The Treatment of the Nazi Past in Contemporary German Legal Education

By *Jan Thiessen*

I. Legal Studies and Legal Thinking

As a law professor, I am bound to believe that lawyers put into practice what they have learned in law school. Of course, when law students leave university and move into legal practice, they learn a lot of new things above and beyond the curricula of our law schools. Nevertheless, what students learn at law school is what I call the way of legal thinking. I am convinced that this way of legal thinking will stick with our former law students during their whole professional lives. Thus, if one wants to change the way of legal thinking of future generations of lawyers, one has to change legal education. This is at least true in theory. In real life, it must be noted that generations of German lawyers, scholars and politicians have discussed various amendments to legal education for at least the last two centuries.[1] The main result of those debates is that legal education is nearly the same as it was two centuries ago.

However, there has been a recent change in German legal education.[2] In June 2021, the German Parliament passed an act to amend the German Judges' Code (Deutsches Richtergesetz). The new parts of section 5a of the German Judges' Code read as follows:

> "the mandatory subjects [of legal studies, J. T.] have to be taught so as to reflect upon the National Socialist injustice and the injustice done by the East German dictatorship." Further, "The studies have to consider the ethical foundations of law and promote the ability to critically reflect on the law".[3]

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[1] *Gerhard Dilcher*, Die preußischen Juristen und die Staatsprüfung. Zur Entwicklung der juristischen Professionalisierung im 18. Jahrhundert, in: Festschrift für Hans Thieme, 1986, pp. 295–305; *Hans Hattenhauer*, Juristenausbildung. Geschichte und Problem, in: JuS, 1989, pp. 513–520; *Thomas Rüfner*, Historischer Überblick: Studium, Prüfungen, Berufszugang der Juristen in der geschichtlichen Entwicklung, in: Christian Baldus/Thomas Finkenauer/Thomas Rüfner (eds.), Bologna und das Rechtsstudium. Fortschritte und Rückschritte der europäischen Juristenausbildung, 2011, pp. 3–31.

[2] Gesetz zur Modernisierung des notariellen Berufsrechts und zur Änderung weiterer Vorschriften vom 25. Juni 2021, BGBl. I pp. 2154 et seq.

[3] § 5a Abs. 2 S. 2 DRiG: "Die Vermittlung der Pflichtfächer [des rechtswissenschaftlichen Studiums, J. T.] erfolgt auch in Auseinandersetzung mit dem nationalsozialistischen Unrecht und dem Unrecht der SED-Diktatur."; § 5a Abs. 3 S. 1 DRiG: "Die Inhalte des Studiums

In order to evaluate the potential impact of this amendment, we have to take into account the status quo ante. It is not surprising that legal education is designed to teach the skills that lawyers need. With respect to German legal education in particular, it is designed to teach the skills that judges need. German law students pursue qualification as a judge (Befähigung zum Richteramt),[4] notwithstanding the fact that many students will never become judges but will work in various other legal professions or even professions without any relation to their legal studies. In any case, the skills that law students must acquire do not concentrate on legal history from the outset. Legal education is predominantly dedicated to private law, criminal law, constitutional law, administrative law and so on. Nevertheless, some of the statutory requirements for legal education include legal history to a certain degree.

As is well-known, in German legal education there is a crucial distinction between the first and the second examinations.[5] To begin with the second examination, it focuses on legal practice in the judiciary, advocacy, and public administration. At least in Berlin, there is no specific regulation concerning legal history as a subject of the second examination. However, the Nazi past is much more a subject of the apprenticeship prior to the second examination (Referendariat) than it is within the mandatory classes at law schools. When the new apprentices (Referendare) are sworn-in here in Berlin, the ceremony takes place at the Kammergericht, the Higher Court of Berlin. It is held in the hall where the notorious Volksgerichtshof and its President Roland Freisler administered injustice against the conspirators of the 20th of July 1944. Prior to the swearing-in, the respective president of the Kammergericht talks about this history. During the Referendariat's classes, the apprentices have to pass mandatory lessons on the Nazi past. Some of these lessons take place at historical sites in Berlin.

At the law schools the situation is reversed. Aside from the recent amendment, legal studies have to include the "historical, philosophical and social foundations"[6] of law. Therefore all German law schools offer lectures on these foundations. However, at most law schools it is up to the student to choose from several lectures. Even if students are required to pass an examination in legal history within the first semesters, this may mean that they deal with late-antiquity Roman Law – and not necessarily with the Nazi past. This is also true for advanced studies in specialized pro-

berücksichtigen die ethischen Grundlagen des Rechts und fördern die Fähigkeit zur kritischen Reflexion des Rechts.", BGBl. I p. 2172.

[4] § 5 Abs. 1 DRiG.

[5] The classic two-stage educational structure was only briefly called into question in the context of reform discussions of the 1970s, see Gesetz zur Änderung des DRiG vom 10.09. 1971, BGBl. I p. 1557; for a critical reflection, see *Nicolas Lührig*, Die Diskussion über die Reform der Juristenausbildung von 1945 bis 1995, 1997, pp. 143–180.

[6] § 5a Abs. 2 DRiG: "Pflichtfächer sind die Kernbereiche des Bürgerlichen Rechts, des Strafrechts, des Öffentlichen Rechts und des Verfahrensrechts einschließlich […] der philosophischen, geschichtlichen und gesellschaftlichen Grundlagen".

grams (Schwerpunktstudium). Whether lectures on the Nazi past are available depends on the respective law school's staff.

Now, however, the new section 5a of the German Judges' Code requires both professors and students to reflect on the injustice brought by the Nazi Law. The amendment that was passed in June 2021 has been discussed for at least four years. In 2017, the former German Minister of Justice Heiko Maas presented the findings of the historical commission to investigate the influence of Nazi law and Nazi lawyers on the law in general, and the staff of the West German Ministry of Justice in particular post-1945.[7] Minister Maas postulated that law students should learn more about this part of the history of their subject and profession. This proposal caused considerable debate and controversy.[8] The questions raised were quite simple. Why should this part of legal education be limited to the Nazi past? What about injustice done by jurists in general? What about East Germany, Stalinism, and colonialism? Other questions were even more basic: How to teach these reflections on the Nazi past, and examine students on this material?

II. Why to Focus on the Nazi Past

As we have seen at the beginning of this text, the East German dictatorship is now a mandatory subject of legal education alongside the Nazi past. This is a last-minute amendment of a last-minute amendment. At the beginning of 2021, the federal government intended to propose new requirements regarding the injustice of the Nazi era as a subject of legal studies. Nevertheless, the relevant draft from the Ministry of Justice had not been published. It was left to the State of North-Rhine-Westphalia to initiate the amendment via the second chamber (Bundesrat) of the German Parliament in February.[9] In June, the committee of the first chamber (Bundestag) responsible for legal issues proposed to insert the East German dictatorship as an additional subject

[7] *Manfred Görtemaker/Christoph Safferling* (eds.), Die Rosenburg. Das Bundesministerium der Justiz und die NS-Vergangenheit – eine Bestandsaufnahme, 2013; *Manfred Görtemaker/Christoph Safferling*, Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit, 2016; see also https://www.bmj.de/SharedDocs/Publikationen/DE/Rosenburg_Broschuere_englisch.pdf?__blob=publicationFile&v=5, last visit 02. 11. 2022.

[8] *Lena Foljanty*, Historische Reflexion als Ausgangspunkt für die heutige Berufspraxis: Das Justizunrecht des 20. Jahrhunderts als Gegenstand der juristischen Ausbildung, in: AnwBl 2017, pp. 1158 – 1164; Contributions of *Christoph Gusy*, *Hannes Ludyga*, *Joachim Rückert*, *Chrisoph Safferling* and *Frank Bleckmann* in the special issue "Juristenausbildung und NS-Unrecht", ZDRW 2019, pp. 1 – 84; *Christine Lamprecht*, Neu über Recht und Unrecht nachdenken, in: FAZ, 28. 1. 2021, https://www.faz.net/aktuell/politik/inland/gastbeitrag-zur-juristenausbildung-neu-ueber-un-recht-nachdenken-17168083.html, last visit 02. 11. 2022; *Gerhard Werle/Moritz Vormbaum*, Nationalsozialistisches Unrecht, SED-Unrecht und juristische Ausbildung – Zur Reform von § 5a DRiG, JZ 2021, pp. 1163 – 1167.

[9] BR-Drs. 20/21, p. 15: "Im gesamten Studium ist gerade vor dem Hintergrund des nationalsozialistischen Unrechts die Fähigkeit zur kritischen Reflexion des Rechts einschließlich seines Missbrauchspotentials zu fördern."

of historical reflection.[10] Thus, one of the main criticisms of Minister Maas' original proposal has been solved by legislation.

Still, the question remains as to why this part of legal education is limited to German history. In my opinion, this limitation can be justified by the tradition of German legal education that spans medieval Bologna to the Berlin Republic. From the rediscovery of the Digests in Northern Italy up to the law schools of our time, legal education has consisted of discussing cases and forming a system out of those cases. Of course, law students all over the world discuss cases. But in the tradition of German legal education, forming a system out of those cases means more than to sort precedents and distinguish them. Forming a system in this sense means that scholars and students try to elaborate legal principles based on an abstraction from the plentitude of peculiarities offered by the abundance of single cases. When new cases were to be solved, both scholars and students tried to match the principles that were derived from old cases. I suppose, and I fear, that this approach to legal education continued throughout the Nazi years up until the present time.

Although there were ideologically-based amendments of legal education in 1934 – 1935[11], and although these amendments have been undone post-1945, these changes in legal education have not significantly affected legal technique. What does this mean? Obviously, the content of legal education in the Nazi era had changed.[12] There were new lectures and new textbooks, new legislation, and new commentaries on it. In particular, there were a lot of anti-Semitic and racist laws. The Nazi law integrated the so-called people's community ("Volksgemeinschaft"), but excluded all individuals considered to be so-called people's enemies ("Volksfeinde"). Both the single cases and the legal principles had changed. The single cases dealt with conflicts such as when a landlord tried to evict a Jewish tenant. Legal principles were corrupted by the orders of the "Führer" made to advance the program of the Nazi party. Once the traditional principles like equal freedom in private law[13] or nulla poena sine lege in criminal law[14] had been altered, the legal technique went on working as usual.

[10] BT-Drs. 19/30503 pp. 21 – 22.

[11] Justizausbildungsordnung vom 22. Juli 1934, RGBl. I, p. 727; *Karl August Eckhardt*, Das Studium der Rechtswissenschaft, 1935; for a critical assessment see *Martin Würfel*, Das Reichsjusitzprüfungsamt. 2019, pp. 34 – 63.

[12] *Ralf Frassek*, Steter Tropfen höhlt den Stein – Juristenausbildung im Nationalsozialismus und danach, in: ZRG (GA) 117, 2000, pp. 294 – 361 (300 et seq.), continued in: KJ 2004, pp. 85 – 96; *Louis Pahlow*, "Ich verüble dem Verfasser weniger einzelne juristische Fehler als das Versagen des Rechtsgefühls". Juristische Staatsprüfungen im Dritten Reich (1934 – 1945), in: Festschrift für Hermann Nehlsen, 2008, pp. 399 – 420 (405 et seq.).

[13] Reichsbürgergesetz vom 15. September 1935, RGBl. I, p. 1146; Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935, RGBl. I, p. 1146 – 1147.

[14] Gesetz über Verhängung und Vollzug der Todesstrafe vom 29. März 1933, RGBl. I, p. 151; Gesetz zur Änderung des Strafgesetzbuches vom 28. Juni 1935, RGBl. I, pp. 839 – 843.

To make it clear: This is not an old or a new version of the legend that German lawyers helplessly followed positive law, regardless of its origin.[15] The lawyers applied the new Nazi law but also interpreted the old law in the light of Nazi ideology. There were many professors, judges, and lawyers who taught Nazi ideology simply because they were fanatical Nazis. Students and apprentices had to learn this ideology, and many of them were fanatical Nazis too. The traditional legal method did not force professors, students, judges and lawyers to integrate Nazi ideology into the legal system. Nevertheless, the traditional legal method allowed the integration of Nazi ideology into the legal system.[16] Jurists of all occupations continued discussing cases and principles, writing and reading textbooks, journals and commentaries. But they discussed cases and principles under the primacy of ideology. It can be assumed, however, that old professors stuck to their old lectures. During the war, at least only a few students and apprentices were left. They began their professional careers once the Nazi period had ended. Therefore, those lawyers who had been educated during the Nazi period started to work under the conditions of democracy and the rule of law in the Western occupation zones and the Federal Republic of Germany. And even though the older professors, judges and lawyers had been members of the Nazi party or other Nazi organizations and were entangled in a system of injustice, their educational background originated from periods under the rule of law or even democracy. In West Germany, those jurists were paid for working within the rule of law and democracy, and the rule of law and democracy paid for them. At least, this is my explanation of how it was possible for formerly Nazi lawyers to establish the rule of law and democracy.

III. Why East Germany Is Different

With respect to legal education, we can see one important difference between the Nazi period and East Germany. In the four decades of the East German dictatorship, Marxist philosophy was an essential part of the legal studies curriculum,[17] whereas

[15] *Gustav Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, SJZ 1946, pp. 105 et seq.; for critical reflections see *Horst Dreier*, Die Radbruchsche Formel – Erkenntnis oder Bekenntnis?, in: Festschrift für Robert Walter, 1991, pp. 117–135 (120 et seq.); *Fabian Wittreck*, Radbruchs Auseinandersetzung mit dem Nationalsozialismus, in: Walter Pauly (ed.), Rechts- und Staatsphilosophie des Relativismus. Pluralismus, Demokratie und Rechtsgeltung bei Gustav Radbruch, 2011, pp. 207–222 (211 et seq.).

[16] In summary *Hans-Peter Haferkamp*, Wege zur Rechtsgeschichte: Das BGB, 2022, pp. 230–248.

[17] *Ulrike Lehmann/Karl-Heinz Lehmann*, DDR-Juristenausbildung im Wandel, in: DA, 1990, pp. 747–750; *Malgorzata Liwinska*, Die juristische Ausbildung in der DDR – im Spannungsfeld von Parteilichkeit und Fachlichkeit, 1997, pp. 61 et seq.; *Steffen Schröder*, Die Juristenausbildung in der DDR, in: Gerd Bender/Ulrich Falk (eds.), Recht im Sozialismus Bd. 2: Justizpolitik, 1999, pp. 441–486; *Hans-Peter Haferkamp*, Richterausbildung in der DDR, in: Adrian Schmidt-Recla/Achim Seifert (eds.), Das Recht der DDR als Gegenstand der Rechtsgeschichte, 2022, pp. 35–88 (52 et seq.).

during the Nazi period only a few lectures explicitly addressed Nazi ideology. In East Germany, legal technique declined in favour of a Marxist interpretation of law.[18] Consequently, there were only a few law journals, textbooks and commentaries. To put it plainly: The East German students had to learn law almost without books. That is why in East Germany the traditional legal method lost more of its importance than it did during the Nazi period. In this text, I cannot comment on the question of how useful it is to compare the Nazi period with the East German dictatorship. As far as legal education is concerned, the East German model is far removed from both the Nazi period and today's legal education. Thus it would not have been necessary to include the East German dictatorship in legal education as a mandatory topic, although East German legal history is well worth teaching and studying. In any case, I must now return to the subject of the Nazi past.

IV. Lessons from Post-Colonial Studies

During the last years a very controversial debate has broken out on the question of whether concentrating on the Nazi past neglects the importance of crimes related to colonialism.[19] With regard to legal education, it is obvious that post-colonial studies should be integrated into classes on public international law, international criminal law, constitutional law and of course legal history. First steps towards post-colonial legal studies in Germany have been gone.[20] There is no need to neglect the impacts of either the Nazi past or colonialism. It is necessary to investigate how German colonialism prepared Germans, and German jurists in particular, to deny the equal dignity of all human beings, to commit genocides, to elaborate schemes for conquering other countries. It is necessary to investigate the question about fundamental differences between colonialism and the Shoah. And it is necessary to reject any attempt to derive anti-Semitic arguments from post-colonial studies.

[18] *Jan Schröder*, Recht als Wissenschaft Bd. 2: Geschichte der juristischen Methodenlehre in der Neuzeit (1933 – 1990), 2021, pp. 77 et seq.; *Michael Ploenus*, Gelenkte Erkenntnis. Über die gesellschaftswissenschaftliche Schulung an den Universitäten der DDR, in: Adrian Schmidt-Recla/Achim Seifert (eds.), Das Recht der DDR als Gegenstand der Rechtsgeschichte, 2022, pp. 13 – 34 (14).

[19] *Saul Friedländer/Norbert Frei/Sybille Steinbacher/Dan Diner/Jürgen Habermas*, Ein Verbrechen ohne Namen. Anmerkungen zum neuen Streit über den Holocaust, 2022; *Susan Neiman/Michael Wildt* (eds.), Historiker streiten. Gewalt und Holocaust – die Debatte, 2022; *Jürgen Zimmerer* (ed.), Erinnerungskämpfe. Neues deutsches Geschichtsbewusstsein, 2023.

[20] *Jochen von Bernstorff/Philipp Dann/Isabel Feichtner* (eds.), (Post)Koloniale Rechtswissenschaft, 2022.

V. Nazi Past as a Subject of Legal Education

Let me return to the question of how to teach and examine reflections on the Nazi past as a subject of legal education. It may be surprising that a legal historian says: This is not a question of teaching and examining legal history. It is a question of teaching and examining the current law. Legal historians do know a great deal about the Nazi past. Legal historians touch on the topic more or less inevitably within their lectures on legal history. In contrast, many of the professors who teach current law will never discuss the Nazi past during their lessons. It is my ceterum censeo that nearly all parts of the current law originate from tradition older than the Nazi period, but underwent a process of change during the Nazi period, the impacts of which are still present. In order to teach and to examine substantial knowledge about this tradition and these changes, it is necessary to identify instructive examples from topics that are mandatory subjects of classes on current law.

Of course, the recent amendment to the German Judges' Code has not yet been executed to a significant degree within legal studies. During the last semesters, I offered a new lecture within my specialised program on contemporary legal history in order to write a new textbook on Nazi injustice as a subject of legal education. At first glance, this seems to be a contradiction to what I said a few minutes ago: that Nazi injustice should be reflected upon in classes on current law and not necessarily in classes on legal history. Unfortunately, I cannot teach all subjects of current law and I cannot teach them all at the same time. Thus, I started to discuss with my students what they know about the Nazi past, both from school and from their legal studies. Their answers were extremely heterogenous. They depended on where the students had gone to school and their teachers, both at school and in our law faculty. Some of our students had received several lessons on the Nazi past in school. They read books or visited memorial sites. But some of our students learned nearly nothing at school about the Nazi past. At our law school, some of the professors mentioned the historical roots of certain provisions of current law, and some did not. Among the participants of my lecture, there was no common ground of knowledge about the Nazi past, although there was a consensus that it is necessary to learn more about it.

My scheme for this lecture is focused on three aspects. First of all, it has to be emphasised that legal education on these topics matters. Not only the tradition of the law but also the tradition of legal education are older than the Nazi period, but both the law and legal education were adapted to Nazi ideology. Consequently, legal education could be re-directed to teach fundamental principles of the rule of law and of democracy post-1945.[21] Reflecting on the Nazi past should be an integral part of legal education for the simple reason that Nazi ideology was able to corrupt fundamental principles of both law and legal education.

[21] *Nicolas Lührig*, Die Diskussion über die Reform der Juristenausbildung von 1945 bis 1995, 1997, pp. 46 et seq.

The second part of my lecture is the most comprehensive one. It deals with what I have called above ‚instructive examples' taken from mandatory subjects of current law. The third and final part is the argument that students should learn more about the ambiguity of legal methods than they usually learn within regular lectures on legal methodology.

VI. Some Examples

Let me tell you more about some examples from mandatory subjects of current law. These examples are taken from the three core fields of legal studies: public law, criminal law, and private law.[22]

1. Constitutional Law

As is well known, the German constitution, the basic law (Grundgesetz), was enacted as the very antithesis of Nazi injustice.[23] Human dignity is not only the head of the fundamental rights section but the head of the whole constitution. The provisions on the protection of human dignity and fundamental principles like democracy, the rule of law, or federalism cannot be amended by the houses of parliament. The federal chancellor cannot be dismissed without electing a new chancellor. The parliament cannot be dissolved by the federal president unless the election of a new chancellor has failed or unless the federal chancellor cannot rely on a parliamentary majority. In contrast, the president of the Weimar Republic could dissolve the parliament by his discretion, and the president could allow the chancellor to govern without the endorsement of the majority of the parliament. Both effects, the political instability caused by frequent re-election of the parliament on the one hand and presidential dictatorship without the consent of parliament on the other, were to be avoided by the new constitution of 1949. The lesson of the Weimar Republic was the essential message to be expressed by enacting the basic law.[24] It would appear to be impossible to teach the political structure of the Federal Republic of Germany without discussing these lessons from the past. Still, when I asked my students what they had learned about the basic law in contrast to the Weimar constitution, some of them said that they had learned the pure text of the constitution without any reference to the past, believe it or not.

In discussions of twentieth-century German legal history, it is a common narrative that, aside from obvious anti-Semitic or racist laws, the Nazi regime finished many

[22] § 5a Abs. 2 S. 2 DRiG.

[23] BVerfGE 124, 300–347 (328 et seq.).

[24] *Christian Waldhoff*, Folgen – Lehren – Rezeptionen: Zum Nachleben des Verfassungswerks von Weimar, in: Horst Dreier/Christian Waldhoff (eds.), Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung, 2018, pp. 289–316.

legislative projects that had already been drafted during the Weimar Republic or even the Wilhelminian Empire. With regard to the fields of law in question, it seems legitimate that the respective laws have been unaltered post-1945. This narrative is relevant for public law, criminal law, and private law.

2. Administrative Law

To begin once again with public law, a very substantial part of modern administrative measures is dedicated to ensuring the citizen's economic subsistence. The German term for these provisions, Daseinsvorsorge, became popular during the Nazi period. The most influential contemporary author on this topic, Ernst Forsthoff, stated that due to industrializiation and urbanization, smaller social entities like families or farms could no longer guarantee the welfare of their respective communities.[25] In the expanding cities, provision for economic subsistence could no longer be limited to the poor. The provision of clean water, waste removal and public transport has long been recognised as a duty owed by the state to all citizens.

All of this seems to be self-evident, without any clear connection to the Nazi period. Nevertheless, there was a particular reason to deal with this topic during the Nazi period. Provision for economic subsistence was limited to the members of the people's community, the Volksgemeinschaft. Persons who were excluded from the people's community were step by step excluded from any public service. Here we can see what the historian Götz Aly called an "accommodating dictatorship" or dictatorship of favours (Gefälligkeitsdikatur).[26] For example, persons who had lost their home to bombardments during the war could sue the Nazi state for compensation. Aside from a monetary compensation to be paid back once the war was won, the compensation could consist of a new apartment, new furniture, new clothes and so on. Often, these apartments, furniture or clothes were robbed from Jews who had been murdered in concentration camps.[27] We can see that providing for economic subsistence was not only a phenomenon of industrialization or urbanization. It was also related to industrialized mass murder and to the expulsion of Jews, not only from urban societies.

[25] *Ernst Forsthoff*, Die Verwaltung als Leistungsträger, 1938; see *Florian Meinel*, Der Jurist in der industriellen Gesellschaft: Ernst Forsthoff und seine Zeit, 2011, pp. 154 et seq.

[26] *Götz Aly*, Hitlers Volksstaat. Raub, Rassenkrieg und nationaler Sozialismus, 2005, p. 49 and passim; english translation: *Götz Aly*, Hitler's Beneficiaries. Plunder, Racial War, and the Nazi Welfare State, 2008, p. 36 and passim. Aly's concept has been questioned by *Marc Buggeln*, Was Nazi Germany an "Accommodating Dictatorship"? A Comparative Perspective on Taxation of the Rich in World War II, in: Central European History 2023, 1 – 21.

[27] *Dominik A. Thompson*, Krieg ohne Schaden. Vertragsstreitigkeiten und Haftpflichtprozesse im Kontext von Kriegswirtschaft und Amtshaftungskonjunktur ausgehend von der Rechtsprechung des Landgerichts Bonn während des Zweiten Weltkrieges (1939 – 1945), Tübingen 2015, p. 98 et seq.

3. Criminal Law

a) Benefits by Deception and Embezzlement

In criminal law, new offences were introduced during the Nazi period which are still on the books today. One example is to obtain benefits by deception (Erschleichen von Leistungen). According to this provision, the offender "obtains the output of a machine or the services of a telecommunications network which serves public purposes or uses a means of transportation or obtains entrance to an event or facility by deception with the intention of not paying the fee."[28] This new offence had been drafted many years prior to 1935, when it was finally enacted.[29] Despite the ominous term "Erschleichen", it is not a Nazi law in itself, although the subsequent question as to whether or not a contractual agreement arises from simply using, for instance, a means of transportation was discussed during the Nazi period under the rubric of the "needs of the people's community." Another example is the offence of embezzlement (Untreue) which was also discussed for decades prior to the Nazi period. In this case, however, the Nazi legislation formulated an offence with a definition so vague that it is practically a non-definition. The offender is "whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them by reason of law, by commission of an authority, legal transaction or fiduciary relationship."[30] What is a fiduciary relationship (Treueverhältnis)? It could be anything. Not so many years ago, however, the Federal Constitutional Court held this provision to be constitutional, even though so much uncertainty is associated with the offence.[31] The Federal Constitutional Court argued that the criminal courts had drawn sufficiently precise contours for the offence to indicate to potential offenders, and other courts, what is allowed and what is forbidden.[32]

b) Murder and Manslaughter

A quite notorious example is related to murder and manslaughter. In contrast to other criminal offences, not the offence but the offender is here defined. A manslayer is a person who kills another person without being a murderer. Then who is a murder-

[28] § 265a a.F. StGB: "Wer die Leistung eines Automaten, die Beförderung durch ein Verkehrsmittel oder den Zutritt zu einer Veranstaltung oder einer Einrichtung in der Absicht erschleicht, das Entgelt nicht zu entrichten".

[29] Gesetz zur Änderung des Strafgesetzbuches vom 28. Juni 1935, RGBl. I, pp. 839–843 (842).

[30] Gesetzes zur Abänderung strafrechtlicher Vorschriften vom 26.5.1933, RGBl. I, p. 295: "Wer vorsätzlich die ihm durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis, über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, mißbraucht oder die ihm kraft Gesetzes, behördlichen Auftrags, Rechtsgeschäfts oder eines Treueverhältnisses obliegende Pflicht, fremde Vermögensinteressen wahrzunehmen, verletzt und dadurch dem, dessen Vermögensinteressen er zu betreuen hat, Nachteil zufügt".

[31] BVerfGE 126, 170–233 (200 et seq.).

[32] BVerfGE 126, 170–233 (208–209).

er? According to the German Penal Code in the version of 1941, a murderer is someone who kills another person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise inferior motives, insidiously or cruelly, or by means constituting a public danger, or to facilitate or cover up another offence.[33] The difference between murder and manslaughter is not the offender's degree of premeditation. The difference between murder and manslaughter is based on motives or means, instead of plain intention. At first glance, there seems to be no specific relationship to the Nazi period except the fact that these definitions were introduced in 1941. Nevertheless, this date of coming into effect is not a mere coincidence. When the Nazis came to power, they commissioned a group of experts from courts, law schools, and the Ministry of Justice to draft amendments to the penal code. One of their tasks was to review the offences of murder and manslaughter. The main criterion for re-defining these offences was what kind of person the people's community would consider to be a murderer or a manslayer. It seems to be only a slight difference whether these offences are defined based on the offender or on their deeds. However, the reform of 1941 was based on a theory of a typology of offenders (Tätertypenlehre).[34] In other words: The offender as a person is a murderer or a manslayer. This was a significant contrast to the leading theory of the late nineteenth century that offenders have to be seen within their contexts as social beings. According to this theory, the social community does not define what sort of person is an offender—rather the offender grows up as part of the social community. The Nazi legislation reversed this theory. Offenders had to be punished for their intrinsic nature as offenders as it apperars in the offence, not for the offence itself as a complex part of social reality.[35] Admittedly, this theoretical question was not the crucial issue preoccupying the legislature and judiciary post-1945. During the Nazi period, the death penalty was used excessively. In reaction to this, the basic law of 1949 abolished the death penalty altogether.[36] Furthermore, it was argued that life imprisonment was a violation of human dignity, or at least unreasonable in cases where the choice of an insidious method was not based on inferior motives, such as the case in which a mistreated wife poisons her tyrannical husband, or kills him in his sleep. The Federal Constitutional Court held that murderers who had been sentenced to life imprisonment had to be released on probation after a certain time, for it is intrinsic to human dignity to have a prospect of regaining freedom.[37] The Federal Supreme Court also restricted the wide definition of insidiousness.[38]

[33] Gesetz zur Änderung des Reichsstrafgesetzbuches vom 4. September 1941, RGBl. I, p. 549–550 (549).

[34] *Georg Dahm*, Todesstrafe und Tätertyp nach der Strafgesetznovelle vom 4. September 1941, in: DR 1942, pp. 401–406; for a critical reflection, see *Gerhard Werle*, Justiz-Strafrecht und politische Verbrechensbekämpfung im Dritten Reich, 1989, pp. 708–715.

[35] *Gerhard Werle*, Justiz-Strafrecht und politische Verbrechensbekämpfung im Dritten Reich, 1989, pp. 705 et seq.; *Kai Ambos*, National Socialist Criminal Law. Continuity and Radicalization, 2019, pp. 138 et seq.

[36] Art. 102 GG.

[37] BVerfGE 45, 187–271 (227 et seq,).

4. Private Law

a) General Clauses

In classes on current private law, there are also several opportunities to deal with the Nazi past. Perhaps the most important issue is the interpretation of so-called general clauses (Generalklausen) like "good faith," "good morals" or "important reason".[39] According to Nazi ideology, it was a violation of good morals to charge significant interest for a loan, even in times when credit markets were in trouble, such as during the banking crisis of 1931. To "redeem Germans from living in the slavery of loan interest" was one of the Nazi party's anti-Semitic slogans. According to Nazi ideology, it was considered unbearable for so-called Aryan landlords, shareholders or employers to adhere to contractual agreements that had been made prior to 1933. The anti-Semitic "race doctrine" constituted an "important reason" for expelling Jewish tenants from their apartments, Jewish shareholders from their corporations, Jewish employees from their work. The expelled tenants, shareholders and employees were forced to accept their expulsion in order to comply with "good faith" in the Nazi sense of the expression. It is completely unknown to many contemporary German jurists that adjudicating on loan interest[40] or the expulsion of shareholders for an "important reason"[41] still draws on judicial decisions of the Nazi period. Of course, immorally high interest rates are possible, there could be important reasons to expel shareholders, and so on. Still, it has to be emphasized that the codifications of the Wilhelminian Empire were characterized by the principle that contractual obligations must be honoured regardless of whether or not a party to the contract regrets concluding it. The political, economic, and social crises between 1914 and 1933 shook the principle of contractual compliance. When the Nazis decided to blame the Jews for all the world's evil, Jewish parties were to be deprived of their contractual rights.

In other fields of private law, there are more provisions that can be discussed in law classes as survivals of the Nazi past. In the volume at hand, Benjamin Lahusen provides us with much detail about current developments in the restitution of Nazi-confiscated property. Up until now, such questions have not been raised frequently in lectures on private law. In principle, restitution claims under the German Civil Code could be suitable instruments for resolving conflicts between the heirs of per-

[38] BVerfGE 45, 187 – 271 (262 et seq.).

[39] For an historical overview, see *Bernd Rüthers*, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 9th ed., 2022.

[40] *Jan Thiessen*, Gute Sitten und "gesundes Volksempfinden". Vor-, Miss- und Nachklänge in und um RGZ 150, 1, in: Arndt Kiehnle/Bernd Mertens/Gottfried Schiemann (eds.), Festschrift für Jan Schröder, 2013, pp. 187 – 219.

[41] *Jan Thiessen*, Der Ausschluss aus der GmbH als "praktische Durchführung einer verbrecherischen Irrlehre" – eine Rechtsfortbildungsgeschichte, forthcoming.

sons dispossessed by the Nazis and today's possessors of the confiscated property.[42] In practice, the restitution claims may fail due to acquisition in good faith, acquisition in prescription, or expired limitation periods.[43] Nevertheless, it is useful to talk about the effects of such modes of acquisition and limitations in classes, and alternative ways to settle those conflicts.

b) Family Law

My last example deals with discrimination and diversity. In family law, there has been a provision allowing so-called 'matrimony for all' since 2017.[44] Homosexual partners can now get married, just like heterosexual partners. When this amendment to family law was discussed in the Houses of Parliament, only one representative reminded the Bundestag's plenary assembly that homosexuals had been criminalized by the Nazis.[45] It has been shown by the "Rosenburg" research project that high-level postwar officials of the Federal Ministry of Justice argued against decriminalization of homosexuality based on the same terminology that was used by Nazi officials.[46] The "nation's body" had to be protected against any "weakening" by the alleged immorality of homosexuals. Thus, while discussing matrimony for all in class, law professors should remind students that human dignity and equality were threatened by Nazi ideology with respect even to individuals' most intimate sphere.

VII. Legal Methodology

So much for the topic of possible changes to legal education. I would like to conclude with some remarks on legal methodology. As we have seen, one of the new aims of legal education is "to consider the ethical foundations of law and to promote the

[42] *Sophie Schönberger*, Was soll zurück? Die Restitution von Kulturgütern im Zeitalter der Nostalgie, 2021, pp. 40 et seq.

[43] *Sophie Schönberger*, Was soll zurück? Die Restitution von Kulturgütern im Zeitalter der Nostalgie, 2021, p. 53; *Benjamin Lahusen*, Von *hard law* zu *soft law* und wieder zurück? Die Rückerstattung nationalsozialistischer Raubkunst, in: myops 46, 2022, pp. 4–21 (8); *Thomas Finkenauer/Jan Thiessen*, Zur rechtlichen Beurteilung von Kulturgutentziehungen in SBZ und DDR, 2023, p. 88–90.

[44] Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 20. Juli 2017, BGBl. I, p. 2787–2788.

[45] *Mechthild Heil* (CDU/CSU): "Die Verfolgung homosexueller Menschen hat in Deutschland über viele Jahre großes Unrecht und Leid verursacht – in der Weimarer Republik, in der Zeit des Nationalsozialismus, aber auch in der neu gegründeten Bundesrepublik und in der Deutschen Demokratischen Republik."; BT-Plenarprotokoll 18/244, p. 25223 (D).

[46] *Manfred Görtemaker/Christoph Safferling*, Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit, 2016, pp. 306 et seq.

ability to critically reflect on the law."[47] Needless to say, critical reflections on the law are always welcome to a law professor. Does the law achieve its purpose? What is just, what is unjust? Is there any certainty about the outcome of a lawsuit in advance? What is equal, what is unequal? Does the law only protect the interests of the rich? Justice, equality, and certainty can be described as ethical foundations of the law. But these principles are so fundamental that it does not seem to be necessary to emphasize them by amending the provisions on legal education. Obviously, "ethical foundations" are meant to be more than this.

When reading the legislative reasons for the amendment,[48] however, it is hard to discover which ethical foundations are meant. Ethical foundations of law shall be "accentuated" as a "part of the philosophical foundations of law".[49] Students and apprentices "are expected to learn to recognize and to deal autonomously with the legal and ethical conflicts that are potentially related to various legal professions." They have to achieve the "capacity to methodically reflect on ethical dilemmas at the intersections of law and ethics."[50] Neither the dilemmas nor the intersections are specified in any way. On the one hand, every legal provision will be based on certain ethical reasons. On the other hand, law and ethics are not the same. Once a legal provision has been enacted within a democratic procedure according to the constitution, it is not up to a judge or a civil servant, for example, to question the legal concept behind the law. It would be against the rule of law if judges or civil servants could replace a legal provision with their own ethical convictions. Apparently, the mentioned dilemmas between law and ethics are imagined to emerge if a legal provision has been enacted in a formally correct procedure, whereas the content of the provision is illegitimate according to material constitutional standards. In such a case, a judge can request a preliminary decision from a constitutional court. A civil servant, however, has to apply the positive law. The person affected by this decision can take legal action at the administrative or constitutional courts. Under the rule of law, the courts will decide according to the constitution. To teach constitutional values in legal education, however, depends on the constitution. If the constitution itself violates principles like human dignity or equality, legal education alone cannot provide an effective remedy. But jurists who have learned more about how democracy and the

[47] § 5a Abs. 3 S. 1 DRiG: "Die Inhalte des Studiums berücksichtigen die ethischen Grundlagen des Rechts und fördern die Fähigkeit zur kritischen Reflexion des Rechts".

[48] BT-Drs. 19/26828 p. 254; BT-Drs. 19/30503 p. 21.

[49] BT-Drs. 19/26828 p. 254: "Durch die Ergänzung des Prüfungszwecks um die 'ethischen Grundlagen' des Rechts soll die aktive Befassung angehender Juristinnen und Juristen auch mit den ethischen Grundlagen des Rechts als Teil seiner philosophischen Grundlagen stärker akzentuiert werden."

[50] BT-Drs. 19/30503 p. 21: "Studierende und Rechtsreferendarinnen und Rechtsreferendare sollen erlernen, die rechtlichen und ethischen Konflikte, die mit den verschiedenen juristischen Tätigkeiten verbunden sein können, zu erkennen und selbstständig damit umzugehen. Ihnen soll ein methodisches Reflexionspotenzial zur Behandlung ethischer Dilemmata an den Schnittstellen von Recht und Ethik vermittelt werden."

rule of law have been threatened in German history may defend these constitutional values when necessary.

Let me finish by emphasising that students and apprentices certainly do need specific knowledge about the roots of the current law. It can be taught and it can be examined. Perhaps it is even possible to draw lessons from the past.