these protagonists and their ideas, it is equally important to unpack the scholarship by their other contemporaries, upon their democratic versus antisemitic stances. This task should be accomplished without explicitly framing some (mainly Jews) as good versus others (mainly non-Jews) as bad, even if that may be the case. At the end, there are at least 50 shades of grey here. It was not only *Carl Schmitt* or *Karl Larenz* (1903–1993) who contributed to Nazi jurisprudence.⁴⁹ It is enough to note that none of the National Socialist jurist/legal experts – or »just« followers/Mitläufer – were »faceless« or »nameless« men who have come or gone back to Mars after their twelve years in Nazi German law faculties and/or judiciary.

46 Ibid., *Brentzel* (fn. 48), p. 185.

47 See more in *Christoph Schuch*, Rückkehr nach Lemberg und die Geburtsstunde des Völkerstrafrechts: Eine recht literarische Völkerstrafrechtsgeschichte, in: GRZ (2022), <https://nasjournal.org/goettinger-rechtszeitschrift/article/view/1248> (last accessed October 10, 2023).

48 *Martti Koskenniemi* was one of the first international legal scholars who understood the magnitude of Jewish (but also Gentile) German contributions to legal theory by and large. See more in *Martti Koskenniemi*, Introduction to *Hersch Lauterpacht*, The Function of Law in the International Community (2011), p. xxxiv; and *Koskenniemi* (fn. 25). The translations of the works by the legal historian *Michael Stolleis* (1941–2021) remain incredibly helpful in salvaging Jewish voices as well. See for instance *Michael Stolleis*, A History of Public Law in Germany 1914–1945 (2004).

49 See more in *Christian Joerges/Navraj Singh Ghaleigh* (eds.), Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions. With a Prologue by *Michael Stolleis* and an Epilogue by *Joseph H. H. Weiler* (2003).

Thus, especially if we wish to study history in order to widen our horizons about change rather than repetitiveness, we need to essentialize legal agency. The jurist has the official and moral power to alter others' lives and deaths, even if poetry and law »had arisen from the same bed,«⁵⁰ as argued by *Jacob Grimm*, a close friend of *Friedrich Carl von Savigny* (1779–1861) comprehensively discussed below. *Savigny* and the *Grimm* brothers – who founded with numerous others in 1811the »Deutsche Tischgesellschaft« (German Table Society), an exclusive reactionary club with immense bearing on the establishment of modern Germany as a Christian patriarchal and antisemitic state – understood well that both the poet and jurist create reality linguistically.⁵¹ Their social responsibility diverges immensely. In light of the obvious limitations of this contribution, the following section spotlights how antisemitism – that in Germany became a lot more than just »the rumour about the Jews«⁵² – was and still is enacted and re-enacted by specific legal agents and agencies today.

IV. Back to the Future: Antisemitism, *Rechtswissenschaft*, and the German Judiciary

Law is a »spineless discipline«. ⁵³ The legal form, especially in Christian Western legal-political traditions, necessarily transforms both the universal and the particular to be seen as »formal« and »empty« when they are in fact neither abstract nor theoretical.⁵⁴ Alas, and as discussed above, law is only sustainable

50 *Jacob Grimm*, *Von der Poesie im Recht*, in: *Zeitschrift für geschichtliche Wissenschaft* (1816), p. 2.

51 »Good lawyers, like good poets, wrestle with world and word. Good lawyers, like good poets, fuse theory and practice in a craft of language.«, so says *Harold Anthony Lloyd*, *Poets and Lawyers: Birds of a Feather*, in *HuffPost Press* from December 15, 2015, https://www.huffpost.com/entry/poets-and-lawyers-birds-o_b_8813190 (last accessed October 10, 2023).

52 *Theodor W. Adorno*, *Minima Moralia* (2001), p. 200.

53 *Armin Von Bogdandy/Sergio Dellavalle*, *Universalism and Particularism as Paradigms of International Law*, in: *International Law and Justice Working Paper* (2008), p. 30, <https://www.iilj.org/publications/universalism-and-particularism-as-paradigms-of-international-law/> (last accessed January 25, 2024).

54 Law exists in the way jurists creatively manage the dichotomous tension between the law's *de jure* and *de facto*; its concrete »is« (*Sein*) and its normative »ought« (*Sollen*) etc. This is an argument that *Martti Koskenniemi* follows in his works »The Gentle Civilizer of Nations« and »From Apology to Utopia«. See more in *Rein*

when the universal and particular are tangible and contextualized. Without delving deeper into legal theory or the myriad definitional complexities inherent to Judaism and/or antisemitism,⁵⁵ suffice it here to emphasize that the particularistic »Otherness« symbolized by Judaism and Jews (which *à la Sartre* remains integral to the antisemite, irrespective of the actual presence of Judaism or Jews,⁵⁶) challenges substantively these inherent legal tensions within Western traditions.⁵⁷ In other words, Jewish »Otherness« inevitably itches a legal system that depends on its spinelessness and authorization by »persons from nowhere.«⁵⁸ Such make-belief façade depends on jurists who are neces-

Müllerson, Review: The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (Martti Koskeniemi), in: *European Journal of International Law* (2002), pp. 727–735 (732), <https://doi.org/10.1093/ejil/13.3.727> (last accessed October 10, 2023).

- 55 See more in *Tarek Naguib*, Wenn der Antirassismus staatlich sanktioniert wird: Urteil GRA gegen Kaspar (5A_82/2012): Rassismus benennen als Persönlichkeitsverletzung, in: *Recht* (2013), pp. 13–27; *Kenneth L. Marcus*, The Definition of Antisemitism, in: *The Social Science Research Network* (2023), pp. 97–109.
- 56 See *supra* fn. 19.
- 57 Most of my scholarly works excavate the numerous ways in which Jews, as an ethnoreligious minority with a specific cultural historical but also a clear legal heritage, have always presented a challenge to western and indeed Christian legal traditions. Apart from »A Gateway Between a Distant God and a Cruel World«, see for instance *Reut Yael Paz*, Legalizing Antisemitism? The Legacy of Savigny’s Roman(tic) Law, in: Pamela Slotte/John D. Haskell (eds.), *Christianity and International* (2021), pp. 177–198; *Reut Yael Paz*, From Rosa Luxemburg to Hersch Lauterpacht: An Ostjüdische Heritage in International Law?, in: Alberto Puppo/Dawid Bunikowski (eds.), *On a Critical Philosophy of Law, Peace and Religion* (2019), pp. 232–249; *Paz* (fn. 32); *Reut Yael Paz*, »If I forget thee, O Jerusalem«: Religion, International Law and Jerusalem, in: Mónica García-Salmones/Paolo Amorosa (eds.), *International Law, Religion and Empire* (2017), pp. 269–272; *Paz* (fn. 46); *Reut Yael Paz*, Review Essay – Erich K. Before the Law: Reflections on Degenhardt’s Study of Erich Kaufmann, in: *German Law Journal* (2010), pp. 439–456; *Reut Yael Paz*, The Jewish Background of F. A. Mann (1907–1991) – From the Rhineland’s SHUM to Money’s Intangibility, in: Jason Allen and Gerhard Dannemann (eds.), *F. A. Mann: The Lawyer and His Legacy* (2024 – forthcoming); *Reut Yael Paz*, Leo Strauss: (Jewish) Conservatism in International law?, in: Nechama Hadari/Stephan Wendehorst/George R. Wilkes (eds.), *Contemporary International Law, Jewish Law and Jewishness*, *Fuerth Special Issue 2021*, forthcoming.
- 58 Whereas *Gerry Simson* refers to international legal issues such as states »political sovereignty«, »individual/minority human rights«, »the protection of the world

sarily entrenched in a very specific legal education that is heavily indebted to a specific culture, history, context, language, religion and norms. Jews, as I extensively elaborate elsewhere, particularly during the Weimar Republic, successfully mirror the choices/problems/solutions available to the legal profession because it *inter alia* emulates their own negotiation with reality.⁵⁹ In a nutshell, much of the politics of identity negotiations Jews experienced during the 19th and 20th centuries in Europe mirrored the »insoluble ascending/descending« liberal dyad that personifies the legal form, which is structured between theory and practice, concreteness and normativity, law and politics, apology and utopia, public and private etc.⁶⁰ Moreover, their multifaceted and complex identity which signifies – if not incarnates – numerous contexts, loyalties but also capacities, »traps« them in a double jeopardy position (if not quadruple or more).⁶¹ This is particularly true for Germany that after the Napoleonic era, has undergone a substantial reactionary, anti-revolutionary and extremely conservative shift, largely attributed to the influence of the »Historical School«, which was championed by *Friedrich Carl von Savigny*.

It remains impossible to exaggerate *Savigny's* impact on German legal science (but also international law and its inherent distinction between the private and the public).⁶² The legacy of his jurisprudence, which is compared with *Immanuel Kant's* effect on philosophy and with *Beethoven's* influence on music,⁶³

cultural and natural heritage« or »climate change, issues of administrative, public, civil and constitutional law are as demanding«. For more on this paradox see *Gerry Simson*, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics*, (2021), p. 31.

59 See more in *Paz* (fn. 3).

60 As *Koskenniemi* phrases this: »Doctrine is forced to maintain itself in constant movement from emphasizing concreteness to emphasizing normativity and vice versa, with-out ever being able to establish itself permanently in either position. ... [Ultimately this is] explained by the contradictory nature of the liberal doctrine of politics.«, *Martti Koskenniemi*, *From Apology to Utopia: The Structure of International Legal Argument* (2005), pp. 46–47.

61 As discussed in more detail above, the reference here is to the post-colonial studies that attach the *Freudian* and *Lacanian* projection thesis to the relationship between the western, European, masculine, Christian, and white to »their Others«. See for instance *Fanon* (fn. 11).

62 See more in *Paz*, *Legalizing Antisemitism?* (fn. 60).

63 His name still decorates street and squares all over Germany. In fact, the law student union of the Humboldt University Berlin continues to bear his name. This is still the case in spite of my personal attempts to draw attention to his

can be traced back to the very belief in Germany that law is a science (*Rechtswissenschaft*), an independent, objective, and separate field from all other social sciences. *Savigny's* vehement antisemitism, on the other hand, is barely acknowledged, if at all.⁶⁴ As I argue elsewhere, this is important because »Savigny's German-Prussian-Christian jurists – who are rooted in blood and soil – safeguarded the Christian state against the Jewish (»state within a state«) subversive, even if and especially because the Jews are the original owners of the Bible.«⁶⁵ Keeping the Christian state on a pedestal – which remained detrimental for his German and legal »Volksggeist« – *Savigny* envisioned a »military« of jurists to serve as the gatekeepers of morality/public welfare. Because Jews, *à la Savigny*, were inherently excluded from the German »Volksggeist« (neither did they share the German one nor did they possess their own), they were to be barred from German law as well.

Less than fifty years after *Savigny's* reactionary, conservative and anti-semitic legal revolution, and despite the considerable efforts made by him and his followers to revert this altogether, nearly twenty-percent of the German judiciary is Jewish. The pinnacle of such Jewish achievement reached its disastrous culmination with the appointment of *Hitler* as Chancellor in 1933. The German judiciary, however, joined the Nazi bandwagon at least a decade earlier: When *Hitler* faced a trial by a Bavarian court after his failed *coup d'état* in the so-called »Beer Hall Putsch« that took place on November 8, 1923.⁶⁶

During this event (which is certainly worthy of a motion picture by *Quentin Tarantino*) *Hitler* and his supporters copied *Mussolini's* »March on Rome« to seize power in Munich but failed miserably primarily because the Bavarian government withdrew its support at the last moment. On February 26, 1924, *Hitler* seized his monumental opportunity to deliver a four-hour opening speech before the court elucidating his political perspectives and objectives. Reportedly, one of the judges remarked during the trial, »What an extraordinary figure this Hitler is!«⁶⁷ Thus, it was a Weimar Republic court that rather than imposing the death penalty, a long prison sentence, or deportation

rabid antisemitism. See the Savigny student Union website: <https://www.rewi.hu-berlin.de/de/st/fsj/unsere-fachschaftsarbeit/jfk/sc2017> (last accessed October 10, 2023).

64 See more in *Paz*, *Legalizing Antisemitism?* (fn. 60).

65 *Ibid.*, pp. 177–178.

66 For more on this see *David King*, *The Trial of Adolf Hitler: The Beer Hall Putsch and the Rise of Nazi Germany* (2017).

67 *Ibid.*

back to Austria, facilitated *Hitler's* transformation into a national hero during his 24-day trial for state treason. This encounter was detrimental for *Hitler* and his already then legal advisor, *Hans Frank* who later became the direct administrator of four extermination camps when acting Governor-General of the occupied Polish territories (and a major protagonist of the *Philippe Sands* »East West Street« mentioned above). For one, meeting the judiciary this way solidified *Hitler's* »brothers-in-arms« relationship with many of the Nazi elites. For another, such early support by the German judiciary proved its unwavering complicity, which bolstered *Hitler's* conviction that democratic and lawful avenues are easily manipulated.

V. Jews and German Judiciary Post-Shoa

It was at least since this »failed« Coup that the Nazis demonstrated no legal consistency and openly exploited the politics of a hierarchal, racist and genocidal »Volksgeist« over any measure of democratic legitimacy and the rule of law. The only purpose of the Nazi's mishmash of legal theories was to advance the regime's totalitarian goals. Its judicial zenith spanned twelve years and was led by its German »Sondergerichte«, which were inherently white patriarchal supremacist and Christian, despite the competitive relationship between Nazism and Christianity.⁶⁸ The Nazi judicial militant gatekeepers – »Commanders in Red Robes« (Feldherren in roter Robe) – followed orders that were neither normative nor were they too complex: Jurists, like soldiers, »must have the same drive and ability to seek out, find and confront the enemy, and they must have the same penetrative accuracy in hitting and destroying the identified enemy.«⁶⁹ Although these People's Courts were a different – perhaps

68 *Doris L. Bergen*, *Nazism and Christianity: Partners and Rivals? A Response to Richard Steigmann-Gall, The Holy Reich. Nazi Conceptions of Christianity, 1919–1945*, in: *Journal of Contemporary History* (2007), pp. 25–33.

69 As the National Socialist jurist/State Secretary *Roland Freisler* directed his People's Courts: »Sie müssen ebenso schnell sein wie die Panzertruppe, sie sind mit großer Kampfkraft ausgestattet. Kein Sondergericht kann sagen, daß der Gesetzgeber ihm nicht genügend Kampfkraft gegeben habe. Sie müssen denselben Drang und dieselbe Fähigkeit haben, den Feind aufzusuchen, zu finden und zu stellen, und sie müssen die gleiche durchschlagende Treff- und Vernichtungsgenauigkeit gegenüber dem erkannten Feind haben«, see more in <https://www.mdr.de/geschichte/video137994.html> (last accessed October 10, 2023).

a redder – version of *Savigny's* image, it is impossible to contest that he personally was celebrated as a »Greater German« by the Nazis.⁷⁰ While this doesn't directly implicate him with the Nazi extermination of Jews, *Savigny's* advocacy for a Christian state tied to land and blood, defended by militant jurists, benefited the Nazis. Indeed, as long as *Savigny's* unwavering antisemitism remains marginalized or footnoted, his legacy and specific legal contributions will not be understood holistically, upon their light and darkness and hence continue to have a dangerously discriminatory undercurrent in theory and practice today.

The fight against antisemitism, *Max Horkheimer* reminds us, is tantamount to the battle against totalitarianism.⁷¹ The real force and totalitarian danger behind *Savigny's* legacy lies in the way his elusive concept of »Volkgeist« legalizes the insiders/outsider, however informally, invisibly but mostly interchangeably, in/to German law by the manner in which is constructed its private versus public.⁷² That Germany's legal consciousness remains haunted by *Savigny's* »Historical School« and Christian biased »Volkgeist« remains a barrier against (all of) Germany's »Others«. Thus, while Jews were always a *de facto* part of Germany's population, its *de jure* status remains negotiable, whatever its positive and/or negative implications.

To exemplify how »Vergangenheitsbewältigung« (»coming to terms with the past«) legislation in post-Shoah Germany works theoretically one should mention the famous intervention regarding natural law in post-WWII Germany by *Gustav Radbruch* (1878–1949). A prominent legal scholar and philosopher, who grappled with the moral and legal aftermath of the Nazi regime's

70 *Joachim Rückert*, *Unrecht durch Recht: Zur Rechtsgeschichte der NS-Zeit* (2018), p. 92. His theories were also incorporated into Nazi ideology, mainly his concept of »Volksempfinden« (»popular sentiment«). *Paz*, *Legalizing Antisemitism?* (fn. 60), p. 195.

71 As *Max Horkheimer* argued in the late 1930's, »the elimination of antisemitism is identical with the struggle against the authoritarian state.«, *Max Horkheimer*, *Die Juden und Europa* (1939), pp. 136–137.

72 *Savigny's* ambiguous and vague concept of »Volkgeist« can be seen to parallel the equally dangerous undefined notion of »juridical conscience of the civilized world« which implicates the inherent legal dichotomy between the public and the private (utopia versus apology, the sein versus sollen etc.) that as *Savigny* but others before him argued goes back to Roman law. See more in *Paz*, *Legalizing Antisemitism?* (fn. 60).

atrocities, *Radbruch*, in his 1946 essay titled »Statutory Lawlessness and Supra-Statutory Law« demanded to reintegrate natural law principles into the post National Socialist German legal system because allegedly it was too much legal positivism that permitted the Nazi judiciary. Whereas it is impossible to insinuate that the Nazi judiciary inconsistent and erratic legalism was positivistic, *Radbruch's* approach contributed to the development of a post-war legal reconstruction of Germany that emphasized human rights and the protection of fundamental freedoms. Significantly, however, regardless of *Radbruch's* intentions, his logic has given rise to a strange allusion of the high presence of Jews in neo-Kantian circles which implicates and indeed blames them for the instability of the inter-war era. This in its turn was the main reason for WWII, and in this respect, positivist Jews, headed by *Kelsen*, were also responsible for the Holocaust.⁷³ Jews, in other words, even in post-Shoa Germany, still need to negotiate and indeed prove their allegiance to German law by being either »good« or »bad« positivists. What this should mean, depends on whatever the non-Jewish German man says it means.

The legalization of the immigration of post-Soviet Jews into Germany between 1991–2005 is another example of »Vergangenheitsbewältigung«.⁷⁴ Arguably, that this recent Jewish immigration stands apart from other immigrations proves both Jewish »whiteness« and Jewish existence legal negotiability. Evidently, German law still has the flexibility to mask German denial and/or approval of its Jewish »Other«, when this hardly signifies the kind of critical

73 *Rudolf Smend* (1872–1975) for instance has written in his contribution to *Erich Kaufmann's* »Festschrift« (1950) that »for surrounding the wasteland into which positivism had led us, there still stood the fence erected by neo-Kantianism, and the penalty for every attempt to break out of this concentration camp (Konzentrationslager) was the automatic loss of honour and standing among our peers.« See more in *Paz* (fn. 3), p. 313.

74 According to the German Federal Administration Office, approximately 128,000 Jewish migrants, including their family members, came to Germany between 1990 and 2000 only. »One of the reasons the German Government allowed the admission of Jews from the former USSR was the Jewish community's claim that this immigration might rejuvenate the German Jewish population in the long run.«, see more in *Barbara Dietz/Uwe Lebok/Pavel Polian*, The Jewish Emigration from the Former Soviet Union to Germany, in: *International Migration* (2002), <https://library.fes.de/libalt/journals/swetsfulltext/15286778.pdf> (last accessed October 10, 2023). For more on this immigration see <https://www.bamf.de/EN/Themen/MigrationAufenthalt/JuedischeZuwanderer/juedischezuwanderer-node.html> (last accessed October 10, 2023).

self-reflection that *Adorno* understood to truly mean »coming to terms« with the past.⁷⁵ German Jews today – who have been »brought out of the ashes of the Soviet Union« – are to be thankful for their luck to be given a new and democratic possibility. That because they may have »suffered enough« to be given this chance implies nevertheless that they are »expected to behave better« in Germany. There is resemblance here with the international community's expectations from Israel, the state that necessarily represents German Jews as well.⁷⁶ Whereas a lot more is known and written today about legal blame-shifting and legal gaslighting,⁷⁷ it should be noted that such a passive aggressive approach helped the reconstruction of reunited Germany and its judiciary, at the dawn of the Cold War. Significantly, by 2021, Germany's »Vergangenheitsbewältigung« has reached a new comfort-zone that helped bring about the official change in 2021 that now requires German law students to »grapple with National Socialist injustices« for their degree under section 5a of the German Judiciary Act (*Deutsches Richtergesetz*, § 5a DRiG).⁷⁸ Whereas such academic interests and formalities remain ambiguous, esoteric and of minor influence – especially when we contextualize it against the legal horrors conducted by the German judiciary for twelve years – this transformation remains extremely necessary even if overdue. Be that as it may, again we should leave the issue of timing as an open question: Why does this happen only now, when the German

75 *Sonja Boos*, Introduction to Theodor W. Adorno's »Was bedeutet: Aufarbeitung der Vergangenheit« (The Meaning of Working through the Past), in: Boos (ed.), *Speaking the Unspeakable in Postwar Germany: Toward a Public Discourse on the Holocaust* (2014), pp. 195–210.

76 Dangerous and pseudo-scientific comparisons between Israelis and Nazi Germans are made since the 1940's. See for instance *Noam Fruchter*, *Holocaust Inversion: Unmasking the False Comparisons of Palestinians to the Holocaust*, in *The Algemeiner* from April 25, 2022, <https://www.algemeiner.com/2022/04/25/holocaust-inversion-unmasking-the-false-comparisons-of-palestinians-to-the-holocaust/> (last accessed October 10, 2023).

77 See for instance *Alvin YH Cheung*, *Legal Gaslighting*, in: *University of Toronto Law Journal* (2022), pp. 50–80; or *Ellen Suni*, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, in: *Fordham Law Review* (2000), pp. 1643–1693, <https://ssrn.com/abstract=1016824> (last accessed October 10, 2023).

78 *Philipp-Alexander Hirsch*, *Neu über Recht und Unrecht nachdenken: Nationalsozialistisches Strafrecht in der juristischen Ausbildung und die Novelle des § 5a DRiG*, in: *GRZ* (2023), pp. 1–10; and *Christoph Schuch*, *Bildung gegen Antisemitismus in der juristischen Ausbildung*, in: *ZDRW* (2023), pp. 259–274.

judiciary is clear and clean of its tainted jurists and most implicated Jewish jurists have already passed away? While it is important to keep this question alive and unresolved, we should persist in examining its ramifications.

VI. Conclusion: »Der Jude existiert nicht!«⁷⁹

The provocativeness of this contribution attempts to compensate for its conciseness. Notably, it was written shortly before the atrocious Pogrom by Hamas on Israeli civilians on the southern Israeli border on October 7, 2023. I wonder how this article would have been, had it been written now. If I would have been able to write anything at all. I am still rather paralyzed going through its final edits presently, one hundred days after October 7th, when the International Court of Justice begins to deliberate the possible implication of genocide and/or incitement of genocide by Israeli officials opens so many questions.⁸⁰ It certainly remains too early and still too painful to unpack the manner in which this impacts Jewish »authenticity« by the German judiciary and the world by and large. It is helpful that this is primarily a historical narrative. Most probably, I would have dealt with the starting point – how Jews are being portrayed on the big and/or small screen today – differently. Cinematic-footage feels differently after October 2023. Recapping – pre October 7th – the questions raised by or about the numerous contemporary films that unpack similar issues, I moved to discuss the specific agency of in/authentic Jews also versus antisemitic/democratic gentiles. The negotiations between these dichotomies assists in contextualizing these protagonists in their time that is obviously still very relevant to us today. Drawing on *Kelsen*, I show the limitations of his authenticity, which may explain, however partially, his limited visibility, especially in contrast to others. I then move to discuss the manner in which *Savigny's* reactionary legal agency assisted to root the law in »blood and soil« and a specific vague »Volkgeist« safeguarded the Christian state against the Jewish subversive. This, also thanks to the active Nazi judiciary – personified by men who we still know too little about especially given they

79 Jacques Lacan, (1973a) *Télévision, Paris* (Television: A Challenge to the Psychoanalytic Establishment Seuil) (1990), p. 60.

80 For an objective overview see UN News from January 12, 2024, War against Hamas in Gaza is act of self-defence, Israel tells world court, <https://news.un.org/en/story/2024/01/1145452> (last accessed January 25, 2024).

neither arrived from Mars in 1933 nor did they go back there in 1945. There is still much to be studied, scrutinized and removed from German law today. This article intentionally raises numerous open-ended questions about the need to delve deeper into both legal theory and the myriad definitional complexities inherent to Judaism and/or antisemitism, in order to understand how the particularistic »Otherness« symbolized by Judaism and Jews works in the German judiciary and German *Rechtswissenschaft* today. Understanding how this works is essential when we unpack Jewish German legal history that leaves us with too many conundrums and recursive puzzles. Alas, no matter how intricate, dense, complicated and multilayered this history is, it offers a wealth of valuable insights especially when the focus remains on personal agency, which helps us understand the legal context with more precision. Spotlighting personal agency and/or limelighting legal theoretical debates, to find different voices and interpretations of the legal form, permits novel appreciations and possible blind-spots. It allows us, moreover, to speak with our predecessors, successors and contemporaries simultaneously. And even if this remains contested, incomplete and a broken endeavour, there is much to gain when we remember that »there is a crack, a crack in everything. That's how the light gets in.«⁸¹

81 Leonard Cohen, Anthem, <https://www.youtube.com/watch?v=1jzloNITmzY> (last accessed January 25, 2024).