A towering figure in German *Vergangenheitsbewältigung*, where the *self-initiated* prosecution of Nazi-related crimes and the restoration of justice are concerned, is Fritz Bauer (1903–68), state attorney general of Hesse during the turbulent years of the 1960s. Among others, he was pivotal in the Remer trial in Braunschweig (1952),¹ the Eichmann trial in Jerusalem (1961),² and, finally, the Auschwitz trials in Frankfurt am Main (1963–65). Furthermore, his legacy in postwar Germany went far beyond the judicial realm. Norbert Frei credited him with having given a boost to the

---

¹ Otto Ernst Remer was tried for calling the German resisters of the 20 July coup attempt “traitors.” He was convicted but escaped punishment by fleeing Germany.

² Bauer was the first to receive information on Adolf Eichmann’s whereabouts in Argentina, passed this information to Israel, and demanded that Bonn request extradition, to no avail. For his role in the capture of Eichmann, see Irmtrud Wojak, *Fritz Bauer 1903–1968: Eine Biographie* (Munich: C. H. Beck, 2009), 284–302.
developing field of contemporary historical research, and Michael Stolleis concluded simply that “Fritz Bauer has changed the Federal Republic.”

Paradigmatic as Bauer is, he is also an enigmatic figure who has been subject to misinterpretation. Because of his German-Jewish ancestry, for example, he was accused of spreading “typical Jewish lies” against the “fatherland-loving Germans,” while he was hailed by others as a “prophet of the Old Testament.” It is therefore imperative to understand how, and with what specific forms of expression, Bauer saw it as a German duty to “come to terms with the past” by “holding proceedings over ourselves,” as a means of conducting German “self-purification” or the “self-healing of a sick society.”

Indeed, the series of German prosecutions against former Nazis and their helpers, which continues to the present day, and in which Bauer played a pioneering role, has served to reassure the victims of Nazi crimes that postwar Germany did not stop at the level of “handshake reconciliation,” which was opposed by Bauer, but instead spontaneously moved inward to address questions of justice and punishment. But just as in other areas of repentant acts, “coming to terms with the past” in the judicial realm is also subject to the problem of ambiguous interpretation, namely, the dilemma of condoning and scapegoating.

---

5. Fritz Bauer was born in Stuttgart of Jewish parents, and was “doubly hated” in Nazi Germany for being a Jew and a Social Democrat (Wojak, Fritz Bauer, 14). He survived the concentration camp and exile in Scandinavia, and returned to Germany in 1949.
10. One recent example as of this writing is the trial of Oskar Gröning in Lüneburg.
On the one hand, the pursuit of Nazi criminals or former Nazis could be interpreted as a postwar German attempt to scapegoat—for not all Nazis were prosecuted, and hence the “line-drawing” between the “bad ones” to be punished and the “unburdened rest” could be a false distinction, especially when the latter used it as justification to disengage themselves. On the other hand, if postwar Germans did not undertake this pursuit, whether in false or genuine agreement with Arendt’s dictum that “when all are guilty, none can judge in the final analysis” (see P2), then the charge would be that they condoned the Nazi crimes by “doing nothing” of their own accord about the perpetrators.

Although, as we have seen in the corresponding biblical section (R4), satisfying demands and conceptions of human justice is not the primary concern of the repentant perpetrator, these accusations from opposite directions are not entirely groundless. Hence their resolution—satisfactory or otherwise notwithstanding—in Bauer’s lifework is instructive. If nothing else, Bauer’s two great achievements were bringing Nazi perpetrators to justice, and reforming German justice. It is in this double goal that a viable way out of the dilemma can be found.

According to Bauer’s writings concerning the reform of justice, a chief problem of postwar German justice was that it resembled “justice” during the Third Reich in its foundation on “guilt and punishment” (Schuld und Sühne), which is characterized by revenge (Rache) and retaliation (Vergeltung). Thus he quoted a high judicial official in the Nazi era disparagingly: “Guilt calls for punishment! This demand for punishment is for us Germans so old an idea, as old as our people itself. . . . The demand for punishment

---

12. Sühne, of course, is more akin to “atonement” rather than “punishment” in English, which is in most situations matched by Strafe in German. But in view of the broader context of Bauer’s opposition to the concept, it is deemed necessary to render it as “punishment” in order to highlight the reason why Bauer was against it in the first place. The fact is that in many instances he spoke of Vergeltungsstrafe and Sühnestrafe interchangeably in his “Der Zweck im Strafrecht”; hence it is clear that Bauer was opposed to Sühne applied as Vergeltung (e.g., by the Nazis to exact damage on the “criminals”) rather than the concept understood religiously as a way of purification, which we shall see below.
lives in us.” And Bauer condemned this application of the concept, which is essentially, in my view, the shame-culture application of guilt: “Guilt as blamability (Vorwerfbarkeit) was also taught and practiced in the ‘Third Reich.’ . . . This formulation does not correspond with reality, for it tries to locate the entirety of the conditions and facts of the case in the person of the perpetrator, whereas it exists in truth in the heads and souls of the others.”

For Bauer, Sühne, when understood properly as atonement, is not the province of the courts:

> Who can speak here of guilt and atonement with good conscience, when they concern not isolated consideration of [individual crimes], but the whole person? Intent and negligence are excellent juridical concepts; it is neither necessary nor responsible to conflate them with a morally or religiously tinted “guilt,” like the proponents of retaliation-punishment (Vergeltungsstrafe) do. . . .

> Atonement (Sühne) means that the perpetrator, through voluntarily taking upon himself the suffering of punishment, cleanses his self from sin (Sünde) and guilt (Schuld), with which he had stained himself by his wrongdoing.

In contrast to the Nazi conception of justice (i.e., “retaliation-punishment”), which was ultimately based on the idea of “evening out” (Ausgleich), Bauer argued for the reformed goal of justice, human justice, as “betterment” (Besserung) through the reintegration (Wiedereingliederung) of the perpetrators and the protection of society. Thus he quoted Augustine’s letters: “We do not want revenge for the sufferings of the servants of God through the imposition of the same pain by the law of retaliation. Greater is the necessity for judicial investigation than for punishment. . . . Fight evil with good. . . . Lengthen the respite for repentance (Frist zur Buße).”

---

14. That is, the identification of the whole person, or the whole nation, with the wrong done. See R1.
He ended with his own conclusion: “This is the Western ethic that is passed on to us and in the spirit of which the Basic Law of our democratic and social constitutional state was created.”¹⁸

The link between betterment and repentance is of course not Bauer’s invention. For in the German language, one of the two commonly used terms for repentance, Buße (tun), the other being Umkehr, is etymologically linked with betterment (Besserung).¹⁹

What is new, perhaps, is Bauer’s conceptualization of social or societal betterment/repentance through the reintegration of perpetrators. Interpreting the Sermon on the Mount,²⁰ he said:

The Sermon on the Mount does not forbid the judgment on the question, who the perpetrator is, not the determination of damages to be repaid (that is the Wiedergutmachung²¹ of the perpetrator), not the socialization or resocialization of the perpetrator (that is the Wiedergutmachung of the society in the sense of repaying evil with good); it does not also forbid the protection of society.²²

In other words, there are two levels of repentance/betterment (individual and collective), and they entail, among other things, different forms of Wiedergutmachung. Whereas the perpetrator/sinner himself has an important responsibility to repay the victims, where repaying is possible, the society as a whole, from which the crimes emerged, is responsible for reintegrating the perpetrator/sinner. If the society casts him away or leaves him alone to repay his debts, it is not doing its Wiedergutmachung, for then it is not recognizing its own share in the perpetrator’s crime. “If human behaviour is the

---

¹⁹. See chapter 2.
²¹. Wiedergutmachung is usually translated as “reparation” in English, and is in fact mostly used in the postwar period to refer to the material reparations to the victims of Nazi crimes. It can be translated literally as “making good again.” Constantin Goschler, however, observes that the concept actually covers an “exceptionally broad range of subject matters,” and is ultimately an “untranslatable peculiarity of the German language.” See Goschler, Wiedergutmachung: Westdeutschland und die Verfolgten des Nationalsozialismus 1945–1954 (Munich: R. Oldenbourg, 1992), 12.
product of nature and nurture... then we as his neighbors—the ones who nurture him [the perpetrator]—can make an impact if we act neighborly.”

While Bauer’s application of Paul’s dictum of “fighting evil with good” (Rom 12:21) in resocialization may be unconvincing in itself as an argument, his peculiar conception of individual and collective repentance—at least where Wiedergutmachung is concerned—does pose a plausible way out of the “condoning/scapegoating” dilemma. It is not condoning crimes, for the Nazi perpetrators will be identified and tried in court, and will have to repay the damages. It is not scapegoating either, for the punishment of the perpetrators is not the goal, nor is it employed to pay for the guilt of Germany, but the entire society will engage itself in the resocialization of the perpetrators, and reeducate itself—this time not forced by the Allied victors but voluntarily—through the court proceedings.

“What the word of the Bible forbids,” declared Bauer, “is ‘loveless judging’ (das ‘liebelose Richten’), is retaliation as the affliction of evil for the sake of evening out evil. The state and its judges do not have the function of the Last Judgment; that would be arrogance and asking too much of us humble human beings.” For him, our “justice” is but “inadequate work of human hands,” not “wisdom and justice with finality.”

Thus the kind of relational attitude to which Bauer wished to “turn” postwar German society is clear: prosecution without self-justification and ostracization, motivated by a love that seeks to heal not only the victims but also the perpetrators and those

23. Ibid., 277. In the context, it is clear that Bauer’s determinism seems hostile to the idea of human free will only because it is perceived as being (mis)used in history to support “guilt and punishment.”


26. Ibid., 259.

27. The same year that Bauer published his Das Verbrechen und die Gesellschaft (1957), he also founded an association for the resocialization of prison inmates, which was named after him posthumously as Gefangenenbildungswerk.
judging them. This is the key to understanding his otherwise enigmatic words as he began his plea in the Remer trial: “The goal of this trial is not to sow discord, but to build bridges and to reconcile, certainly not through a dubious compromise, but through the clarification by a democratic, independent court of the question, ‘Were the men of the 20 July plot traitors guilty of high treason?’ ”

His goal was not so much about punishing the perpetrators, but rather to bring the society to insight.

At the end of the Auschwitz trial in Frankfurt in 1965, although the much-hoped-for confession or “breaking of silence” by the accused did not materialize, the judgment itself at least came close to Bauer’s vision in terms of humility and circumspection. Applying Karl Jaspers’s guilt concepts, the verdict issued by presiding judge Hans Hofmeyer displayed not the kind of high-minded judgment that Bauer condemned, but instead refrained from adjudicating anything more than criminal guilt, conceding that it was not in the court’s purview to discuss and prove political, moral, and metaphysical guilt. The massive publicity given to the trials also meant that after “the Auschwitz trials had laid bare in front of the German population the dreadful details of the process of mass murder of European Jewry—no one can deny these anymore.”

Hence Bauer’s striving for “betterment,” at least where the societal part of it is concerned, was not at all futile, although he himself was disappointed by the results.

Toward the final phase of the first Auschwitz trial, on 12 May 1965, the BRD and the State of Israel formally established

---

Dr. Fritz Bauer (renamed in 2000 Berufsbildungswerk Dr. Fritz Bauer). See Wojak, Fritz Bauer, 17.


29. Wojak, Fritz Bauer, 8. See also R2.


31. See P2.


33. Wojak, Fritz Bauer, 360.

34. Ibid.
diplomatic relations. About two months after the verdict was issued, the EKD issued what came to be remembered as the Ostdenkschrift, or the position- and discussion-paper on the “situation of the expellees and the relationship between the German people and their eastern neighbor.”\(^\text{35}\) In the Ostdenkschrift, the EKD continued with its tradition that began right after the war: to promulgate the way of seeing postwar German suffering as just punishment for German guilt.

Beginning with the “message to the pastors” of 1945, the link between the “harsh reality” in postwar Germany and the crimes of Nazi Germany was clearly emphasized: “We confess our guilt and bow under the burden of its consequences. . . . It is God who in everything is punishing us with his merciful justice.”\(^\text{36}\) “God’s angry judgment has broken out over us all. God’s hand is heavy upon us. . . . Cowardice in the face of suffering has brought upon us this immeasurable grief.”\(^\text{37}\)

From these embryonic, general forms of acknowledgment of “just punishment,” which mimicked the prophetic interpretation of national calamity in the Bible (see R4), subsequent expressions pointed only further in the same direction, differing only in the specificity of the suffering in question. Thus one reads in the Ostdenkschrift, published twenty years later:

> The violent loss of homeland is placed in relation with God’s intervention in history. . . . One must speak of the connection between God’s judgment and human sin. . . . One cannot speak of the injustice of the expulsion [of Germans from the Ostgebiete] without raising the question of guilt. In the name of the German people, the Second World War was started and suffered in many foreign countries. Its total destructive violence ultimately turned back (sich gekehrt hat) to its initiator. The expulsion of the German population and the fate of the eastern territories is one part of the disaster that the German people has brought upon


\(^{37}\) Ibid., 185–86.
itself and other peoples. . . . None of the guilt of the others can explain or exculpate German guilt.\textsuperscript{38}

The practical input of this way of seeing suffering is that one no longer counts oneself as victim—victim of unjust suffering. Where there is an overarching “framework” of responsibility not only for one’s own unjust actions, but also for the resulting unjust reactions, then the “turning” toward self-victimization (by choosing to focus on a set of facts/interpretations to identify oneself as the victim) is blocked. The drafters of the 1948 “message concerning the Jewish question” had clearly seen this danger: “Today when retribution is being meted out to us for what we did to the Jews, there is increasing danger that we may take refuge from God’s judgment in a new way [sic] of anti-Semitism, thus conjuring up all the old devils once again.”\textsuperscript{39}

Yet, just as the dilemma of condoning/scapegoating exists in juridical prosecution, the dilemma of indifference/self-victimization exists in dealing with social suffering. Are not these proponents of the “just punishment perspective” only doing that because they themselves are not the victims and are therefore indifferent to the suffering of these? And when the champions of the rights of the expellees, rape victims, and retaliatory war victims emphasize the victimhood of these Germans, thereby highlighting German victimhood, are they not moving toward identifying Germany as victim rather than perpetrator?\textsuperscript{40}

In this sense, the resolution of this dilemma—through what one might call “substituted atonement”—in the EKD Ostendenkschrift is instructive. The text began first of all with the recognition of the

\textsuperscript{38} Ostendenkschrift, 15, 40.

\textsuperscript{39} Hockenos, Church Divided, 195–97. See, however, the failure of this 1948 statement in P14.

expellees’ victimhood, but transformed this victimhood from an outwardly to an inwardly directed one, that is, not the victimhood caused by outside aggression, but the victimhood from inside—that is, German—indifference. The nonexpellee German society was judged “guilty” for being complacent about economic “integration” of the expellees but neglected their other human needs;\(^\text{41}\) the German churches were blamed for not taking up this human integration challenge seriously enough. And when the idea of “just punishment” was inculcated, the authors of the text decreed that the expellees must not be left alone to face it: “Only a yes to God’s judgment can make way for the new purposes [of our life], but this yes must be said together with the entire people in the solidarity of a unique, immense guilt- and liability-community (Schuld- und Haftungsgemeinschaft). . . . In no way should the expellees be made especially responsible for their fate.”\(^\text{42}\) In other words, the unspoken assumption was that the victims of expulsion also had responsibility for their own suffering—for they also shared the guilt of German aggression, but the resulting punishment weighed disproportionately heavy on them. That was why they were internal victims, victims of the unequal distribution of a just punishment,\(^\text{43}\) which could only be addressed, as proposed in the Ostdenkschrift, when the nonexpellee German population assumed this guilt and debt toward the expellees.

But was this substituted atonement acceptable to the victims of expulsion themselves? Some contemporary responses demonstrated its rejection.\(^\text{44}\) On the other hand, the recognition of “just punishment” would undoubtedly be more effective, in the sense of

\(^{41}\) Ostdenkschrift, 14.
\(^{42}\) Ibid., 17, 15 (emphasis added).
\(^{43}\) It must be emphasized, though, that the EKD in no way condoned ethnic expulsion as just (Ostdenkschrift, 40). For the possibility of perceiving an act of injustice as just punishment by God, see R4.
\(^{44}\) The official response to the Ostdenkschrift published by the Bund der Vertriebenen (Federation of Expellees, or BdV) in 1966, for example, did not consider this part of the EKD message, even though it was a direct response to the expellees’ Charter of 1950, which had demanded a more proportional distribution of atonement (see P11). Instead, the rebuttal focused solely on the issue of rights and international law. See Ausschuß für gesamtdeutsche Fragen, Die völkerrechtlichen
overcoming obstinacy to such turning, when uttered by the individual victims of expulsion themselves.

In the late 1950s and especially the early 1960s, Marion Gräfin Dönhoff, a journalist and later editor in chief and publisher of Die Zeit, repeatedly called for more engagement with neighbors in the East, particularly Poland. She criticized fellow Germans for being complacent with regard to their reconciliation with former enemies in the West, while being indifferent to the East.\textsuperscript{45} She brought home to her readers the present-day consequences of Nazi occupation in Poland—that is, the sufferings of the Polish people still living. When the “Tübinger Memorandum,”\textsuperscript{46} which supported the recognition of the Oder-Neiße border, was published in 1962, Dönhoff penned a commentary, which appeared on the front page of Die Zeit, urging readers to lend an attentive ear to the memorandum’s arguments, and praising the memorandum authors as “lobbyists of reason.”\textsuperscript{47} In subsequent years, her support for the “just punishment” thesis would become more explicit: “Poland is the first victim of the Second World War, initiated by Hitler. For that reason the Polish people shall now be formally guaranteed [by the Germans] . . . that they have the right to live within secured borders, which shall not be put into question by German territorial claims. . . . This means for all Germans, who once had land on the other side of the Oder as their Heimat, a painful incision.”\textsuperscript{48}

If the same had been uttered by any other German journalist, suspicion of “magnanimity out of indifference” would be justified. Yet Dönhoff herself had every right to claim victimhood—as a fugitive fleeing East Prussia and as a resister in Nazi Germany; in other words, she was punished for a crime that she had actually fought

\textsuperscript{45} Marion Gräfin Dönhoff, \textit{Polen und Deutsche: Die schwierige Versöhnung; Betrachtungen aus drei Jahrzehnten} (Munich: Goldmann, 1991), 21.


against. Yet, she and others like her refused to identify themselves as victims, victims of “unjust punishment,” but instead sought to turn fellow fugitives and expellees from self-victimization to embracing Polish victimhood. Dönhoff represented someone who was inside the core of the wounded German-Polish relationship, who could not be rejected on the ground that “she’s not the victim, of course she can ‘forgive’.” Hence when she passed away in 2002, the Federation of Expellees eulogized her as someone who “had fought with the expellees and their unions over the shaping of the Ostpolitik,” who was “confrontational and fond of debates,” but above all, a “homeland-loving East Prussian.” 49

Other promoters of the “just punishment” thesis have less claim to this “oneness” with the victims. Rather, these “pseudoturners” of various degrees of “outside-ness” have probed the limits of the legitimacy and illegitimacy of “turning.” In recent years, the remembering of German suffering during and after the war has been greeted with “anti-victimizing” responses: when speaking of the rape that German women had suffered toward the end of the war, it has been countered that these women were not “uncompromised” to begin with, for they had been “enthusiastic supporters” of the Hitler regime, and “had also sent their children to the Hitler Youth or League of German Girls.” 50 When the suffering of German citizens in the Allied air bombing was in focus, it was countered that the Wehrmacht had also been compromised in its conduct of war. These and other similar pairs of responses often neglect the issue of subject position: when the same views are upheld by the actual victims of these wrongdoings themselves, then it represents their efforts to do their “turning”; but when these are held by the various “outsiders”—experiential, national, and generational, who are not even attempting substitutive atonement, then it becomes the


latter’s refusal of their own “turning,” as they remain spectators who, by resorting to the “just desert” thesis, refuse to see the suffering of the other and their own connection to it. We will return to this problem of the “abuse of the repentant perpetrator” in a subsequent chapter (P11).